JAROMIR KOSAR *v.* MARIE GIANGRANDE (AC 46271)

Cradle, Clark and Seeley, Js.

Syllabus

The defendant appealed from, inter alia, the judgment of the trial court dissolving her marriage to the plaintiff and its grant of the plaintiff's amended motion for contempt. She claimed, inter alia, that the court abused its discretion when it limited her presentation of her case-in-chief to only fifteen minutes during the hearing on the contempt motion. *Held*:

The trial court abused its discretion and violated the defendant's right to due process by affording her only fifteen minutes to present her case-in-chief at the hearing on the plaintiff's amended motion for contempt and motion for an injunction, the court having made no effort to divide the time equitably between the parties or to otherwise ensure that the defendant had sufficient time to put on her case; accordingly, this court reversed the judgment of the trial court with respect to the award of attorney's fees and ordered a new hearing for the limited purpose of determining whether the plaintiff was entitled to an award of attorney's fees.

The trial court did not abuse its discretion in declining to hear the defendant's motion to open the parties' pendente lite agreement regarding the marital home during the hearing on the plaintiff's amended motion for contempt and motion for an injunction.

The defendant could not prevail on her claim that the trial judge committed plain error by failing to recuse himself sua sponte from presiding over the parties' dissolution trial after previously holding a hearing pursuant to *Matza* v. *Matza* (226 Conn. 166) regarding her then counsel's motion to withdraw, as the defendant failed to demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal, and, even if this court assumed that it was error for the trial judge not to recuse himself, this court would be unable to conclude that the error was so obvious as to be not debatable.

The defendant's claim that the trial court improperly applied the missing witness rule was without merit, the defendant having mischaracterized the court's decision, as the court did not draw an adverse inference as that term is understood in the context of the missing witness rule but, rather, the decision made clear that the defendant's self-serving testimony, without the benefit of corroborating evidence, was not credible.

The defendant could not prevail on her claim that the trial court improperly relied on a prior trial court's credibility finding in adjudicating the parties'

dissolution, as the court's memorandum of decision made clear that it based its credibility determinations on its own observations.

Argued May 20—officially released October 22, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Michael E. Shay*, judge trial referee, granted the plaintiff's amended motion for contempt and motion for an emergency ex parte injunction and issued various orders; thereafter, the court, *Moukawsher, J.*, granted the motion to withdraw filed by the defendant's counsel; subsequently, the case was tried to the court, *Moukawsher, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Kenneth J. Bartschi, with whom was *Karen L. Dowd*, for the appellant (defendant).

Alexander Copp, for the appellee (plaintiff).

Opinion

CLARK, J. In this dissolution action, the defendant, Marie Giangrande, appeals following the trial court's judgment dissolving her marriage to the plaintiff, Jaromir Kosar, and the trial court's order on the plaintiff's amended motion for contempt and injunctive relief. On appeal, the defendant claims that the court, *Hon. Michael E. Shay*, judge trial referee, (1) abused its discretion and deprived her of due process of law by limiting her case-in-chief on the plaintiff's pendente lite amended motion for contempt and motion for injunctive relief to only fifteen minutes and (2) abused its discretion in refusing to hear her motion to open the parties' pendente lite agreement regarding the marital home. She also claims that the court, *Moukawsher, J.*,

(3) committed plain error by presiding over the parties' dissolution trial after conducting a hearing on the motion of the defendant's then counsel to withdraw his appearance and (4) made credibility determinations on improper bases.[1] We agree with the defendant on her first claim but disagree with her on her other claims. Accordingly, we reverse in part and affirm in part the judgment of the trial court.

We begin with the relevant facts and procedural history. The plaintiff commenced this dissolution action against the defendant by complaint dated April 5, 2019. In February, 2020, the parties entered into a pendente lite agreement regarding, inter alia, the sale of the marital home. The agreement provided that the parties would list the marital home for sale with a mutually agreed upon broker. The parties agreed that they would defer to the broker for reasonable and necessary repairs and improvements prior to listing the home and that the defendant would pay for those repairs and improvements with the understanding that those costs would be considered when the court fashioned its financial orders at the time of dissolution. Prior to hiring anyone to work on the home, the parties agreed that they would agree in writing on the provider and the cost. The parties also agreed to defer to the broker on the listing price of the home unless the parties otherwise agreed to a different price. The defendant further agreed to pay various expenses, including (1) $2060 per month to the plaintiff, (2) certain car insurance payments, (3) the first $400 of the marital home's monthly oil bill, (4) one-half of the cost of opening and closing the marital home's pool, and (5) a one time payment of $7000 to assist the plaintiff in purchasing a vehicle. On February

[1] Although the defendant additionally claims that the court's award of attorney's fees should be reversed because it was based on the flawed conclusion as to the motion for contempt, that issue is subsumed in the defendant's other claims, which we address herein.

10, 2020, the court, *McLaughlin, J.*, approved the pendente lite agreement finding that it was fair and equitable under the law.

Following the approval of the pendente lite agreement, the parties filed a host of motions with the court. Relevant for purposes of this appeal, the plaintiff filed a motion for contempt on September 25, 2020,[2] arguing that the defendant violated the pendente lite order by paying the plaintiff less than $2060 per month, failing and refusing to pay her share of the pool costs, and failing and refusing to pay for reasonable and necessary repairs and improvements needed prior to listing the marital home for sale. The plaintiff filed an amended motion for contempt on November 10, 2020, making additional allegations, including, inter alia, that he had taken care of as many of the repairs and improvements that he reasonably could with the hope that the court would order reimbursement to be made by the defendant. He also claimed that, although he had made those repairs and improvements, the defendant still refused to sign an agreement to list the property for sale despite using a broker whom she herself had selected.

On April 20, 2021, the plaintiff filed a motion for an ex parte emergency injunction, seeking to enjoin the defendant from further violating the parties' pendente lite order as it related to the sale of the marital home. Specifically, the plaintiff sought an order requiring the defendant to sign, within twenty-four hours, a listing agreement for the sale of the property at the listing price recommended by the broker. In the event the defendant failed to sign the agreement within that time frame, the plaintiff requested the court to "order the property to be judicially transferred to the plaintiff,

[2] The parties filed numerous motions for contempt over the course of the litigation. The earliest such motion pertaining to the pendente lite order was filed by the plaintiff on March 13, 2020; he alleged that the defendant had violated the order by failing to pay her share of the marital home's oil bill.

granting the plaintiff final decision-making authority as to all decisions related to the sale of the property so that he [could] effectuate the order to list and sell the property, all net proceeds of which [would] be held in escrow pending agreement of the parties or further order of the court . . . ." The court did not grant ex parte relief but scheduled the matter for a hearing.

On July 2, 2021, the defendant filed a motion to open and set aside the court's February 10, 2020 order accepting and approving the parties' pendente lite agreement. In her motion, the defendant claimed that the plaintiff's financial affidavit, dated February 10, 2020, fraudulently misrepresented the plaintiff's income and assets.

On July 7, 2021, the court held a virtual hearing to address the various motions that were pending. At the outset of the hearing, the court observed that there were thirteen motions on its docket for that day, which it described as "a couple of discovery motions regarding the Bitcoin," "a motion to modify which is a little bit different," and "a whole mess of contempts . . . that seem to [involve] an agreement that the parties reached in . . . 2020." The court also observed that there was a pending motion to open and to set aside the parties' pendente lite agreement but that the motion was not scheduled to be heard that day. Although the defendant's counsel argued that the defendant's motion to open and set aside should be addressed during that hearing in light of the fact that many of the pending motions pertained to the pendente lite order that the defendant sought to set aside, the court nevertheless ruled that the motion to open would be "for another day." After some further discussion about which motions would be heard that day, the court indicated that it would focus on the plaintiff's amended motion for contempt and motion for an injunction and proceeded with the hearing on those motions.

On August 17, 2021, the court issued a memorandum of decision on the plaintiff's amended motion for contempt and motion for an injunction. The court concluded that the defendant had violated the pendente lite order by, among other things, refusing to agree to and pay for any reasonable and necessary repairs and improvements to the marital home as recommended by the broker, obstructing and impeding the listing of the property, and failing to make the full monthly payment of $2060. It characterized the defendant's conduct as "well outside of the realm of good faith and fair dealing." Although the court denied the plaintiff's motion for contempt, it nevertheless ordered the defendant to pay the plaintiff his reasonable attorney's fees and the costs that he incurred.[3] The court also granted in part the plaintiff's motion for injunctive relief, giving the plaintiff (1) exclusive possession of the marital home, (2) sole authority to sign any and all documents necessary to list the marital property for sale, and (3) sole authority to engage any person or entity and to contract for all reasonable and necessary repairs and improvements as recommended by the broker. The court also ordered that the cumulative total of any and all sums owed by the defendant due to her failure to abide by the terms of the pendente lite order, including all reasonable and necessary costs for repairs and improvements, would become a charge against her share of the net proceeds from the sale of the marital home.

On November 4, 2021, following the denial of her motion for reargument, the defendant appealed to this court challenging the court's August 17, 2021 decision. On November 26, 2021, the defendant amended her appeal to also challenge the court's November 17, 2021 attorney's fees award. The plaintiff moved to dismiss

[3] On November 17, 2021, after a hearing on attorney's fees, the court ordered the defendant to the pay the plaintiff $18,792.50 for attorney's fees incurred.

the appeal and the amended appeal on the ground that they were not taken from a final judgment. This court dismissed the portion of the appeal "challenging the pendente lite order of exclusive possession and pendente lite order for injunctive relief" but denied the motion to dismiss "as to the portion of the appeal challenging the pendente lite award of attorney's fees." Although this court denied the motion to dismiss as to the portion of the appeal challenging the pendente lite award of attorney's fees, the defendant nevertheless withdrew her appeal on August 10, 2022.

On June 30, 2022, Attorney Ross Kaufman, the defendant's then counsel, moved to withdraw his firm's appearance on behalf of the defendant. A virtual hearing on the motion to withdraw was held by the trial court on July 21, 2022, at which time Attorney Kaufman requested a hearing pursuant to *Matza* v. *Matza*, 226 Conn. 166, 627 A.2d 414 (1993), a hearing colloquially referred to as a "*Matza* hearing."[4] The plaintiff and his counsel were ordered to leave the hearing, at which time the court heard from Attorney Kaufman and the defendant. By written order dated July 21, 2022, the court, *Moukawsher*, *J.*, granted counsel's motion to withdraw.

The trial on the dissolution that had been scheduled for July, 2022, was postponed to a later date so that the defendant could obtain new counsel. The defendant subsequently retained counsel, who filed an appearance on September 23, 2022, and a trial was held on the dissolution on October 24 and December 16, 2022, and January 19, 2023. On February 2, 2023, the court rendered judgment dissolving the parties' marriage and issued various financial orders. This appeal followed.

[4] A *Matza* hearing is a hearing on an attorney's request to withdraw his or her representation of a client because of concerns that continued representation of that client would result in a violation of the Rules of Professional Conduct.

