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CITY OF MILFORD *v.* RECYCLING, INC., ET AL.
(AC 44819)

Moll, Cradle and Bear, Js.

Syllabus

The plaintiff city sought to foreclose a municipal tax lien on certain real property on which the defendant trustee, S, held a first mortgage. The trial court rendered a judgment of strict foreclosure and set law days. S filed a motion to open the judgment of strict foreclosure and to convert it to a judgment of foreclosure by sale, which the trial court granted. Thereafter, S filed a motion to open and to extend the sale date, claiming that there was an interested buyer in the property and that contract negotiations were ongoing. The plaintiff opposed the motion because

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S failed to identify the alleged buyer or to provide any documentation evidencing the potential sale. The trial court denied the motion, and S appealed to this court. *Held* that the trial court did not abuse its discretion by denying S's motion to open the judgment and to extend the sale date because its determination that the balancing of the equities favored the plaintiff was made after considering all of the relevant circumstances and needs of justice specific to the case and was reasonable under the facts and circumstances in the record.

Argued March 3—officially released June 21, 2022

Procedural History

Action to foreclose a municipal tax lien on certain real property, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Hon. Arthur A. Hiller*, judge trial referee, rendered judgment of strict foreclosure; thereafter, the court, *Tyma, J.*, granted the motion to open the judgment of strict foreclosure and to convert it to a judgment of foreclosure by sale filed by the defendant Donna Stewart, Trustee; subsequently, the court, *Hon. Arthur A. Hiller*, judge trial referee, denied the motion to open the judgment and to extend the sale date filed by the defendant Donna Stewart, Trustee, and the defendant Donna Stewart, Trustee, appealed to this court. *Affirmed.*

Janine M. Becker, with whom, on the brief, was *Patricia Moore*, for the appellant (defendant Donna Stewart, Trustee).

Matthew B. Woods, for the appellee (plaintiff).

Opinion

PER CURIAM. In this municipal tax lien foreclosure action, the defendant Donna Stewart, Trustee,¹ appeals

¹ In the underlying foreclosure action, the following were also named as defendants: Recycling, Inc.; City Streets, Inc.; Outlaw Boxing Kats, Inc.; Cell Phone Club, Inc.; Millionair Club, Inc.; Frank P. Gillon, Jr., and John L. Silva, as trustees of the Connecticut Laborers' Health Fund; Frank P. Gillon, Jr., and Charles LeConche, as trustees of the Connecticut Laborers' Pension Fund; Marvin B. Morganbesser and Charles LeConche, as trustees of the Connecticut Laborers' Annuity Fund; Charles LeConche and Marvin B. Morganbesser, as trustees of the Connecticut Laborers' Legal Services Fund;

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from the judgment of the trial court sustaining the objection of the plaintiff, the city of Milford, and denying her motion to open the existing judgment of foreclosure and to extend the sale date ordered therein. On appeal, the defendant claims that the court erred in concluding that, considering the equities advanced by both parties for the court's consideration, the balancing of those equities favored the plaintiff.² In response, the plaintiff argues that the judgment of the court should be affirmed because the court did not abuse its discretion in concluding that those equities favored the plaintiff. We agree with the plaintiff and, accordingly, affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of the defendant's appeal. The defendant is the holder of a first mortgage on commercial property located at 990 Naugatuck Avenue in Milford (property). On March 24, 2010, the plaintiff instituted the present municipal tax lien foreclosure action. On July 27, 2015, the court, *Honorable Arthur A. Hiller*, judge trial referee, rendered a judgment of strict foreclosure and set law days to commence on February 1, 2016. On July 27, 2020, after the disposition of numerous

Felix J. Conti and Robert B. Discuillo, Sr., as trustees of the New England Laborers' Training Trust Fund; Felix J. Conti and Robert B. Discuillo, Sr., as trustees of the New England Laborers' Laborer-Management Cooperation Trust; N 990 Naugatuck Avenue, LLC; Marr Consulting, LLC; Tricia Mulvaney; Rio, Inc.; Regensburger Enterprises, Inc.; Cummings Enterprises, Inc.; Nicholas Owen III; Allstar Sanitation, Inc.; Bridgeport Redevelopment, Inc.; Darlene Chapdelaine; JRB Holding Co., LLC; and Naugatuck Avenue, LLC. Those defendants are not involved in this appeal. We therefore refer in this opinion to Donna Stewart, Trustee, as the defendant.

² On appeal, the defendant also claims that the court erred in concluding that it lacked subject matter jurisdiction to open the foreclosure judgment and extend the sale date because of the four month restriction set forth in General Statutes § 52-212a. Because the court expressly stated that it was basing its denial of the motion to open on equitable grounds, we do not agree that the court concluded that it lacked subject matter jurisdiction, and, therefore, we decline to address this claim.

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bankruptcy petitions and motions filed by one or more of the parties, the court, *Abrams, J.*, opened the foreclosure judgment and reset the law days to commence on September 9, 2020.