I

The defendant first claims that the court abused its discretion and deprived her of due process of law when it afforded her only fifteen minutes to present her case-in-chief at the July 7, 2021 virtual hearing on the plaintiff's amended motion for contempt and motion for injunction. She claims that, although the court ultimately did not find her in contempt following that hearing, it nevertheless concluded that she violated the pendente lite order and awarded the plaintiff attorney's fees without affording her a full and fair opportunity to present her case. She also claims that the court abused its discretion in refusing to hear her motion to open at that same hearing. We address the defendant's claims in turn.[5]

[5] The plaintiff contends that the defendant waived her right to challenge the court's order requiring her to pay the plaintiff's attorney's fees because she previously raised the same issue in an earlier appeal and subsequently withdrew it. We disagree. The plaintiff points to our decision in *Detar* v. *Coast Venture XXVX, Inc.*, 91 Conn. App. 263, 266, 880 A.2d 180 (2005), for the proposition that a failure to raise an issue in an initial appeal to this court constitutes a waiver of the right to bring the claim in a subsequent appeal. The facts of *Detar*, however, are different from the facts of the present case, and we are not persuaded that declining review of the defendant's claim under these circumstances is appropriate. In *Detar*, this court decided the merits of an appeal and remanded the case to the trial court for further proceedings out of which a subsequent appeal later ensued. Id., 265–66. This court explained that a "[f]ailure to raise an issue in an initial appeal to this court constitutes a waiver of the right to bring the claim." Id., 266. Because the defendant in that case failed to challenge the trial court's prejudgment interest award in the first appeal when it had the opportunity to do so, we declined to address the claim in the subsequent appeal that came before the court. Id. In the present case, however, this court never decided the merits of the initial appeal because it dismissed part of the appeal, and the defendant withdrew the remaining part of the appeal pertaining to the court's award of attorney's fees. To the extent the facts of *Detar* are similar in some respects to the facts of the present case, we agree with the defendant that it nevertheless was reasonable under the circumstances of this case for her to withdraw the remaining portion of her earlier appeal as to the attorney's fees because, as the defendant correctly points out, her challenge to the attorney's fees award was tied inextricably to the dismissed portion of the appeal, which challenged the merits of the underlying judgment out of which the attorney's fees award arose.

It is well known that "[m]atters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court. . . . Connecticut trial judges have inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . The [trial] court has wide latitude in docket control and is responsible for the efficient and orderly movement of cases. . . . The trial court has inherent authority to control the proceedings before it to ensure that there [is] no prejudice or inordinate delay." (Citations omitted; internal quotation marks omitted.) *Ill* v. *Manzo-Ill*, 210 Conn. App. 364, 374, 270 A.3d 108, cert. denied, 343 Conn. 909, 273 A.3d 696 (2022).

In reviewing the court's exercise of its discretion, however, we are cognizant that "[t]he court's discretion . . . is not unfettered; it is a legal discretion subject to review. . . . [D]iscretion imports something more than leeway in [decision making]. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice . . . ." (Internal quotation marks omitted.) *C. A.* v. *G. L.*, 201 Conn. App. 734, 739, 243 A.3d 807 (2020).

A court's obligation to conform with the spirit of the law necessarily requires conformity with the principles of due process. When one is charged with contempt, for instance, due process requires that the person be "advised of the charges against [her], have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses [o]n

Accordingly, under the facts of this case, we conclude that the defendant did not waive her claim.

[her] behalf, either by way of defense or explanation." (Emphasis omitted; internal quotation marks omitted.) *Ill* v. *Manzo-Ill*, supra, 210 Conn. App. 376.

"A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. . . . It is a fundamental tenet of due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 10, of the Connecticut constitution that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. . . . Where a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained." (Internal quotation marks omitted.) *Morera* v. *Thurber*, 187 Conn. App. 795, 799–800, 204 A.3d 1 (2019). As such, a court does "not have the right to terminate [a] hearing before [the parties have] had a fair opportunity to present evidence on the contested issues." *Szot* v. *Szot*, 41 Conn. App. 238, 242, 674 A.2d 1384 (1996). "Whether a party was deprived of [her] due process rights is a question of law to which appellate courts grant plenary review." *McFarline* v. *Mickens*, 177 Conn. App. 83, 100, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

With these principles in mind, we turn to the record in this case. At the outset of the court's July 7, 2021 hearing, during which it heard the plaintiff's amended motion for contempt and motion for injunction, the court explained to the parties' counsel that "we've been

assigned one day. You're both very experienced counsel. This will take one day. This is not going over into another day. There was a time when thirteen motions [would] strike terror in my heart, it does not anymore." A few moments later, the court reiterated that "[t]his is [the] time that you guys have been allotted, this is the judge that you have been allotted, and this will finish by no later than 4:45 this afternoon and, maybe, hopefully sooner." The court indicated that it would focus on the plaintiff's amended motion for contempt and motion for injunction.

The plaintiff proceeded to put on his case. The plaintiff's counsel called as witnesses the plaintiff, the defendant, and Timonthy Dent, the parties' real estate agent. At no point during the hearing did the court give the plaintiff's counsel a tentative deadline by which she was required to conclude her presentation of evidence to ensure that the defendant had ample time to present her case. After the plaintiff rested his case late in the afternoon, the court said to the defendant's counsel: "Okay. [Attorney] Kaufman, you have sixteen minutes, so I would, you know, urge you to if you have any witnesses that you want to call, [that] you use your time wisely. You know . . . as I said, this is my function is to manage this case. We have two motions, one of them [is] a contempt motion. Contempt is a relatively, you know, easy motion. You know, we're now five hours down the road so I think that we've aired this out pretty well. . . . [I]f you do have some testimony that you think is relevant to the points that are . . . seminal whatever you want to call it, you know, the gravamen of these two motions, then please call them. You've got fifteen minutes to do it."[6]

[6] By that point, the court already had been put on notice that the defendant intended to present a case-in-chief and did not intend to rely solely on her cross-examination of the witnesses. Indeed, earlier in the hearing, the court pressured the parties during the plaintiff's direct examination and the defendant's cross-examination of the defendant to finish up with that witness. It stated: "I think we need to button this witness down here. . . . [W]e need

The defendant's counsel then proceeded to recall the defendant. After some questioning, the court interrupted counsel, stating: "We've reached the witching hour, folks, it's 4:45." At this point, the court had already reminded the parties multiple times that it would be concluding the proceedings at 4:45 p.m. The court extended the hearing five minutes to allow both attorneys to tell the court "what you think [it] need[s] to do and what . . . the evidence show[s]." When the defendant's counsel was afforded the opportunity to speak, he stated: "I just want to state for the record I did not have a chance to complete my case-in-chief." The defendant's counsel then proceeded to make his closing argument, stating at one point during the argument that "[y]ou heard counsel just say there was no evidence about that. You know what? She's right. There was no evidence because we didn't get to it. And I'm certain that, had we gotten to it, there would have been evidence to that point. But we didn't get to it." The court responded: "[W]ould have, should have, could have. You know, everybody knew at ten o'clock this morning what the ground rules were. So, you know . . . I make no apologies."

A

The defendant claims that the court abused its discretion and violated her due process rights by affording

to finish with this witness." Although the defendant's counsel had more questions for his client on cross-examination, he assuaged the court, stating: "Your Honor, I can pass the witness, I can take up the rest of my inquiry on the defendant's case-in-chief." The court responded: "Okay." Later in the hearing, the court inquired on whether the defendant's counsel intended to rely on his cross-examination or planned on presenting a case-in-chief. The court stated: "[C]ertainly, if there's some, you know, burning issue that, you know, that you feel that you need to get to that you didn't cover on your cross-examination I certainly want to give you the opportunity to do that." Defense counsel reiterated to the court: "I have a case-in-chief that I'd like to put on, I intend to recall my client . . . . [Y]ou know, I—I passed over her previously so that we could get to Mr. Dent while he was on the screen and prepared to go."

her only fifteen minutes to present her case-in-chief at the hearing during which the court heard the plaintiff's amended motion for contempt and motion for an injunction. We agree.

There is no question that a court may limit the time allowed for an evidentiary hearing. See, e.g., *Dicker* v. *Dicker*, 189 Conn. App. 247, 265, 207 A.3d 525 (2019). But that limitation must be reasonable in light of the needs of the parties to present their cases. See *Eilers* v. *Eilers*, 89 Conn. App. 210, 218, 873 A.2d 185 (2005). The court's limitations in the present case were not reasonable.

Although the court may have wanted to complete the hearing in one day, due process cannot be administered arbitrarily with a stopwatch. See *Ill* v. *Manzo-Ill*, supra, 210 Conn. App. 383 (concluding that trial court deprived plaintiff of due process of law by affording plaintiff only one day to present defense, when the defendant was given four days to present her case). Throughout the hearing, the court made it clear that it intended to complete the hearing in one day without going beyond 4:45 p.m. Although such a goal, in and of itself, does not necessarily violate due process in any given case, arbitrarily limiting the defendant in the presentation of her case after giving the plaintiff almost the entire allotted time to present his case deprived the defendant of a full and fair opportunity to be heard. See, e.g., *Szot* v. *Szot*, supra, 41 Conn. App. 242 ("[t]he court . . . did not have the right to terminate the hearing before the plaintiff had a fair opportunity to present evidence on the contested issues").

The defendant was afforded only fifteen minutes to present her case-in-chief, and the court made no effort to divide the time equitably between the parties or to otherwise ensure that the defendant had sufficient time to put on her case. Though the defendant was afforded

the opportunity to cross-examine the plaintiff's witnesses, cross-examination is not a substitute for presenting one's own case. See *Zakko* v. *Kasir*, 223 Conn. App. 205, 214, 308 A.3d 92 (2024) ("[i]t is axiomatic that parties have a right to present evidence on contested issues when at a hearing before the court").

The court's management of the July 7, 2021 hearing resulted in the plaintiff receiving several hours to present his case-in-chief while the defendant was afforded just a few minutes. The court's failure to allow the defendant more time to present her case improperly deprived her of a "fair opportunity to present evidence on the contested issues." *Szot* v. *Szot*, supra, 41 Conn. App. 242. Accordingly, the judgment of the trial court must be reversed and the case remanded for further proceedings.

We still must decide, however, the appropriate scope of our remand. Following the hearing at which the defendant's due process rights were violated, the court issued a decision on August 17, 2021. In its decision, the court found that the defendant had violated the pendente lite order by, among other things, refusing to agree to and pay for any reasonable and necessary repairs and improvements to the marital home as recommended by the broker, obstructing and impeding the listing of the property, and failing to make the full monthly payment of $2060. As a result, it issued various orders related to the plaintiff's motion for an injunction, including, inter alia, that the plaintiff would have sole possession of the marital home and sole authority (1) to sign any and all documents necessary to list the marital property for sale and (2) to engage any person or entity and to contract for all reasonable and necessary repairs and improvements as recommended by the broker. It further ordered that the cumulative total of any and all sums owed by the defendant due to her failure

to abide by the terms of the pendente lite order, including all reasonable and necessary costs for repairs and improvements, would become a charge against her share of the net proceeds from the sale of the marital home. Lastly, the court ordered the defendant to pay the plaintiff his reasonable attorney's fees and costs as a result of the court's determination that the defendant violated the pendente lite order.

The defendant, while acknowledging that a final judgment of dissolution generally renders a pendente lite order moot; see *Netter* v. *Netter*, 220 Conn. App. 491, 494–95, 298 A.3d 653 (2023); nevertheless contends that an order reversing the pendente lite orders in this case would afford her practical relief. Specifically, she argues that she is entitled to orders: (1) reversing the award of attorney's fees, (2) requiring the plaintiff to pay her what she characterizes as "restitution" for the $2060 monthly payments and other expenses she paid under the pendente lite order, and (3) requiring the trial court to conduct a new trial on "all financial orders incident to the decree of dissolution." We address each claim in turn.

The defendant first contends that we should reverse the court's award of attorney's fees. The plaintiff counters that the defendant waived her claim challenging the attorney's fees award when she withdrew her first appeal from the pendente lite order. For the reasons set forth in footnote 5 of this opinion, we reject that claim. Moreover, because the court's award of attorney's fees was not extinguished by the final judgment of dissolution and was predicated on the findings that the court made following the hearing that we have concluded violated the defendant's due process rights, we agree with the defendant that her claim is not moot. We therefore remand the case for a new hearing on the plaintiff's amended motion for contempt for the limited

purpose of determining whether the plaintiff was entitled to an award of attorney's fees.

Next, the defendant claims that, on remand, she is entitled to what she describes as "restitution" for the $2060 monthly payments and other expenses she paid under the pendente lite order. We disagree. That claim is based solely on the defendant's claim that the pendente lite order, itself, was procured through fraud. The defendant's claim for restitution thus represents a challenge to the validity of the pendente lite order. It is well established, however, that a motion for contempt "does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed . . . ." (Internal quotation marks omitted.) *Griswold* v. *Stern*, 126 Conn. App. 265, 272, 10 A.3d 1095 (2011). Contempt proceedings are limited to determining (1) whether there was a clear and unambiguous judicial directive and (2) whether the alleged contemnor wilfully violated that directive. See *M. S.* v. *M. S.*, 226 Conn. App. 482, 494 n.9, 319 A.3d 223 (2024).

Permitting the alleged invalidity of the underlying court order to serve as a defense to contempt would run afoul of the rule that "[a] party to a court proceeding must obey the court's orders unless and until they are modified or rescinded, and may not engage in 'self-help' by disobeying a court order to achieve the party's desired end." *Hall* v. *Hall*, 335 Conn. 377, 397, 238 A.3d 687 (2020). Although the defendant also claims that the court abused its discretion when it refused to consider her motion to open the pendente lite order at the July 7, 2021 hearing on the plaintiff's motions seeking to enforce the pendente lite order, we reject that claim in part I B of this opinion.

Lastly, the defendant claims that Judge Shay's error requires a new trial on "all financial orders incident to the decree of dissolution." Specifically, she argues that

Judge Moukawsher improperly relied on Judge Shay's adverse credibility findings in issuing those financial orders. Because we reject that characterization of Judge Moukawsher's decision making in part III B of this opinion, the defendant's claim that she is entitled to a new trial on the financial orders necessarily fails as well.

In sum, because the court failed to provide the defendant with an adequate opportunity to present her case-in-chief, which deprived her of due process of law, the judgment of the trial court with respect to the award of attorney's fees must be reversed. The case is remanded for a new hearing on the plaintiff's amended motion for contempt for the limited purpose of determining whether the plaintiff was entitled to an award of attorney's fees.

B

The defendant next claims that the court abused its discretion by declining to consider the defendant's motion to open and vacate the parties' pendente lite agreement at the July 7, 2021 hearing. She acknowledges that the court reasonably could limit the number of motions to address at that hearing but claims it was error for the court not to consider her motion to open. In her view, had the court considered and granted her motion to open and vacated the pendente lite agreement as she requested, it would have rendered moot the defendant's motion for contempt, which was predicated on the defendant's alleged violation of the pendente lite agreement. We are not persuaded.

At the time of the July 7, 2021 hearing, there were more than one dozen pending motions before the court, some of which were filed more than one year prior to the hearing. Indeed, it is clear from the record that the plaintiff had been attempting to enforce the parties' pendente lite agreement for more than one year, as evidenced by his motions for contempt. A judicial notice

went out to the parties on May 25, 2021, informing them that a remote hearing would be held on July 7, 2021. The defendant's motion to open, however, was filed on July 2, 2021, only five days before the scheduled hearing was to take place. During the hearing, the court explained to the defendant's counsel that his motion to open was not on the list of motions to be considered that day and that the motion to open would be "for another day." Although the defendant believes it would have been more efficient for the court to hear her motion to open first, the court was within its discretion to decide the motions that it chose to hear—especially when those motions were filed long before the defendant's motion to open, which was filed just five days before the date the court was scheduled to hear motions pertaining to the underlying order that the defendant sought to open. See *Edgewood Properties, LLC* v. *Dynamic Multimedia, LLC*, 226 Conn. App. 583, 608, 319 A.3d 123 (2024) ("[t]he trial court has inherent authority to control the proceedings before it to ensure that there [is] no prejudice or inordinate delay" (internal quotation marks omitted)). On this record, we cannot conclude that the court abused its discretion in declining to hear the defendant's motion to open at the July 7, 2021 hearing.

II

The defendant next claims that the trial court, *Moukawsher, J.*, committed plain error when it presided over the parties' dissolution trial after previously holding a *Matza* hearing between the defendant and her prior counsel. Specifically, the defendant contends that, during the *Matza* hearing, her then counsel accused her of lying and that those accusations tainted the court's view of the defendant. Although the defendant did not ask the court to disqualify itself from hearing the dissolution trial, she claims that the court should have recused itself sua sponte because its impartiality

reasonably could have been questioned. We are not persuaded.

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 467–68, 93 A.3d 1076 (2014).

This brings us to the relevant legal principles. Rule 2.2 of the Code of Judicial Conduct provides: "A judge shall uphold and apply the law and shall perform all

duties of judicial office fairly and impartially." Rule 2.11 (a) of the Code of Judicial Conduct instructs that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Our Supreme Court has explained that "[t]he reasonableness standard is an objective one." *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 527, 911 A.2d 712 (2006). "[T]he question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances." (Internal quotation marks omitted.) *State* v. *Ortiz*, 83 Conn. App. 142, 150, 848 A.2d 1246, cert. denied, 270 Conn. 915, 853 A.2d 530 (2004).

We turn to the relevant facts and procedural history pertinent to the defendant's claim. On June 30, 2022, the defendant's then counsel, Attorney Kaufman, moved to withdraw his firm's appearance on behalf of the defendant. The written motion stated, without further elaboration, that there had been a "breakdown in the attorney-client relationship." A virtual hearing on the motion was held on July 21, 2022, at which time Attorney Kaufman requested a *Matza* hearing be conducted and indicated that such hearings are typically held outside the presence of the opposing party. The plaintiff's counsel did not oppose the motion to withdraw but did voice concerns about the delays that had already occurred, pointing out that the defendant had already been represented by four different law firms. The plaintiff's counsel therefore objected to any continuance of the trial that had been scheduled. At that point, the plaintiff and his counsel left the remote hearing.

Attorney Kaufman then stated to the court: "I find myself in the position where I am compelled to seek mandatory withdraw[al]. Or I am required to withdraw from this matter pursuant to the Rules of Professional Responsibility 1.16 (a) (1). The reason being that my

continued representation will result in a violation of the Rules of Professional Responsibility." Attorney Kaufman continued: "I have been asked and told, instructed to do things in this, in this matter that would, without question, result in a violation of my—of our Rules of Professional Responsibility. I don't know how much detail Your Honor would like me to get into. I don't, as I've said, I have not done a hearing like this before. In nearly twenty years of practice, I've never found myself in this position."

The court then proceeded to address the defendant: "So . . . what Mr. Kaufman's comments reflect is that he's trying to protect your privilege to discuss with him your views on strategy and tactics with respect to the trial. So, what he's telling me is that he believes that he's being asked to do something unethical, in essence, he is not telling me what it is because he doesn't want to prejudice your case. So, what would you say in response?" The defendant responded: "We have a written agreement, and I do not believe there's any part of that written agreement that I have crossed or not complied with. I hear that Attorney Kaufman is saying that I asked him to do something, which, I guess, would be unethical. And I do not know what he is pointing to to indicate that. My work with him has been very, very different than the work with my previous two lawyers who were not very active on the case at all. I'm not aware of any disagreement. Our last interactions were regarding the attestation. I was given an attestation review file on Sunday morning and on Monday I came back. I read their advice on three of those questions and I came back with corrections. And when I came back with the corrections is when Attorney Kaufman said he would not be filing them and that he was, you know, would not work on the case any longer."

Because the defendant told the court that she did not understand the basis for counsel's motion to withdraw, the court offered counsel a few minutes to speak

with the defendant off the record. Attorney Kaufman explained to the court that his firm had already engaged in this conversation with the defendant but that he agreed that it was a good idea to take five minutes to discuss the issues again with the defendant.

Once the hearing resumed, the court allowed Attorney Kaufman and the defendant to further address the court. The court proceeded to ask Attorney Kaufman: "[I]f the trial goes forward and you follow the instructions of your client, would there be a moment in which you believe the rules of practice would require you to make a disclosure to the court that would damage your client?" Attorney Kaufman responded: "I believe—so, Your Honor, the short answer is, yes. But I think I want to add that, before the trial even starts, I would be in violation of the Rules of Professional Responsibility before the trial even starts." At the conclusion of the hearing, the court stated that, "[b]ecause I'm hearing completely opposite versions of what this is all about. Totally opposite versions. . . . I will have to take into account what both of you have said and get you a decision on it as soon as possible."

Later that day, the court, by written order, granted Attorney Kaufman's motion to withdraw. The order provided in relevant part: "Counsel for [the defendant] requests to withdraw from the case. They say that the attorney-client relationship is broken. More important, they assert that they would be ethically obliged if the case goes forward with them in it to take steps that might severely prejudice their client. [The defendant] objects to her lawyers withdrawing. She says there is no such issue in the case and that the disagreement is purely about [the defendant] disagreeing with her lawyers' strategy. Even if the issues between [the defendant] and her lawyers is only a strategy disagreement, the court was convinced at its hearing on the motion that the disagreement is so fundamental as to mean

[the defendant] would be better served by not having a lawyer than by having lawyers she will battle with throughout the trial. And if it's something more—as counsel vehemently asserts—it could severely prejudice her case to have a lawyer who may be compelled to by the Rules of Professional Conduct to make prejudicial disclosures to the court before or during trial." Accordingly, the court found that counsel had good cause to withdraw.