On August 27, 2020, the defendant filed a motion to open the judgment of strict foreclosure and to convert it to a judgment of foreclosure by sale with a proposed sale date of August 28, 2021. On August 28, 2020, the court, *Tyma, J.*, denied the defendant's motion without prejudice to refile the motion to indicate the position of any appearing parties. On September 1, 2020, the defendant filed a caseflow request with an attached memorandum stating the position of the various appearing parties with respect to the motion and the proposed sale date. On September 2, 2020, the court granted the motion and converted the judgment to a judgment of foreclosure by sale, with a sale date set for June 26, 2021.

On May 14, 2021, the defendant filed a motion to reopen the judgment and extend the sale date, claiming that "there [was] a buyer interested in the property at a significant purchase price and that there [was] a written option and contract negotiations [were] ongoing." The plaintiff disputed the merits of this claim because of, inter alia, the defendant's failures to identify the alleged buyer and to provide any supporting documentation. On June 17, 2021, after a hearing, Judge Hiller denied the defendant's motion to open and set the sale date for July 24, 2021. This appeal followed.

"The standard of review of [a denial of a motion to open] a judgment of foreclosure by sale . . . is whether the trial court abused its discretion. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court

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correctly applied the law and could reasonably have reached the conclusion that it did.” (Internal quotation marks omitted.) *McCord v. Fredette*, 92 Conn. App. 131, 132–33, 883 A.2d 1258 (2005).

In the present case, at the hearing on the defendant’s motion to open the judgment of foreclosure by sale and extend the sale date, the court stated the following in support of its decision to deny the defendant’s motion: “The court has reviewed all the papers and considered all the arguments. The court believes that the equities are clearly in favor of the plaintiff. There is no reason that the . . . taxpayers should fund this defendant’s project or use of the premises. The equities require a sale so [that the plaintiff] can pay its obligations without adding to the tax bill sent to its taxpayers.” In claiming on appeal that the court erred in concluding that the equities favored the plaintiff, the defendant argues that the court abused its discretion by denying the motion to open the judgment and extend the sale date because “complete justice required [that] the sale date be extended.” We disagree.

“Foreclosure is peculiarly an equitable action, and the court may entertain such questions as are necessary to be determined in order that complete justice may be done. . . . [B]ecause a mortgage foreclosure action is an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done. . . . [E]quitable remedies are not bound by formula but are molded to the needs of justice.” (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Morgera v. Chiappardi*, 74 Conn. App. 442, 456–57, 813 A.2d 89 (2003). “The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court.” (Internal quotation marks omitted.) *TD Bank, N.A. v. M.J. Holdings, LLC*, 143 Conn. App. 322, 326, 71 A.3d 541 (2013).

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Upon review of the record, we conclude that the trial court's determination that the balancing of the equities favored the plaintiff (1) was made after considering all of the relevant circumstances and the needs of justice specific to this case and (2) was reasonable under the facts and circumstances to be found in the record. In light of this conclusion, we further conclude that the court did not abuse its discretion by denying the defendant's motion to open the judgment and extend the sale date.

The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

STATE OF CONNECTICUT *v.* DEYKEVIOUS RUSSAW
(AC 43748)

Elgo, Suarez and Palmer, Js.

Syllabus

Convicted of the crime of conspiracy to commit murder as a result of a drive-by shooting during which an unintended person rather than the intended victim was fatally shot, the defendant appealed. He claimed, inter alia, that his conviction was legally insufficient because the state relied on the doctrine of transferred intent to prove the conspiracy charge and because it is legally impossible to conspire to kill an unintended victim. The state, which also charged the defendant with murder, alleged that the defendant had intended to kill a member of a rival gang but, instead, fatally shot the unintended victim, and the trial court, in its instructions to the jury, stated that the doctrine of transferred intent applied to both the murder charge and the charge of conspiracy to commit murder. *Held:*

1. The defendant could not prevail on his unpreserved claim that his conviction of conspiracy to commit murder is legally insufficient, which was based on his assertion that the doctrine of transferred intent does not apply to the crime of conspiracy, and, thus, he was deprived of his right to due process because it is legally impossible to conspire to kill an unintended victim: the state did not rely on the doctrine of transferred intent, as that theory bore no relevance to the conspiracy charge because it made no difference whether the rival gang member or the unintended third party was killed, and the state alleged and proved the elements of the conspiracy charge, which were the agreement to kill the rival

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gang member and the overt act of firing the gunshot intended for the gang member in furtherance of that agreement; moreover, the trial court's jury instruction on transferred intent did not transform the state's theory of the conspiracy charge into one predicated on that doctrine, that instruction having been, at most, surplusage that had no bearing on the nature of the state's case or the jury's consideration of whether the state proved its case.