Subsequently, a trial on the parties' dissolution was held before Judge Moukawsher, at which the defendant was represented by new counsel. At no point during or after the *Matza* hearing did either party request that Judge Moukawsher recuse himself. On February 2, 2023, the court rendered judgment dissolving the parties' marriage and issued various financial orders.

The defendant claims that Judge Moukawsher committed plain error when he proceeded to try the parties' dissolution on the merits after previously holding a *Matza* hearing between the defendant and Attorney Kaufman. The defendant contends that Judge Moukawsher was necessarily exposed to harmful information by presiding over the *Matza* hearing. Although she concedes that there are no cases holding that the judge who conducts a *Matza* hearing may not preside over a subsequent dissolution trial, she nevertheless argues that the potential for prejudice, or at least the appearance of impropriety, is obvious.

We conclude that the plaintiff has failed to demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. See, e.g., *Marafi* v. *El Achchabi*, 225 Conn. App. 415, 438, 316 A.3d 798 (2024). The defendant essentially advocates for a per se rule that a judge be required to recuse himself or herself from presiding over subsequent proceedings of a party if that party's

counsel requests a *Matza* hearing. Indeed, after requesting a *Matza* hearing, the defendant contends that the judge is now tainted by the request and by any hearing that may take place and will be unable to fairly adjudicate subsequent proceedings involving that party. The defendant's argument ignores, however, the fact that "judges are regularly faced with the task of disregarding irrelevant and possibly prejudicial evidence and making a decision based exclusively on the evidence admitted at trial and the applicable law." *Tessmann* v. *Tiger Lee Construction Co.*, 228 Conn. 42, 58, 634 A.2d 870 (1993). "[J]udges are expected, more so than jurors, to be capable of disregarding incompetent evidence"; *Doe* v. *Carreiro*, 94 Conn. App. 626, 640, 894 A.2d 993, cert. denied, 278 Conn. 914, 899 A.2d 620 (2006); and we have held that "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (Internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 571, 231 A.3d 1196, 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).

Contrary to the defendant's contention, we are not persuaded that the facts of this case would cause a reasonable person to question Judge Moukawsher's impartiality. The record reflects that, during the *Matza* hearing, Attorney Kaufman refrained from divulging any specific information regarding the reasons why he felt that his representation of the defendant might place him in violation of the Rules of Professional Responsibility. Moreover, in his order on Attorney Kaufman's motion to withdraw, Judge Moukawsher in no way indicated that he believed Attorney Kaufman's representations

over those of the defendant and instead stated that he was granting the motion because—regardless of whose representations were accurate—the conflict between the defendant and her counsel could prejudice her case.

But even if we assume that it was error for Judge Moukawsher not to recuse himself from the dissolution trial after presiding over the *Matza* hearing, we would be unable to conclude that the error was so obvious as to be not debatable. The defendant herself concedes that there are no cases holding that a judge is required to recuse himself or herself under these circumstances. To the contrary, the authority weighs against this proposition. This court has explained that "[t]here is nothing extraordinary about a judge who has presided previously over a proceeding concerning a party hearing another case involving that same party." *Senk* v. *Senk*, 115 Conn. App. 510, 516, 973 A.2d 131 (2009). And our Supreme Court has acknowledged that an opinion held by a judge as a result of what the judge learned in an earlier proceeding need not necessarily be characterized as bias or prejudice. See *In re Heather L.*, 274 Conn. 174, 178, 874 A.2d 796 (2005), citing *Liteky* v. *United States*, 510 U.S. 540, 551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994); see also *In re Omar I.*, supra, 197 Conn. App. 571. Notably, the commentary to Rule 2.11 of the Code of Judicial Conduct, which addresses recusal, similarly recognizes that "[Rule 2.11] does not prevent a judge from relying on personal knowledge of historical or procedural facts acquired as a result of presiding over the proceeding itself." Code of Judicial Conduct, Rule 2.11, commentary (5). On the basis of the record before us, we conclude that the defendant has not "met the stringent standard for relief pursuant to the plain error doctrine"; (internal quotation marks omitted) *Prescott* v. *Gilshteyn*, 227 Conn. App. 553, 581, A.3d (2024); and, accordingly, the defendant's plain error claim fails.

III

The defendant next claims that the trial court made credibility determinations on improper bases. Specifically, she contends that the court improperly (1) applied the missing witness rule and (2) relied on a prior court's credibility findings. We disagree.

We begin by setting forth our standard of review and the relevant legal principles pertaining to the defendant's claim. Whether the court properly applied the " 'missing witness' " rule is a question of law over which our review is plenary. *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, 187 Conn. App. 282, 295, 202 A.3d 1033 (2019). To the extent we are called upon to review the trial court's factual findings, we review them for clear error. See *Hammel* v. *Hammel*, 158 Conn. App. 827, 832, 120 A.3d 1259 (2015). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Fogel* v. *Fogel*, 212 Conn. App. 784, 788, 276 A.3d 1037 (2022). "Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 508, 4 A.3d 288 (2010).

A

We first address the defendant's claim that the court improperly applied the missing witness rule. "For

decades, Connecticut recognized the . . . missing witness rule, which sanctioned a jury instruction that [t]he failure of a party to produce as a witness one who [1] is available and [2] . . . naturally would be produced permits the inference that such witness, if called, would have exposed facts unfavorable to the party's cause. . . . That instruction . . . is now, for various policy reasons, prohibited by statute in civil cases; General Statutes § 52-216c; and by [Supreme Court] precedent in criminal cases [see *State* v. *Malave*, 250 Conn. 722, 737 A.2d 442 (1999), cert. denied, 528 U.S. 1170, 120 S. Ct. 1195, 145 L. Ed. 2d 1099 (2000)]. . . . [H]owever . . . [a]lthough § 52-216c and *Malave* restricted the means by which the trier of fact is apprised of its ability to draw an adverse inference, it is clear that it remains permitted to do so. . . . This inference . . . is a permissive rather than a mandatory one—that is, one which the [trier of fact] at all times is free to accept or to reject . . . .§ (Citations omitted; footnote omitted; internal quotation marks omitted.) *Watson Real Estate, LLC* v. *Woodland Ridge, LLC*, supra, 187 Conn. App. 295–96.

The following procedural history is relevant to the defendant's claim. During the dissolution trial in the present case, in the context of explaining the cause of the marital breakdown, the defendant claimed that she experienced domestic violence at the hands of the plaintiff. She testified, among other things, that the plaintiff physically abused her several times per year and verbally abused her continually. She testified that the abuse included, inter alia, the plaintiff's attempt to strangle her and pick her up and throw her on her neck. She also said that he grabbed her pocketbook, which twisted her neck. The defendant testified that one of these incidents occurred in front of the parties' adult daughter. She also described verbal abuse, such as being yelled at and called names, sometimes in front of friends, colleagues,

and their daughters. The plaintiff denied abusing the defendant. Although he acknowledged that they argued, sometimes in front of their children, he denied any physical abuse. To the contrary, he testified that the defendant had an alcohol abuse problem and that there were times that she would become physically out of control, including toward the plaintiff.

At one point during the hearing, just prior to a lunch break, the court stated: "I wanted to say before we [recessed] that I've been struck by the strong, strong contrast between the two witnesses with respect to this question of very serious claims of—of domestic violence. And those have a very serious impact if true, and also, they have a very serious impact on the credibility of the two parties. And I don't—I couldn't find the—your witness list, [defendant's counsel]. I have read . . . [the] witness list [of plaintiff's counsel]. I'm just missing it. But the point is that I don't note that anyone has corroborating testimony offered or listed as a potential piece of evidence in the case with regard to these incidents. There's one in which I—the name Shanna came up as a—in this incident with the choking and the refrigerator incident. And that person was an adult then and is an adult now I assume. But these are very serious allegations, and they have significance in terms of credibility as well. So, the parties should consider whether they—what I'm supposed to do if there's no other evidence on these questions. And I want you to know that it's a serious enough matter that if the parties need time or other accommodations to offer any further witnesses, I'm open to it. But if they—if they don't do it, then they have to consider to—to explain to me in argument ultimately as they—why there was no other evidence on it. I just don't want you to think I'm pushing you to go forward and not—not have evidence that's on such an important matter as this. So, think about that over the break, too."

After the luncheon break, the defendant's counsel indicated that the defendant was not prepared to call her daughter, who was purportedly in therapy because of the parties' divorce. The defendant's counsel then indicated that he could potentially call the defendant's cousin to testify remotely from Massachusetts. The court stated: "It's up to you to decide whether the witness is worth it, so if—if you have some corroborating testimony about the severity—I mean, these . . . things that were described were extremely severe. And, if you have corroborating testimony about that, it would be important to me. But, if you had—if somebody is going to come on and testify that they argued or that there was some sort of mild incident or something it wouldn't have the impact that—that you might desire. So, it's up to you to decide what testimony you want to put on ultimately. . . . [T]here's a very important judgment call I have to make here. If these things happened as described, they're very serious. If they—if they aren't true, that's very serious too. And, if [the plaintiff] was lying about it, that's very serious. If he's telling the truth and your client's lying about it, that's very serious. That's why this is—this is a very—a very serious, important aspect of the case because there's really a dramatic contrast between these parties on this subject. So, I wanted you to understand that, and—and then, you can decide what to do about it. But I have to make a judgment . . . ."

On February 2, 2023, the court issued a memorandum of decision dissolving the parties' marriage. The court explained that the parties disputed how to divide the $665,000 net proceeds held in escrow from the sale of their former marital home, in addition to whether the defendant is the beneficiary of a family trust with "around $1.4 million in assets." It noted that the defendant also sought financial compensation for abuse during the marriage.

The court ultimately found the defendant not credible as a witness. The defendant had claimed that she had disclaimed any interest in the subject trust and that she instead had received only approximately $10,000 a year as a fee for administering the trust. The court did not believe her. The court noted that "[t]he supposed disclaimer only surfaced deep into the litigation. It is handwritten. It wasn't notarized or witnessed. It is patently convenient, and she says she would have produced it earlier, but it was in the marital home, and she had no access to it. Why then didn't she retrieve it when, while [the plaintiff] was away, she backed a moving truck up to the house and made off with a truckload of furniture?" The court also found important the fact that "the tax documents she swore to be true each year listed her as beneficiary and showed the payments [from the trust] as benefits to her even though the forms had a place for her to report the payments to her as fees." The court stated: "The court chooses to believe them, not her self-serving current testimony. And it does so because of the facts but also from the court's judgment of the credibility of the totality of her testimony, her demeanor, and her unreasonable litigation conduct labelled already by another judge as 'well outside the realm of good faith and fair dealing.' "

As to the claims of abuse, the court noted that, "[d]espite earlier admitting [that] the parties had just fallen out of love and that both parties contributed to the breakdown of the marriage, [the defendant] made shocking claims at trial that [the plaintiff] physically abused her several times a year, including repeatedly throwing her to the floor and, on at least one occasion, strangling her in front of her daughter." The court stated: "If the court believed these claims, it would certainly tell in terms of the court's orders. But it doesn't believe them. The court pressed [the defendant] to support those claims with some other evidence. She declined

to call her daughter. Instead, she called family members who said [the plaintiff] has a temper. Reportedly, during their thirty years of marriage he threw some souvenirs at her and knocked a hat off her head during a New York trip. On another hotly disputed occasion, she struck his car with hers and then he furiously struck her car with his. But if [the plaintiff] was so brutally and repeatedly violent—even knowing domestic violence is often hidden—more evidence would likely be found over the course of thirty years than what she presented. It is a big thing to take [the defendant's] word about what happened on faith when, as already noted, the court has other reasons to doubt that word." The court subsequently denied the defendant's claim for alimony.

The defendant claims that the court improperly applied the missing witness rule. She claims that, in rejecting her claim that the plaintiff abused her, the court noted that it had pressed the defendant to support the claims with other evidence, including by calling her daughter, but she declined to do so. She claims that, because the parties' daughter could have been called by either party, the trial court erroneously held the defendant's decision not to call her daughter against her. We disagree.

Although the defendant endeavors to characterize the court's decision as an improper application of the missing witness rule, it is clear that the court did not draw an "adverse inference" as that term is understood in the context of the missing witness rule. As the plaintiff points out, the trial court did not state it was making an adverse inference and was never asked to do so by either party. The court did not have occasion to inquire as to the relative availability of the witnesses or weigh the applicability of the missing witness rule. Rather, the court's decision made clear that the defendant's self-serving testimony, without the benefit of any corroborating evidence, was not credible. The court merely used the defendant's failure to call her daughter as one

example of her failure to corroborate her allegations of physical abuse. It was properly within the purview of the trial court to find the defendant's testimony not credible without corroborating evidence. See, e.g., *Davey B.* v. *Commissioner of Correction*, 114 Conn. App. 871, 878–79, 971 A.2d 735 (2009). Thus, the defendant's claim that the court improperly applied the missing witness rule is without merit.

B

As a final matter, the defendant claims that the court improperly relied on a prior court's credibility findings in adjudicating the parties' dissolution. We are not persuaded. Although the defendant contends that Judge Moukawsher's judgment was improperly based on the credibility determinations that Judge Shay made in his August 17, 2021 decision on the plaintiff's amended motion for contempt and motion for injunctive relief, her argument is belied by the court's memorandum of decision. The court's memorandum of decision is clear that it chose to believe certain documentary evidence over the defendant's self-serving testimony based on *its own* observation of "the totality of her testimony, her demeanor, and her unreasonable litigation conduct." Although the court noted—quoting Judge Shay's August 17, 2021 decision—that another judge had described her litigation conduct as being "well outside the realm of good faith and fair dealing," its comment, at best, was the court's recognition that its observations confirmed the conduct observed by a prior judge. Although the defendant attempts to label this as improper, we have found nothing in our case law to support her contention. Accordingly, the defendant's claim fails.

The judgment is reversed with respect to the award of attorney's fees and the case is remanded for a new hearing on the plaintiff's amended motion for contempt for the limited purpose of determining whether the

plaintiff was entitled to an award of attorney's fees; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DANIEL MULVIHILL *v.* KARA SPINNATO
(AC 45829)

Elgo, Moll and Seeley, Js.

Syllabus

The defendant appealed from the trial court's judgment denying her special motion to dismiss the plaintiff's defamation action pursuant to the anti-SLAPP statute (§ 52-196a), claiming that the court improperly concluded that the plaintiff met his burden under § 52-196a of establishing probable cause that he would prevail on the merits of his complaint. *Held*:

The trial court properly denied the defendant's motion to dismiss, this court having concluded that, viewing the pleadings and affidavits of the parties in the light most favorable to the plaintiff, the plaintiff satisfied the relatively minimal burden under § 52-196a of establishing probable cause that he would prevail on the merits of his complaint.

Argued April 16—officially released October 22, 2024

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the court, *Brazzel-Massaro, J.*, rendered judgment denying the defendant's special motion to dismiss, from which the defendant appealed to this court. *Affirmed.*

Jack G. Steigelfest, with whom, on the brief, was *Thomas P. Cella*, for the appellant (defendant).

Daniel Mulvihill, self-represented, the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Kara Spinnato, known also as Kara Callahan, appeals from the judgment of the trial court denying her special motion to dismiss filed

pursuant to Connecticut's anti-SLAPP statute, General Statutes § 52-196a,[1] in this defamation action brought by the self-represented plaintiff, Daniel Mulvihill. On appeal, the defendant claims that the court improperly concluded that the plaintiff met his burden under § 52-196a of establishing probable cause that he will prevail on the merits of his complaint.[2] We affirm the judgment of the trial court.

At the outset, we note that § 52-196a constitutes a "special statutory benefit"; *Lafferty* v. *Jones*, 336 Conn. 332, 372, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021); that "provides a moving party with the opportunity to have [a] lawsuit dismissed early in the proceeding and stays all discovery, pending the trial court's resolution of the special motion to dismiss." *Priore* v. *Haig*, 344 Conn. 636, 659, 280 A.3d 402 (2022). As this court has observed, "[a] special motion to dismiss filed pursuant to § 52-196a . . . is not a traditional motion to dismiss based on a jurisdictional ground. It is, instead, a truncated evidentiary procedure enacted by our legislature in order to achieve a legitimate policy objective, namely, to provide for a prompt remedy." *Elder* v. *Kauffman*, 204 Conn.

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

Our Supreme Court recently held that "the denial of a special motion to dismiss based on a *colorable claim* of a right to avoid litigation under § 52-196a is an immediately appealable final judgment . . . ." (Emphasis in original.) *Smith* v. *Supple*, 346 Conn. 928, 960, 293 A.3d 851 (2023). Because the defendant has raised a colorable claim under § 52-196a, we conclude that she properly has appealed from the judgment denying her special motion to dismiss.

[2] The defendant also claims that the court improperly concluded that she failed to meet her burden of establishing that the conduct in question falls within the ambit of the anti-SLAPP statute. In light of our conclusion that the court properly determined that the plaintiff had established probable cause pursuant to § 52-196a, we do not consider that contention.

App. 818, 824, 254 A.3d 1001 (2021); see also *Smith* v. *Supple*, 346 Conn. 928, 965, 293 A.3d 851 (2023) (*D'Auria, J.*, dissenting) ("[o]n an expedited basis and on a quickly assembled record, a trial judge serves as a gatekeeper, promptly weeding out and dismissing lawsuits that plainly have been filed for [an] illegitimate purpose"). Section 52-196a (e) (2) instructs that, "[w]hen ruling on a special motion to dismiss, the court shall consider pleadings and supporting and opposing affidavits of the parties attesting to the facts upon which liability or a defense, as the case may be, is based." Our recitation of the relevant facts is gleaned from such materials in the record before us.[3]

The plaintiff has been a licensed real estate broker since 1999.[4] The defendant, who was a licensed real estate agent from 2010–2016, at all relevant times maintained a Realtor profile on zillow.com (Zillow).[5] The

[3] Prior to oral argument before this court, the defendant moved to strike portions of the plaintiff's appellate brief and appendix on the ground that it purported to introduce evidence that had not been presented to the trial court. We granted that motion and ordered stricken several paragraphs contained therein. In our consideration of the present appeal, we have disregarded that stricken material.

[4] In his objection to the special motion to dismiss, the plaintiff stated that he "has been a licensed real estate broker for over twenty-three years. The plaintiff is licensed in Connecticut, New York, Florida and Rhode Island. He holds designations/certifications in the following: GRI: Graduate of Real Estate Institute, SRES: Senior Residential Specialist, AWHD At Home with Diversity, ABR Accredited Buyer Representative, CIPS Certified International Property Specialist, and SFR Short Sale Foreclosure Specialist. He was the president of the Northern Fairfield County Association of Realtors in 2012, he has served on the legislative committee with the Connecticut Realtor Association and has been a member of the board for CTR and a board member for NFCAR. The plaintiff has been a moderator for political forums sponsored by NFCAR. He is a certified safety instructor for the National Association of Realtors and teaches Realtors safety measures throughout Connecticut and New York."

[5] "Zillow is an online real estate marketplace website that offers comprehensive real estate market data, including estimated values of real property." *Wahba* v. *JPMorgan Chase Bank, N.A.*, 349 Conn. 483, 490 n.3, 316 A.3d 338 (2024); see also *San Diego* v. *Invitation Homes, Inc.*, Docket No. 22-cv-260-L (MDD), 2023 WL 35217, *1 n.2 (S.D. Cal. January 3, 2023) (Zillow

defendant also is a licensed notary public. At all relevant times, the defendant was the conservator of her uncle, who was suffering from dementia and owned real property known as 31 Skyline Drive in Danbury (property).

In November, 2021, the defendant contacted the plaintiff about a potential sale of the property. The plaintiff met with the defendant and toured the property on November 15, 2021.[6] At that time, the residence on the property "was not habitable" and the parties had to enter from the rear, where a doorway "was boarded up with a piece of ply-wood and a pad-lock." The parties met the defendant's husband, a general contractor, in the basement and discussed possible rehabilitation costs.[7] With respect to a potential sales price for the

"hosts a database of homes for sale, homes for rent, and homes not currently on the market as well as home value and rent estimates, among other home-related information"). The defendant at the present time continues to maintain a Realtor profile on Zillow. See https://www.zillow.com/profile/Kara-Spinnato (last visited October 8, 2024).

[6] In his complaint and his affidavit, the plaintiff avers that the November 15, 2021 meeting at the property lasted ten minutes. In her affidavit, the defendant states that the meeting lasted approximately forty-five minutes.

[7] The respective affidavits of the parties contain differing accounts of what transpired once they entered the basement. In her affidavit, the defendant states in relevant part that the plaintiff "met my husband in the basement of the home and seemed to focus more on discussing his suggestions with my husband rather than with me, even though I was the person in charge of selling the house. His conduct gave me the feeling that he was discriminating against me because I am a woman. He told me and my husband that it would cost $100,000 to rehabilitate the house. He suggested that we could list the house for sale at $150,000 and that we might get an offer of $140,000. He commented that he was involved in the sale of another house on the same street and said 'we flipped it,' giving me the impression that he was interested in a quick turn over of the property rather than selling the property at the best possible price. Given the market for houses at that time, I concluded that his suggestion of a listing price of $150,000 was very low."