2. The defendant's claim that the trial court improperly denied his motion to suppress certain incriminating statements he had made to the police during their custodial interrogation of him was unavailing, as the record supported the court's findings that the police ceased questioning him after he invoked his right to counsel but that he thereafter initiated further communication with them of his own accord without counsel present:
 - a. Contrary to the defendant's assertion that the police induced him to speak to them after he invoked his right to counsel, the trial court correctly concluded that he knowingly and voluntarily initiated further communication, as it credited testimony by R, the lead detective during the questioning, that another officer had informed R that the defendant, notwithstanding the previous invocation of his right to counsel, wanted to speak with the police: the defendant was advised of his rights under *Miranda v. Arizona* (384 U.S. 436) before questioning resumed, he provided no authority to support his claim that the police were required to provide him with an attorney or means to contact one, he did not ask them for permission to contact anyone, and his father was at the police station during the custodial interview and had visited with him; moreover, the record did not bear out the defendant's contention of persistent statements by the police that they wanted to talk to him, and the brief outline of the incriminating evidence they gave him was in response to his question about why he was being held on a charge of murder.
 - b. This court concluded, in light of all of the relevant facts adduced at the suppression hearing, that the state had met its burden of demonstrating a knowing, intelligent and voluntary waiver by the defendant of his *Miranda* rights, as there was no showing that the police threatened the defendant or employed other coercive or improper tactics to obtain the waiver: although the defendant became eighteen years of age the day before the police questioned him, that did not require the court to reach a different conclusion, as the defendant had an eleventh grade education, could read and write, was not impaired in any way, and had signed two waiver forms after twice being informed of his *Miranda* rights, and his assertion of his right to counsel after being advised of those rights the first time was a clear indication that he understood those rights; moreover, the defendant's will was not overborne, as he contended, because the police did not contact a lawyer for him and, for a period of time, left him alone in the interview room separated from his father, and the surroundings and circumstances of his police interview, although hardly

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comfortable, did not mean that he was necessarily unable to decide whether to resume speaking to the police without a lawyer.

c. The defendant could not prevail on his claim that he was harmed by the admission of R's testimony as to certain statements the defendant made during his police interview: because there was compelling independent evidence that the defendant was a passenger in the vehicle from which the gunshot was fired at the time it was fired, his statement to R acknowledging that he was in the vehicle was merely cumulative, and his statement to R identifying the intended victim of the shooting did not establish that the defendant was present when the shooting took place, as that statement contained no indication as to how the defendant became aware of the identity of the intended victim, it was hardly persuasive evidence of his participation in the shooting, and it could have been based on information he learned after the shooting; moreover, the state was not required to establish the shooter's identity for purposes of the charge of conspiracy to commit murder, the evidence having been clear that, even if the defendant did not fire the gunshot, it was fired from the vehicle in which he was a passenger, and the testimony of another passenger who claimed that the defendant was not in the vehicle at the time of the shooting was flatly contradicted by that passenger's sworn statement to the police; furthermore, all of the witnesses who testified were subjected to extensive cross-examination about whatever interest or motive they may have had to falsely implicate the defendant, and the jury was well aware of any such interest or motive.

Argued September 20, 2021—officially released June 21, 2022

Procedural History

Substitute information charging the defendant with the crimes of murder and conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford, where the court, *D'Addabbo, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *D'Addabbo, J.*; verdict and judgment of guilty of conspiracy to commit murder, from which the defendant appealed. *Affirmed.*

Pamela S. Nagy, supervisory assistant public defender, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *David L. Zagaja*, supervisory assistant state's attorney, for the appellee (state).

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Opinion

PALMER, J. The defendant, Deykevious Russaw, appeals from the judgment of conviction, rendered after a jury trial, of conspiracy to commit murder in violation of General Statutes §§ 53a-54a and 53a-48.¹ The defendant's conviction stems from an incident involving a drive-by shooting that resulted in the death of an unintended third person rather than the intended victim. On appeal, he claims, first, that his conviction of conspiracy to commit murder is legally insufficient because the doctrine of transferred intent, upon which he contends the state relied, does not apply to the crime of conspiracy, and second, that the trial court improperly denied his motion to suppress certain statements that he made to the police while he was in custody and after he had invoked his right to counsel. We reject both of the defendant's claims and, therefore, affirm the judgment of conviction.

The following facts and procedural history are relevant to this appeal. The defendant's conviction stems from a drive-by shooting that occurred on July 16, 2017, and resulted in the death of the victim, Jeffrey Worrell, who had sustained a single gunshot wound to the head. When he was shot, the victim was sitting at a picnic bench in a small park located in an area in Hartford known as the five corners, where Westland Street, Garden Street and Love Lane all intersect. Police officers who arrived at the scene shortly after the shooting spoke to witnesses, but none gave a description of the

¹ General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person"

General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

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shooter. Shell casings, however, were recovered from the scene, and a video surveillance camera installed by the city of Hartford at the corner of Garden and Westland Streets captured the shooting. Upon review of the footage from that camera, the police identified three vehicles involved in the incident, a blue Honda Accord, a black Ford Escape, and a white Nissan Altima. The driver of the Honda Accord was identified as Dominick Pipkin, who, upon questioning by the police within hours of the shooting, provided information concerning the identities of the individuals in both the Nissan Altima and the Ford Escape. With respect to the occupants of the Ford Escape, Pipkin identified the driver as Teddy Simpson, and the rear passengers as Jonathan Vellon and his brother, Osvaldo Vellon, and a person whose nickname is “Bama,” later identified as the defendant.² The police also received information identifying the front seat passenger of the Ford Escape as Dayquan Shaw.³ In addition, the Vellon brothers, who admitted that they were present when the shooting occurred, gave the police information about others involved in the incident, including the defendant. Early in the investigation, it became apparent to the police that a member of a rival gang, and not the victim, was the likely target of the shooting.