In his affidavit, the plaintiff offered a different account, stating in relevant part: "The defendant['s] husband and I had a brief conversation in the basement . . . about him being a general contractor and we discussed how much it would cost to [rehabilitate the residence]. At the time he was throwing items off a workbench into a garbage can. He said he was in a hurry [be]cause he had to get back to the other side of the state. He kept telling me that I will get you the code for the pad lock on the back door.

property, the plaintiff alleges in his complaint and in his sworn affidavit that he provided a comparative market analysis to the defendant "for $210,900" during the November 15, 2021 meeting. In her affidavit, the defendant states that the plaintiff "never provided me with a comparative market analysis . . . ."

On November 18, 2021, the plaintiff sent the defendant an email, in which he stated: "Hi Kara, [j]ust checking in with you. I have been thinking about the property, and would recommend a hold harmless agreement due to [the] condition of the property. Also in the listing, I would include that only principals and decision makers enter the property. I wouldn't want a family to go in with children and get hurt. A safety precaution. I am attaching a hold harmless that I use often. Thanks, Daniel." The defendant replied to that email, stating: "Thank you Daniel. That makes good sense. I am waiting to hear a proposal from one more realtor and I will be in touch later today or tomorrow. Have a great day."

The defendant thereafter retained the services of another real estate agent, who listed the property for $200,000 on November 26, 2021.[8] On November 29, 2021,

. . . I never told the defendant that 'I [f]lipped [a] [h]ouse [n]earby.' I never had [an] ownership [interest in a nearby house], nor did I ever make that statement. I said that my client flipped [a nearby] property. I never had a financial interest either direct or indirect, or derived any benefit except my commission. . . . I made the conversation [in the basement] brief since [the defendant and her husband] were both in a hurry. The meeting did not drag on, nor did I direct the conversation to the defendant['s] husband. I had more conversation about the defendant['s] uncle than we did about the home. Besides [the defendant's husband] was bending down and picking items up off a work bench and the floor. It was poor lighting and I knew they were on a time schedule and needed to leave. The defendant told me about her children. She was very pleasant during our brief meeting."

[8] The parties disagree as to whether the defendant informed the plaintiff that she would not be working with him following their November 18, 2021 email exchange. In her affidavit, the defendant avers that she subsequently "informed [the plaintiff] that [she] would not be working with him." By contrast, the plaintiff states in his affidavit that "[t]he defendant never informed me whether or not she was listing the property with me despite the fact that she said she did in her 'sworn affidavit.' "

the defendant accepted an offer to purchase the property for $252,900; the real estate closing transpired on February 9, 2022.

On March 28, 2022, the defendant posted a review of the plaintiff on Zillow under the name "Kara Callahan."[9] That post was titled "Will never recommend" and stated: "[The plaintiff] worked with me on an opportunity to be our selling agent for my [u]ncle's home. [The plaintiff] could not seem to handle being professional. Furthermore he told me he'd advise listing the home we were selling at $100k less [than] we actually got when it sold within 48 hours with another agent. I have a feeling he was never going to list it rather bring in a cash buying friend (house was a big rehab project). I have never dealt with such a shady individual. Buyer and Seller beware!!"

In response, the plaintiff commenced this defamation action on April 21, 2022. His one count complaint alleged that the defendant's Zillow post was defamatory and, by way of relief, sought removal of the post, as well as monetary and injunctive relief.

After her attorney filed an appearance on June 2, 2022, the defendant filed a special motion to dismiss pursuant to § 52-196a, claiming that her Zillow post "was an exercise of her right to free speech in connection with matters of public concern." The plaintiff filed an objection to that motion, in which he argued that "[t]he statements made [in the Zillow post] were false statements, designed to impugn and damage the professional reputation of the plaintiff and deter third persons from associating or dealing with the plaintiff. [They] were designed and calculated specifically to injure the plaintiff in his business and profession." He further stated that the defendant "was deceptive in writing the review using her maiden name Kara Callahan and not

[9] Kara Callahan is the defendant's maiden name.

her legal name Kara Spinnato. . . . [T]he defendant hid behind her maiden name in order to defame the plaintiff after the fact." The plaintiff also recited various factual allegations to support his contention that he had presented sufficient evidence to establish probable cause that he will prevail on the merits of his complaint.

The court held a hearing on the defendant's special motion to dismiss on August 8, 2022. At that time, the court invited the parties to submit sworn affidavits. Both parties did so days later.[10]

In its September 2, 2022 memorandum of decision, the court first determined that, although Zillow constituted a public forum for purposes of § 52-196a, the defendant's post did not involve a matter of public concern. The court further concluded that the plaintiff had met his statutory burden of establishing probable cause that he will prevail on the merits of his complaint. The court thus denied the defendant's special motion to dismiss, and this appeal followed.[11]

As a preliminary matter, we note that the inquiry mandated by § 52-196a is twofold in nature. Pursuant to § 52-196a (e) (3), a party that files a special motion to dismiss bears the initial burden of demonstrating, by a preponderance of the evidence, "that the opposing party's complaint . . . is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern . . . ." If that burden is met, the burden shifts to the party that brought the complaint to demonstrate "that there is

[10] The defendant also submitted an affidavit from her husband, Joe Spinnato. His affidavit contains an account of what transpired in the basement meeting on November 15, 2021, that is largely identical to that set forth in his wife's affidavit.

[11] There is no indication in the record before us that the plaintiff sought an award of costs as the prevailing party pursuant to § 52-196a (f) (2).

probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint . . . ." General Statutes § 52-196a (e) (3). For a special motion to dismiss to be granted, the court must resolve both prongs in favor of the moving party.

In the present case, the court resolved both prongs in favor of the nonmoving party, the plaintiff.[12] To succeed in this appeal, the defendant therefore must demonstrate that the court committed reversible error with respect to both prongs of the test set forth in § 52-196a (e) (3). Accordingly, we may address either prong of that test in resolving her appeal.[13] In the present case,

[12] When a court is presented with a motion to dismiss predicated on subject matter jurisdictional grounds, "it must be immediately acted upon by the court. . . . [A]ll other action in the case must come to a halt until such a determination is made." (Citations omitted.) *Gurliacci* v. *Mayer*, 218 Conn. 531, 545, 590 A.2d 914 (1991). If the court concludes that the action must be dismissed for lack of subject matter jurisdiction, it "need not, and cannot, consider" additional claims raised by a defendant. (Internal quotation marks omitted.) *Haydusky's Appeal from Probate*, 220 Conn. App. 267, 276, 297 A.3d 1072 (2023); see also *Weiss* v. *Weiss*, 297 Conn. 446, 451 n.5, 998 A.2d 766 (2010) (conclusion that court lacks subject matter jurisdiction "by its very nature precludes the court from considering the merits" of nonjurisdictional claims); *State* v. *Despres*, 220 Conn. App. 612, 624 n.9, 300 A.3d 637 (2023) ("because the court had determined . . . that it did not have subject matter jurisdiction, it therefore should not have addressed the claim on the merits, and the court's analysis and conclusion regarding the merits of the defendant's arguments constitute dicta").

Special motions to dismiss, by contrast, do not implicate the subject matter jurisdiction of the court. See *Elder* v. *Kauffman*, supra, 204 Conn. App. 824. For that reason, it was entirely appropriate for the trial court, for prudential reasons, to address both prongs of § 52-196a (e) (3).

[13] Our precedent recognizes, in a variety of contexts, the discretion of a reviewing court to focus on whichever prong of a multifactor test that it deems most relevant to resolving the appeal. See, e.g., *State* v. *Golding*, 213 Conn. 233, 240, 567 A.2d 823 (1989) (because appellant's claim will fail if it cannot satisfy any prong of multifactor test for unpreserved claims of constitutional error, "[t]he appellate tribunal is free . . . to respond to the [appellant's] claim by focusing on whichever condition is most relevant in the particular circumstances"); *Dills* v. *Enfield*, 210 Conn. 705, 717, 557 A.2d 517 (1989) (explaining that impracticability doctrine is governed by multifactor test and that reviewing court need not address all prongs of test if court concludes that party failed to establish any prong); *McDonnell* v. *Roberts*, 224 Conn. App. 388, 400, 312 A.3d 1103 (2024) (explaining that motion to open default judgment is governed by two-pronged test in which

we focus our attention on whether the plaintiff met his burden of establishing probable cause that he will prevail on the merits of his complaint. We conclude that the plaintiff satisfied that burden.[14]

appellant's "failure . . . to meet either prong is fatal" and concluding that reviewing court "need not address the [appellant's] arguments as to the first prong" in light of conclusion that she had not satisfied second prong of test); *Delgado* v. *Commissioner of Correction*, 224 Conn. App. 283, 291–92, 311 A.3d 740 ("[i]t is axiomatic that courts may decide against a petitioner on either prong [of the two-pronged test for ineffective assistance of counsel claims], whichever is easier"), cert. denied, 349 Conn. 902, 312 A.3d 585 (2024); *State* v. *Chester J.*, 204 Conn. App. 137, 156 n.13, 253 A.3d 971 ("[b]ecause the test for an equal protection violation in jury selection procedures is stated in the conjunctive, we need not address either of the other two prongs, as a failure of proof on any of the prongs defeats the claim"), cert. denied, 337 Conn. 910, 253 A.3d 493 (2021); *Stratford* v. *Winterbottom*, 151 Conn. App. 60, 78, 95 A.3d 538 ("[b]ecause a cause of action for money had and received requires proof of two prongs, [a reviewing court] may affirm the judgment of the trial court" if plaintiff failed to satisfy either prong and reviewing court "need not address" both prongs), cert. denied, 314 Conn. 911, 100 A.3d 403 (2014).

[14] In light of that conclusion, we do not address the defendant's claim that the court improperly concluded that she failed to meet her burden of establishing that the conduct in question falls within the ambit of the anti-SLAPP statute. We note that the statutory scheme set forth in § 52-196a is of recent vintage and existing appellate case law is scant on precisely what constitutes "a matter of public concern," as that term is used therein. That term is defined in § 52-196a (a) (1) as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ." At oral argument before this court, the defendant's counsel clarified that the defendant's exercise of free speech in this case allegedly involved an issue related to "community well-being," as provided for in § 52-196a (a) (1) (B).

"[C]ommunity well-being" is not defined in our anti-SLAPP statute. It is a nebulous, broadly worded, and potentially far-reaching term. If the defendant here is correct that a real estate agent's conduct is a matter of community concern sufficient to preclude actions regarding defamatory statements, is the same not true for the conduct of other licensed professionals in the community, such as teachers, child care providers, or plumbers? Broadly construed, a matter of "community well-being" may pertain to the conduct of any business establishment that is open to the public. Because we conclude that the plaintiff in this case satisfied the probable cause prong of § 52-196a (e) (3), prudence dictates that we leave for another day the question of statutory interpretation regarding matters of community well-being under § 52-196a (a) (1) (B).