Shortly after the incident, the police identified several addresses associated with the defendant, including a former residence in a multiunit apartment building in New Britain. When detectives from the Hartford Police Department went to that former residence in New Britain the day after the shooting, they discovered the Ford Escape.

² The police learned that the defendant is nicknamed “Bama” because he is originally from Alabama.

³ The operator of the Nissan Altima was identified as Jose Verdes, who also provided the police with information about the shooting.

On the basis of the foregoing information, the lead investigator in the case, Sergeant Anthony Rykowski of the Hartford Police Department, prepared and obtained arrest warrants for Simpson and the defendant. The defendant was charged with murder and conspiracy to commit murder and arrested three days after the incident, on July 19, 2017. Following the defendant's arrest and transportation to police headquarters, Rykowski questioned the defendant, who made several incriminating statements.

A jury trial followed,⁴ at which the state adduced testimony from several witnesses to the incident, including Jonathan Vellon. In his testimony, Jonathan Vellon acknowledged that he had provided the police with a written statement about the incident the next day, but he refused to identify anyone else who was in the car when the shooting occurred. He also testified that he did not know who was driving the Ford Escape at the time of the shooting, from where in the car the gunshots were fired, or who brought the gun into the car, even though his statement to the police indicated otherwise. When asked why he was refusing to provide the names of the individuals in the car, he stated that he "just [did not] feel like it." Although he did testify that he knew the defendant, he denied that the defendant was in the Ford Escape on the day of the shooting, and he also denied providing any contrary information to the police. Moreover, he claimed that he did not sign the statement even though he previously had acknowledged that the signature on the statement was his.

At the conclusion of Jonathan Vellon's testimony, the state introduced into evidence his written statement to the police pursuant to *State v. Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct.

⁴ The evidentiary portion of the trial commenced on July 17, 2019.

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597, 93 L. Ed. 2d 598 (1986).⁵ That statement provides in relevant part: “On Sunday afternoon [on the day of the shooting], my brother Osvaldo [Vellon] and I . . . were walking past . . . Flatbush Avenue . . . [when] I heard someone call my name from inside a car. When I looked at the car, I noticed [the defendant] in a black Ford Escape. [The defendant] was sitting in the passenger side rear seat . . . [and] told us to get in the car [and] so we did. . . . The person driving the Ford Escape is named Teddy [Simpson]. . . . The front seat passenger was someone I’ve never seen before

“Once inside the car, all five of us drove around and were smoking weed. . . . [Simpson] then pulled up to a blue Honda Accord and I saw a black male, around [nineteen to twenty years old] driving the Honda all alone. . . . I heard [Simpson] and [the defendant] say let’s shoot the G’s. The G’s are gang members from the Barbour Street area. I’ve been with the Ave gang for around three months The Ave gang is from the Albany Avenue area.

“The next thing I [knew] [Simpson] was handed a gun by the driver of the blue Honda Accord and then [Simpson] passed it to [the defendant]. The gun was a small black handgun and it looked like the handle was grayish because it looked old. I heard the driver of the Honda tell [the defendant] that he wanted him to shoot the G’s. [Simpson] then drove down the street and [the defendant] racked the gun back and I saw a bullet fall inside the car. [The defendant] then held the gun out the window and shot the gun around three times. I think the gun jammed once or twice as [the defendant] was shooting. [Simpson] then sped away and drove to meet

⁵ In *State v. Whelan*, supra, 200 Conn. 753, our Supreme Court “adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination.” *State v. Bermudez*, 341 Conn. 233, 240 n.8, 267 A.3d 44 (2021).

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the guy in the blue Honda Accord. . . . [The defendant] then passed the gun over to [Simpson] who then handed the gun out the window to the driver of the blue Honda Accord. [Simpson] then told [the defendant] to drive so [Simpson] got into the passenger seat, [the defendant] got into the driver's seat and the tall guy who was sitting in the passenger seat before walked home. We sat there for around [twenty] minutes and then [the defendant] drove the Ford Escape to New Britain and parked it where the [p]olice found it [The defendant] used to live at the apartment where the car was found Once [the defendant] parked the car, [my brother] and I walked home to our house" (Internal quotation marks omitted.) In his written statement, Jonathan Vellon further stated that he had identified the defendant from a photographic array shown to him by the police, that he signed his name on the defendant's photograph, and that he was "100 [percent] sure" the photograph chosen from the array was the defendant, whom he "saw shoot from the Ford Escape at the G's," as he "was sitting shoulder to shoulder with [the defendant]" at the time of the shooting.⁶ (Internal quotation marks omitted.)