"[T]he existence of probable cause is a question of law to be decided by the court. . . . Accordingly, our review of the court's determination that probable cause existed is plenary." (Citation omitted; internal quotation marks omitted.) *Ferri* v. *Powell-Ferri*, 213 Conn. App. 841, 846, 278 A.3d 624, cert. denied, 345 Conn. 911, 283 A.3d 506 (2022); see also *State* v. *Jones*, 320 Conn. 22, 70 n.26, 128 A.3d 431 (2015) ("whether a set of facts is sufficient to satisfy the probable cause standard is subject to plenary review"). In the context of special motions to dismiss, the determination as to whether probable cause exists entails consideration of the "pleadings and supporting and opposing affidavits of the parties . . . ." General Statutes § 52-196a (e) (2).

"The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." (Internal quotation marks omitted.) *Elder* v. *Kauffman*, supra, 204 Conn. App. 825. "Proof of probable cause is not as demanding as proof by preponderance of the evidence"; id.; and is " 'substantially less than that required for conviction' " under the reasonable doubt standard. *State* v. *Eady*, 249 Conn. 431, 439–40, 733 A.2d 112, cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999). Probable cause is a "modest" standard; *United States* v. *Sanders*, 106 F.4th 455, 463 (6th Cir. 2024); that "requires a plaintiff to show more than that success is . . . merely plausible . . . ." (Internal quotation marks omitted.) *Sentementes* v. *Lamont*, Docket No. 3:21-cv-453 (MPS), 2021 WL 5447125, *2 (D. Conn. November 22, 2021); see also *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 442, 39 A.3d 1139 (2012) (noting "the very low burden of proof required" under probable cause standard); *Malden* v. *State*, 359 So. 3d 442, 445 (Fla. App. 2023) ("[p]robable cause is not rigid

nor is it a standard that is particularly difficult to meet—probable cause is a relatively low legal burden").

In concluding that the plaintiff had established probable cause pursuant to § 52-196a (e) (3), the court determined that the defendant's Zillow post contained an objective statement of fact. On appeal, the defendant argues that the post constituted mere opinion, which cannot form the basis of an action for defamation. See *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 795, 734 A.2d 112 (1999) ("[t]o be actionable, the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion"). We disagree.

As our Supreme Court has explained, "[a] statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known. . . . An opinion, on the other hand, is a personal *comment* about another's conduct, qualifications or character that has some basis in fact. . . . This distinction between fact and opinion cannot be made in a vacuum, however, for although an opinion may appear to be in the form of a factual statement, it remains an opinion if it is clear from the *context* that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated. . . . [W]hile this distinction may be somewhat nebulous . . . [t]he important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 111–12, 448 A.2d 1317 (1982). "Where the court cannot reasonably characterize the allegedly [defamatory] words as either fact or opinion . . . this becomes an issue of fact for the jury . . . ." Id., 112

n.5; see also *NetScout Systems*, *Inc.* v. *Gartner*, *Inc.*, 334 Conn. 396, 428, 223 A.3d 37 (2020) ("in defamation cases, a jury issue can arise when an expression of opinion contains an ambiguity that reasonably can be understood to convey by implication an actionable factual assertion").

In the present case, the defendant concedes that her Zillow post contained an objective statement of fact. In her appellate brief and at oral argument before this court, the defendant acknowledged that her statement that the plaintiff "told me he'd advise listing the [property] at $100k less [than] we actually got" was a "factual statement." She nonetheless contends that the plaintiff cannot establish probable cause because he did not "rebut" that factual statement or offer any "proof that it was not true." The record indicates otherwise.

In his complaint and his sworn affidavit, the plaintiff averred that he provided a comparative market analysis to the defendant "for $210,900" at the November 15, 2021 meeting. A comparative market analysis is a tool commonly used by real estate professionals to provide sellers with a proposed sales price.[15] The purpose of a comparative market analysis "is to get an idea of what to list a property for [in order] to put the property on the market." (Internal quotation marks omitted.) *Rover Pipeline*, *LLC* v. *Rover Tract*, Docket No. 5:18-CV-68 (LEAD), 2021 WL 3424270, *6 (N.D. W. Va. August 5, 2021); see also *Pellet* v. *Keller Williams Realty Corp.*, 177 Conn. App. 42, 66, 172 A.3d 283 (2017) (real estate expert testified "how a comparative market analysis . . . is generated for a client's property" to arrive at "a recommended list price"); *Showah* v. *Korogodon*,

[15] A comparative market analysis also is referred to as a "broker price opinion." See, e.g., *Securities & Exchange Commission* v. *Fujinaga*, Docket No. 2:13-CV-1658 JCM (CWH), 2017 WL 4369467, *2 (D. Nev. October 2, 2017); *North Carolina Dept. of Transportation* v. *Mission Battleground Park, DST*, 370 N.C. 477, 479, 810 S.E.2d 217 (2018).

Docket No. FA-16-6013342-S, 2020 WL 5984774, *2 (Conn. Super. September 3, 2020) (real estate professional performed comparative market analysis to determine "a reasonable sales price"); *Taveres-Doram* v. *Doram*, Docket No. FA-04-4002471-S, 2007 WL 155155, *4 (Conn. Super. January 2, 2007) (Realtor provided comparative market analysis predicated on recent sales of similar properties that was basis for recommended sales price). Because the record indicates that the defendant was a licensed real estate agent in this state for more than one half of a decade, it is reasonable to infer that she was familiar with comparative market analyses and their purpose.

Furthermore, the self-represented plaintiff responded to the defendant's special motion to dismiss by filing a timely objection thereto.[16] In that objection, the plaintiff reiterated that he had "presented the defendant with a [comparative market analysis] in the amount of $210,900." He further maintained that the defendant subsequently listed the property for "$10,900 less than the [comparative market analysis] presented to the defendant." His position, in short, was that he recommended a sales price *greater* than the property's $200,000 listing price. The plaintiff's complaint, his affidavit, and his objection to the special motion to dismiss all belie the defendant's claim that the plaintiff did nothing to rebut the factual statement contained in her Zillow post that the plaintiff advised her to list the property for $100,000 less than its $252,900 sales price.

[16] We note that "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants . . . ." (Internal quotation marks omitted.) *New Haven* v. *Bonner*, 272 Conn. 489, 497, 863 A.2d 680 (2005); see also *State* v. *Mark T.*, 339 Conn. 225, 233, 260 A.3d 402 (2021) ("[a]lthough the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law . . . we, nevertheless, give great latitude to [self-represented] litigants in order that justice may both be done and be seen to be done" (citation omitted; internal quotation marks omitted)).

This case thus involves an issue of material fact regarding the statement contained in the defendant's Zillow post. The plaintiff steadfastly has averred that he provided a comparative market analysis to the defendant at the November 15, 2021 meeting that recommended a sales price of $210,900. In her sworn affidavit, the defendant disputes that factual assertion and avers that the plaintiff "never provided me with a comparative market analysis . . . ." Accordingly, this is not a case in which critical facts are not in dispute, as the defendant's counsel suggested at oral argument before this court. Rather, this case involves a disputed issue of material fact regarding the Zillow post made by the defendant, as reflected in the pleadings and the affidavits of the parties. See General Statutes § 52-196a (e) (2).

In this regard, we note that this court previously has observed that the procedural mechanism embodied in § 52-196a is "similar to a motion for summary judgment." *Elder* v. *Kauffman*, supra, 204 Conn. App. 824. Under Connecticut law, courts reviewing such motions are obligated to construe the pleadings, affidavits, and other proof submitted in the light most favorable to the nonmoving party. See *Dubinsky* v. *Black*, 185 Conn. App. 53, 71, 196 A.3d 870 (2018). Other courts have taken a similar approach in applying their anti-SLAPP statutes. As the Supreme Court of California explained: "The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by [the anti-SLAPP statute]. . . . If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have

described this second step as a summary-judgment-like procedure. . . . The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. . . . [C]laims with the requisite minimal merit may proceed." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Baral* v. *Schnitt*, 1 Cal. 5th 376, 384–85, 376 P.3d 604, 205 Cal. Rptr. 3d 475 (2016); see also *Reeves* v. *Associated Newspapers, Ltd.*, App. Div. 3d , , N.Y.S.3d (2024) (motion to dismiss filed pursuant to New York anti-SLAPP statute "is analogous to an accelerated summary judgment motion").

Moreover, as the Supreme Judicial Court of Maine has noted: "Other states . . . use different standards to be applied when reviewing a motion brought under their respective anti-SLAPP statutes. . . . What [they] all have in common is that when there are disputed facts, the nonmoving party is given all favorable inferences." (Citations omitted.) *Thurlow* v. *Nelson*, 263 A.3d 494, 501 n.5 (Me. 2021). Construing the pleadings and affidavits of the parties filed in connection with a special motion to dismiss pursuant to § 52-196a in the light most favorable to the nonmoving party is consistent with the approach taken in other jurisdictions when applying anti-SLAPP statutes.[17] Such an approach also

[17] See, e.g., *Roche* v. *Hyde*, 51 Cal. App. 5th 757, 787, 265 Cal. Rptr. 3d 301 (2020) ("we must draw every legitimate favorable inference from the [anti-SLAPP] plaintiff's evidence" (internal quotation marks omitted)); *L.S.S.* v. *S.A.P.*, 523 P.3d 1280, 1286 (Colo. App. 2022) (special motion to dismiss filed pursuant to Colorado anti-SLAPP statute entails summary judgment-like procedure where court accepts plaintiff's evidence as true), cert. denied, Colorado Supreme Court (July 17, 2023) (No. 22SC880); *American Civil Liberties Union, Inc.* v. *Zeh*, 312 Ga. 647, 652–53, 864 S.E.2d 422 (2021) (motion to strike filed pursuant to Georgia anti-SLAPP statute involves summary judgment-like procedure where court is obligated to accept as

comports with "a fundamental policy consideration in this state. Connecticut law repeatedly has expressed a policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his or her day in court. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure. . . . For that reason, [a] trial court should make every effort to adjudicate the substantive controversy before it, and, where practicable, should decide a procedural issue so as not to preclude hearing the merits of an appeal." (Citations omitted; internal quotation marks omitted.) *Egri* v. *Foisie*, 83 Conn. App. 243, 249–50, 848 A.2d 1266, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004); accord *Lafferty* v. *Jones*, supra, 336 Conn. 380 (in § 52-196a context, noting "the policy preference to bring about a trial on the merits of a

true evidence favorable to plaintiff); *Wynn* v. *Associated Press*, Nev. , , 555 P.3d 272 (2024) (in ruling on motion to dismiss pursuant to Nevada anti-SLAPP statute, "the evidence, and any reasonable inferences drawn from it, must be viewed in [the] light most favorable to the nonmoving party" (internal quotation marks omitted)); *Mohabeer* v. *Farmers Ins. Exchange*, 318 Or. App. 313, 316–17, 508 P.3d 37 ("[w]e review a trial court's ruling on a special motion to strike [pursuant to the Oregon anti-SLAPP statute] for legal error, viewing the evidence and drawing all reasonable inferences in the light most favorable to the plaintiff"), review denied, 370 Or. 212, 519 P.3d 536 (2022); *Charles* v. *McQueen*, 693 S.W.3d 262, 281 (Tenn. 2024) ("[a]s is the case when a court rules on a motion for summary judgment or motion for directed verdict, the court [in ruling on a motion to dismiss pursuant to Tennessee's anti-SLAPP statute] should view the evidence in the light most favorable to the party seeking to establish the prima facie case and disregard countervailing evidence"); *ML Dev, LP* v. *Ross Dress for Less, Inc.*, 649 S.W.3d 623, 627 (Tex. App. 2022) (courts "view the pleadings and evidence in a light most favorable to the plaintiff non-movant" in ruling on motion to dismiss pursuant to Texas anti-SLAPP statute); *Kruger* v. *Daniel*, Docket No. 43155-6-II, 2013 WL 5339143, *3 n.4 (Wn. App. September 17, 2013) (unpublished opinion) (stating that process set forth in Washington anti-SLAPP statute "is identical to that of summary judgment" and court must "accept as true all evidence favorable to the plaintiff and assess the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law" (internal quotation marks omitted)).

dispute whenever possible and to secure for the litigant his day in court" (internal quotation marks omitted)). Accordingly, when disputed issues of fact arise in the context of a special motion to dismiss, we view the pleadings and affidavits of the parties in the light most favorable to the nonmoving party.

Viewed in that light, we conclude that the plaintiff in the present case has alleged sufficient facts, if credited by the trier of fact, to establish probable cause that he will prevail on the merits of his complaint. Specifically, the plaintiff has alleged that he provided the defendant with a comparative market analysis that recommended a sales price of $210,900 for the property—a figure greater than the listing price ultimately agreed to by the defendant with another real estate agent. That allegation stands in stark contrast to the defendant's statement in the Zillow post that the plaintiff advised her to list the home for $100,000 less than its sales price. If the trier of fact were to find that the plaintiff provided a comparative market analysis recommending a sales price of $210,900 and did not advise the defendant to list the property for "$100k less [than] we actually got" as the defendant stated in the Zillow post, the plaintiff may well prevail on his complaint. See *Cweklinsky* v. *Mobil Chemical Co.*, 267 Conn. 210, 228, 837 A.2d 759 (2004) ("for a claim of defamation to be actionable, the statement must be false"); see also 3 Restatement (Second), Torts § 566, comment (a), pp. 170–71 (1977).[18]

[18] The Restatement (Second) of Torts offers historical context regarding expressions of opinion in defamation actions, stating: "If the expression of opinion was on a matter of public concern, it was a form of privileged criticism, customarily known by the name of fair comment. The privilege extended to an expression of opinion on a matter of public concern so long as it was the actual opinion of the critic and was not made solely for the purpose of causing harm to the person about whom the comment was made, regardless of whether the opinion was reasonable or not. . . . [*T*]*he privilege of fair comment applied only to an expression of opinion and not to a false statement of fact*, whether it was expressly stated or implied from an

In his affidavit, the plaintiff also alleges facts that raise a question as to the defendant's credibility with respect to her publication of the Zillow post. In his objection to the special motion to dismiss, the plaintiff alleged that the defendant purposely and deceptively published the Zillow review in her maiden name. See footnote 9 of this opinion. In response, the defendant in her August 5, 2022 affidavit stated in relevant part that "[t]he post appeared under my maiden name of Kara Callahan because the last time I posted anything on Zillow was before I was married and my account was still in my maiden name. I did not intend to conceal my identity from viewers of my post." In his August 12, 2022 affidavit, the plaintiff avers that those statements are directly contradicted by the fact that the defendant's Zillow account at that time was under the name "Kara Spinnato." Attached as exhibit A to the plaintiff's affidavit is a copy of the defendant's Zillow profile, which features a photograph next to the name "Kara Spinnato." That exhibit also indicates that the defendant had been a Zillow member since 2014 and that her "screenname" is "Kara Spinnato." The respective affidavits of the parties thus raise a factual dispute regarding the defendant's publication of the Zillow post, which bears on the credibility of the defendant. If the plaintiff's allegations are credited in this regard, it further supports the court's conclusion that he demonstrated probable cause pursuant to § 52-196a (e) (3).

The context of the defendant's Zillow post also is highly relevant to the present inquiry. As our Supreme Court has observed, "the distinction between actionable statements of fact and nonactionable statements of opinion is not always easily articulated or discerned. . . . Context is a vital consideration in any effort to distinguish a nonactionable statement of opinion from

expression of opinion." (Emphasis added.) 3 Restatement (Second), supra, § 566, comment (a), p. 171.

an actionable statement of fact." (Citations omitted.) *NetScout Systems, Inc.* v. *Gartner, Inc.*, supra, 334 Conn. 411–12. To aid in distinguishing opinion from fact, the court has articulated "three basic, overlapping considerations: (1) whether the circumstances in which the statement is made should cause the audience to expect an evaluative or objective meaning; (2) whether the nature and tenor of the actual language used by the declarant suggests a statement of evaluative opinion or objective fact; and (3) whether the statement is subject to objective verification." Id., 414.

The circumstances in which the Zillow post was made are not disputed. The defendant at that time maintained a Realtor profile on Zillow, which states that she is a "[h]ighly experienced sales professional." As a result, readers of her post may have inferred expertise on her part with respect to real estate practices and transactions. Moreover, in her appellate brief, the defendant cites to General Statutes § 20-314 and states that "consumers are entitled to assume that 'only . . . persons who bear a good reputation for honesty, truthfulness and fair dealing and who are competent to transact the business of a real estate broker or real estate salesperson' will hold real estate licenses . . . ."[19] As applied to the circumstances of this case, that proposition suggests that readers of the defendant's Zillow post were entitled to assume that she was speaking honestly and truthfully in light of her experience as a real estate professional, which may have led them to expect an objective perspective from the defendant.

The nature and tenor of the actual language used by the defendant is less helpful. The defendant concedes

[19] General Statutes § 20-314 (a) provides: "[Real estate] [l]icenses shall be granted under this chapter only to persons who bear a good reputation for honesty, truthfulness and fair dealing and who are competent to transact the business of a real estate broker or real estate salesperson in such manner as to safeguard the interests of the public."

that it contains an objective statement of fact regarding the plaintiff's purported sales price advice. At the same time, the Zillow post contains other statements that appear to constitute opinion, rather than statements of fact. Those statements nonetheless must be viewed in the full context of the post, which centers on the defendant's objective statement of fact that the plaintiff advised listing the property for $100,000 less than its actual value as reflected by the sales price. That statement of fact informs and is intertwined with the opinion statements that follow in the post. A fair reading of the defendant's Zillow post is that it is precisely because the plaintiff recommended an exorbitantly low sales price that the defendant had "a feeling [that the plaintiff] was never going to list [the property] rather bring in a cash buying friend" and thought that he was a "shady individual" of whom buyers and sellers should beware.

Importantly, the critical statement of fact in the defendant's Zillow post is subject to objective verification. Although the defendant stated that the plaintiff advised her to list the property for "$100k less [than] we actually got," the plaintiff provided a sworn affidavit indicating that he provided her with a comparative market analysis that recommended a sales price of $210,900 for the property. The defendant denied that averment, creating an issue of material fact to be resolved by the trier of fact.[20] See *Cweklinsky* v. *Mobil Chemical Co.*,

[20] We note that no discovery has taken place in this case, as the court ordered a stay of "all discovery" upon the filing of the special motion to dismiss in accordance with § 52-196a (d). The parties, therefore, have not yet had an opportunity to depose each other. See *Tryon* v. *North Branford*, 58 Conn. App. 702, 716, 755 A.2d 317 (2000) ("[d]eposition testimony often . . . calls into question the credibility of the deponent"); *Gellman* v. *Latimore*, 242 App. Div. 2d 920, 921, 665 N.Y.S.2d 377 (1997) ("[D]efendant has not yet had the opportunity to depose plaintiff. Summary judgment is inappropriate where, as here, the existence of essential facts depends upon knowledge exclusively within the possession of the moving party and [such facts] might well be disclosed by . . . examination before trial or further disclosure." (Internal quotation marks omitted.)).

supra, 267 Conn. 229 ("the determination of the truthfulness of a statement is a question of fact for the jury").

In light of the foregoing, we cannot conclude that the defendant's Zillow post constituted mere opinion. We are mindful that anti-SLAPP motions to dismiss are designed to weed out meritless claims at an early stage of litigation; see *Baral* v. *Schnitt*, supra, 1 Cal. 5th 384; and that, with respect to the second prong of § 52-196a (e) (3), they are governed by a minimal legal standard. See *Elder* v. *Kauffman*, supra, 204 Conn. App. 825; *People's United Bank* v. *Kudej*, supra, 134 Conn. App. 442; see also *Mindys Cosmetics, Inc.* v. *Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) ("the second step of the anti-SLAPP inquiry is often called the 'minimal merit' prong"); cf. *Priore* v. *Haig*, supra, 344 Conn. 670 (*D'Auria, J.*, concurring) ("the special motion to dismiss permitted under § 52-196a is easily defeated under a probable cause standard"). Moreover, the precedent of our Supreme Court instructs that "[w]here the court cannot reasonably characterize the allegedly [defamatory] words as either fact or opinion . . . this becomes an issue of fact for the jury . . . ." *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 112 n.5.

Probable cause determinations are "fundamentally a fact-specific inquiry." *United States* v. *Khounsavanh*, 113 F.3d 279, 285 (1st Cir. 1997); see also *Commonwealth* v. *Melendez*, 490 Mass. 648, 658, 194 N.E.3d 179 (2022) ("[p]robable cause is a fact-intensive inquiry [that] must be resolved based on the particular facts of [the] case" (internal quotation marks omitted)). Where objective facts central to an allegedly defamatory statement are disputed in sworn affidavits, a summary disposition of the action is inappropriate. That is especially the case given the circumstances here, in which a person holding herself out to be a real estate professional

on Zillow published a post on that real estate marketplace website that, as she maintains in her appellate brief, pertained to whether another real estate professional was honest, truthful, and competent to engage in real estate transactions. In response, the plaintiff has averred in his complaint, his affidavit, and his objection to the special motion to dismiss that the defendant's Zillow post contains an untruthful statement of fact. Under the particular facts of this case, the defendant should not be permitted to avail herself of the "special statutory benefit"; *Lafferty* v. *Jones*, supra, 336 Conn. 372; afforded by § 52-196a to summarily defeat the plaintiff's action.[21]

Viewing the pleadings and affidavits of the parties in the light most favorable to the plaintiff, we conclude that the plaintiff satisfied the relatively minimal burden under § 52-196a of establishing probable cause that he will prevail on the merits of his complaint. For that reason, the court properly denied the defendant's special motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

---

[21] We note that other procedural mechanisms remain available to the defendant to challenge the substance of the plaintiff's complaint, including motions to strike and motions for summary judgment. See Practice Book §§ 10-39 and 17-44.