The state next adduced testimony from Simpson, who testified pursuant to a plea agreement with the state related to his involvement in the shooting of the victim.⁷ Simpson explained that he was associated with the Ave gang and was involved in the shooting as the driver of the Ford Escape. He further testified that the other occu-

⁶ Jonathan Vellon's brother, Osvaldo Vellon, also was called by the state as a witness, but he refused to answer any questions.

⁷ Pursuant to the agreement, Simpson pleaded guilty to conspiracy to commit murder and possession of a firearm in a motor vehicle for his role in the shooting, for which he was to be sentenced to a minimum of ten years and no more than twenty-five years of incarceration. In exchange for his guilty plea, he agreed to cooperate with the state by providing information and testimony concerning the shooting and another, separate criminal case involving the defendant. See footnote 10 of this opinion.

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pantsof the car were Jonathan Vellon, Osvaldo Vellon, the defendant and Shaw. According to Simpson, at some point when they were driving around near the intersection of Garden and Capen Streets, they stopped to talk with Pipkin, who was operating a blue Honda. Simpson stated that he was familiar with a picnic spot in the area known as the five corners, and that, while driving in that area, they saw a group of kids from the G's neighborhood with whom they did not get along. Subsequently, they met up again with Pipkin, who began waving a handgun, and Simpson asked Pipkin for the gun at the defendant's request because the defendant had expressed a desire to open fire on the G's. At first, Pipkin told Simpson just to drive off but, shortly thereafter, Pipkin handed the gun to Shaw, who gave it to the defendant. Simpson testified that he did not see the defendant with the gun in the backseat and did not see the defendant fire the gun because he was focused on driving. He also testified that the defendant was not a member of the Ave gang.

Shaw also testified for the state. He stated that he was a front seat passenger in the Ford Escape at the time of the shooting, and he described the other passengers as two Hispanic males and the defendant. He testified further that, as they were driving around the five corners area, they saw a group of people in the grassy area, at which point the defendant stated that they were from the G's gang and that he did not like them. Shaw's testimony was consistent with that of Simpson with respect to how they had encountered Pipkin, the fact that the defendant possessed a gun in the Ford Escape, and how the shooting took place. Shaw also testified that, as they were driving away from the scene of the shooting, the defendant was "bragging about the incident" and saying, "I got somebody." Shaw further stated that the defendant had texted him on the night of the incident and "showed no remorse even though he killed an innocent bystander, he didn't feel bad about it. It

was like he was joyful of it, like he didn't care it was an old man."⁸

Finally, Rykowski testified about certain statements that he had obtained from Pipkin, Osvaldo Vellon and the defendant. With respect to Pipkin and Osvaldo Vellon, Rykowski explained that both of them had provided statements to the police shortly after the incident identifying the defendant as a passenger in the Ford Escape.

Rykowski further testified that he interviewed the defendant following his arrest on July 19, 2017. Although the defendant denied any involvement in the shooting, he did acknowledge that he had been in the Ford Escape on the day of the shooting. He also told Rykowski that he did not get along with the "G's."

Following the conclusion of the evidence,⁹ the jury returned a verdict of not guilty on the murder charge and guilty on the charge of conspiracy to commit murder. The court sentenced the defendant to a term of twenty years of incarceration, which was to run consecutively to a sixteen year sentence he was already serving.¹⁰ This appeal followed. Additional facts and procedural history will be set forth as necessary.

⁸ We note that, contrary to Simpson's testimony, Shaw testified that the defendant was associated with the Ave gang, which conflicted with a written statement he had given to Rykowski shortly after the incident indicating that he was not aware of any such association. Shaw explained, however, that, at the time he gave that statement, he was unaware that the defendant had any gang affiliation and that the police subsequently told him that the defendant was in a gang. Shaw further testified, contrary to Simpson's testimony, that Pipkin himself handed the gun directly to Simpson and never gave the gun to Shaw.

⁹ The defendant, who did not testify at trial, adduced testimony from one witness, Karina Salcedo, an officer with the Hartford Police Department, who had responded to the scene of the shooting.

¹⁰ The defendant's previous sixteen year sentence followed his conviction of manslaughter in the second degree and evading responsibility based on conduct by the defendant that occurred the day before the shooting incident at issue in this appeal. His conviction of those charges was upheld on appeal to this court; see *State v. Russaw*, 203 Conn. App. 123, 247 A.3d 614 (2021); and our Supreme Court denied the defendant's petition for certification to appeal. See *State v. Russaw*, 336 Conn. 933, 248 A.3d 1 (2021).

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I

The defendant claims, for the first time on appeal, that his conviction of conspiracy to commit murder is legally insufficient because the doctrine of transferred intent does not apply to the crime of conspiracy. Specifically, he maintains that, because the state's theory of the case was that the intended target of the murder was a member of the rival gang and not the victim, and because it is legally impossible to conspire to kill an unintended victim, his conspiracy conviction cannot stand. He seeks review of his unpreserved claim pursuant to *State v. Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).¹¹ Although we agree with the defendant that he is entitled to review of his claim under *Golding*, we reject the claim because his conspiracy conviction was not predicated on the doctrine of transferred intent.

The following additional facts are relevant to this claim. The defendant was charged in a two count information with murder in violation of § 53a-54a and conspiracy to commit murder in violation of §§ 53a-54a and 53a-48. The murder charge, set forth in count one, alleged that, “on or about July 16, 2017, at approximately 2 p.m. in the area of Garden and Westland Streets in Hartford . . . the defendant, while acting with the intent to cause the death of another person, caused the death of a third person by discharging a firearm.” Count two, which contained the charge of conspiracy to commit murder, alleged that, “on or about July 16, 2017, at approximately 2 p.m. in the area of Garden and West-

¹¹ Under *Golding*, a defendant may prevail on an unpreserved claim only if the record is adequate for review of the claim, the claim is of constitutional magnitude alleging the violation of a fundamental right, the alleged constitutional violation exists and deprived the defendant of a fair trial, and the state cannot demonstrate the harmlessness of the violation. See *State v. Golding*, supra, 213 Conn. 239–40.

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land Streets in Hartford . . . the defendant, while acting with the intent that conduct constituting the crime of murder be performed . . . agreed with one or more persons to engage in and cause the performance of such conduct and any one of them committed an overt act in furtherance of said conspiracy.”

At trial, the state’s theory with respect to the murder charge was that the defendant fired the handgun from inside the vehicle with the intent to kill a member of the rival gang but, instead, missed and killed the victim. As noted previously in this opinion, the jury found the defendant not guilty of that charge. With respect to the conspiracy to commit murder charge, the jury found the defendant guilty of conspiring with at least one other person in the Ford Escape to shoot and kill a member of the rival gang. On appeal, the defendant does not challenge the legal or evidentiary sufficiency of the state’s case with respect to his conviction of conspiracy to commit murder insofar as the state was required to prove both that he had entered into an agreement with at least one other person to murder a member of the rival gang and that one of the conspirators committed an overt act in furtherance of the conspiracy. He claims, rather, that the state’s case was founded on the doctrine of transferred intent, which, although concededly applicable to the crime of murder, does not apply to conspiracy. Consistent with this assertion, the defendant maintains that he could not have conspired to kill an unintended victim and that, because the victim of the shooting was unintended, his conviction of conspiracy to commit murder is unlawful. This claim is unavailing because it rests on a false premise, namely, that the defendant’s conspiracy conviction was predicated on a theory of transferred intent.¹²

¹² Although the defendant acknowledges that the question of whether the transferred intent doctrine applies to the crime of conspiracy to commit murder has not been decided by the courts of this state, he cites several cases which, he contends, support his claim that it does not. See, e.g., *State v. Beccia*, 199 Conn. 1, 5, 505 A.2d 683 (1986) (“Just as one cannot attempt

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The defendant's claim that his conspiracy conviction was impermissibly founded on the doctrine of transferred intent is largely based on the trial court's jury charge. We therefore recite the relevant portions of those instructions, commencing with the court's charge on transferred intent. The court explained transferred intent as follows: "[I]n considering the evidence presented and what you find credible, it may establish that the defendant had the intent to cause the death of one person and by his actions caused the death of a different person. Our law is that, when considering intent, as long as the defendant has the intent to cause the death of a person and, by his actions, cause[s] the death of another, that is sufficient to establish the element of intent."¹³

Thereafter, the court instructed the jury on the murder charge in count one as follows: "[F]or you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt. One, that the defendant had the specific intent to cause the death of another person. And, two, that, acting with that intent, the defendant caused the death of a third person . . . by discharge of a firearm. . . .

"The first element, intent. The first element the [state] must prove beyond a reasonable doubt [is] that the defendant had the specific intent to cause the death of

to commit an unintentional crime . . . one cannot agree anticipatorily to accomplish an unintended result. There is just no such crime as would require proof that one intended a result that accidentally occurred." (Citation omitted; internal quotation marks omitted.)). We need not consider this issue, however, in light of our determination that the defendant's conspiracy conviction was not predicated on a theory of transferred intent.

¹³ As reflected in the court's instruction on transferred intent, that doctrine "was created to apply to the situation of an accused who intended to kill a certain person and by mistake killed another. His intent is transposed from the person to whom it was directed to the person actually killed." (Internal quotation marks omitted.) *State v. Tutson*, 99 Conn. App. 655, 663, 915 A.2d 344 (2007).

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another person. The state must prove beyond a reasonable doubt the defendant, in causing the death of the other person, did so with the specific intent to cause the death of a person; in other words, that the defendant's conscious objective was to cause the death of a person. . . .

“Intent, therefore, is intent to achieve a specific result; in other words, a person's conscious objective was to cause the specific result. As defined by law, a person acts intentionally with respect to the result when his conscious objective is to cause such result. *Now, the court has previously instructed you on intent and transferred intent. Those instructions apply in this section as well.*” (Emphasis added.)

At the conclusion of its jury instructions on murder, the court proceeded to instruct the jury on the second count, conspiracy to commit murder. After reading the allegations contained in count two, the court recited the elements of the conspiracy statute, § 53a-48 (a).¹⁴ The court then instructed the jury as follows: “So, for you to find the defendant guilty of conspiracy in this count, conspiracy to commit murder, the state must prove the following elements beyond a reasonable doubt: one, that the defendant intended to commit the crime of murder; two, an agreement with one or more persons to engage in or cause the performance of the crime of murder; and, three, the commission of an overt act pursuant to the agreement by one or more of the persons who made the agreement. . . .

“The first element is that [the] defendant had the intent that conduct constituting the crime of murder be performed. The defendant must be proven to have been actuated by criminal intent. The defendant may not be found guilty unless the state has proven beyond a reasonable doubt he had a specific intent to violate

¹⁴ See footnote 1 of this opinion.

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the law and, in this case, intent to commit murder when he entered into an agreement to engage in conduct constituting a crime. *You will refer to the court's previous instructions on intent and transferred intent that are incorporated here with the same force and effect.* For the count of conspiracy, it is only necessary that he intended that certain conduct, which, if performed, would constitute the crime of murder, be performed or take place.” (Emphasis added.)

In explaining the second element—the agreement—the court again made reference to intent. Specifically, the court stated in relevant part: “Remember that I instructed you that intent relates to the condition of the mind of the person who commits the act, his purpose in doing it. . . . *That instruction included an instruction on transferred intent, and that instruction is incorporated in this section with the same force and effect.*” (Emphasis added.)

Relying primarily on the court’s instruction that its advisement to the jury concerning the meaning of transferred intent applied to the charge of conspiracy to commit murder as well as to the murder charge, the defendant asserts that, in light of that instruction, his conspiracy conviction was predicated on a theory of transferred intent. The defendant further maintains that the transferred intent doctrine is inapplicable to the crime of conspiracy and, consequently, his conspiracy conviction is fatally flawed as a matter of law.

We note, preliminarily, that, although the defendant’s claim on appeal is based on the court’s instructions regarding transferred intent, the defendant does *not* purport to raise a claim of instructional impropriety. Indeed, in the trial court, the defendant expressly stated that he had no objection either to the instruction on conspiracy or to the instruction on transferred intent. Moreover, any claim of instructional error that the

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defendant might have raised on appeal would be deemed impliedly waived under *State v. Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011),¹⁵ because the record clearly reflects that defense counsel had ample time to review the court's proposed charge and to object to the portions of the charge at issue and affirmatively accepted the proposed instructions. The defendant claims, rather, that his conviction must be reversed because the jury found him guilty of conspiracy based on a theory that he agreed to kill an unintended victim, which, the defendant further contends, is a legal impossibility. In other words, according to the defendant, the state's evidence, viewed most favorably to the state, established conduct by the defendant that simply does not constitute the crime of conspiracy. Of course, if the defendant is correct that he was convicted of a crime that is not cognizable under our law, then his conviction would be fundamentally incompatible with the fairness principles underlying the right to due process. See, e.g., *State v. Toczko*, 23 Conn. App. 502, 505, 582 A.2d 769 (1990) (defendant's fundamental constitutional rights were violated by virtue of his conviction of conspiracy to commit manslaughter, which is not cognizable crime).

We agree with the defendant that his claim, though unpreserved, is reviewable under *Golding* because the record is adequate for review of the claim and it is of constitutional magnitude. The defendant's claim fails, however, because he cannot establish that his conviction of conspiracy to commit murder was legally insufficient in violation of his right to due process.

¹⁵ In *Kitchens*, our Supreme Court concluded that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." *State v. Kitchens*, supra, 299 Conn. 482–83.

Before considering the merits of the defendant's claim, we first set forth certain general principles governing the crime of conspiracy. "To establish the crime of conspiracy under § 53a-48 . . . it must be shown that an agreement was made between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed." (Internal quotation marks omitted.) *State v. Beccia*, 199 Conn. 1, 3, 505 A.2d 683 (1986). "While the state must prove an agreement [to commit murder], the existence of a formal agreement between the conspirators need not be proved because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [Although] [c]onspiracy can seldom be proved by direct evidence . . . [i]t may be inferred from the activities of the accused persons." (Internal quotation marks omitted.) *State v. Soyini*, 180 Conn. App. 205, 224–25, 183 A.3d 42, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018).

"Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements of the offense." (Emphasis omitted; internal quotation marks omitted.) *State v. Beccia*, supra, 199 Conn. 3–4. "The state, therefore, in order to prove the offense of conspiracy to commit murder, must prove two distinct elements of intent: that the conspirators intended to agree; and that they intended to cause the death of another person." (Internal quotation marks

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omitted.) *State v. Mourning*, 104 Conn. App. 262, 286–87, 934 A.2d 263, cert. denied, 285 Conn. 903, 938 A.2d 594 (2007). With due regard for these principles, we now address the defendant’s contention that his conviction of conspiracy to commit murder is unlawful because it was founded on the doctrine of transferred intent.

In the present case, the state did rely on a theory of transferred intent to prove the murder charge: the state sought to establish that the defendant, acting with the intent to kill a rival gang member, killed someone else. The defendant does not dispute the applicability of that theory to the crime of murder. Indeed, the murder statute, § 53a-54a, contemplates scenarios of the kind that occurred here because the statute expressly provides that a person commits the crime of murder when, with the intent to cause the death of one person, he causes the death of another person. See footnote 1 of this opinion.

The state, however, did *not* rely on the doctrine of transferred intent with respect to the conspiracy to commit murder charge. The conspiracy alleged and proven by the state was an agreement to kill a rival gang member, and the overt act proven by the state was the gunshot intended for that rival gang member. The conspiracy to commit murder charge was established by virtue of that proof and that proof alone. Although the gunshot that was fired was intended to kill the rival gang member, the fact that the gunshot, instead, killed the victim is simply irrelevant for purposes of the conspiracy to commit murder charge. In other words, with respect to *that* charge, the state did not need to prove, and indeed could not have proved, that the defendant and at least one other person agreed to kill the actual victim. Rather, as we have explained, the state merely sought to prove, and did prove, first, an agreement to kill a rival gang member, and second, the commission of an overt act in furtherance of that agreement, specifi-

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cally, the gunshot that was intended for the rival gang member but which struck and killed the victim.

The defendant's claim is unavailing, then, because it fails to account for a fundamental difference between the crime of murder, which, among other things, requires proof that a person was killed, and the crime of conspiracy to commit murder, which requires proof only of an *agreement* to kill and an overt act in furtherance of that agreement. Put differently, the conspiracy charge does *not* require proof that the object of the conspiracy, namely, the death of a person, was accomplished, nor does it require proof regarding the result of the overt act committed. As our Supreme Court has explained: "The gravamen of the crime of conspiracy is the unlawful combination and an act done in pursuance thereof, *not the accomplishment of the objective of the conspiracy*. . . . Conspiracy is an inchoate offense the essence of which is an agreement to commit an unlawful act. . . . The prohibition of conspiracy is directed not at the unlawful object, but at the process of agreeing to pursue that object." (Citations omitted; emphasis added; internal quotation marks omitted.) *State v. Bectia*, supra, 199 Conn. 3; see also *State v. Fox*, 192 Conn. App. 221, 228, 217 A.3d 41 (it is agreement that "constitutes the conspiracy which the statute punishes" (internal quotation marks omitted)), cert. denied, 333 Conn. 946, 219 A.3d 375 (2019). In the present case, because the crime of conspiracy to commit murder was completed when the defendant and one or more coconspirators agreed to kill a rival gang member and a gun was fired to that end, the defendant's conspiracy conviction is legally sound even though the murder charge itself was predicated on the death of an unintended victim. Thus, although the murder charge was based on a theory of transferred intent, the charge of conspiracy to commit murder was not.

Furthermore, it is apparent that the court's instruction to the jury that the doctrine of transferred intent

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applied to the conspiracy to commit murder charge as well as to the murder charge did not serve to transform the state's theory of the conspiracy charge into one predicated on transferred intent. Notwithstanding the court's instruction on transferred intent, that doctrine simply bore no relevance to the conspiracy charge because the state's theory with respect to that charge, in contrast to its theory with respect to the murder charge, had nothing to do with transferred intent. For purposes of the conspiracy charge, it made no difference whether the rival gang member was killed—as had been planned—or whether, as actually occurred, the victim of the shooting was an unintended third party. As we have explained, all that was necessary for the state to establish the crime of conspiracy was proof that the defendant agreed with one or more other persons to cause the death of the rival gang member and that an overt act was committed in furtherance of that agreement, and the defendant does not challenge the adequacy or validity of the state's proof in that regard. In such circumstances, the court's instruction to the jury concerning the applicability of the doctrine of transferred intent to the conspiracy charge was, at most, mere surplusage that had no bearing on the nature of the state's case against the defendant or on the jury's consideration of whether the state had proven its case.

For these reasons, the defendant's conviction of conspiracy to commit murder was not predicated on the doctrine of transferred intent. Accordingly, the defendant cannot prevail on his claim of a due process violation stemming from his conviction of an offense that is not legally cognizable in this state, and his claim, thus, fails under the third prong of *Golding*.

II

The defendant next claims that the court improperly denied his motion to suppress certain statements he

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made to the police during a custodial interrogation after he had invoked his constitutional right to counsel. He contends that the police impermissibly failed to honor his request for an attorney and that any statements he made thereafter were the result of improper questioning by the police in violation of his fifth amendment rights as safeguarded by *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its progeny. He also claims, alternatively, that his statements should have been suppressed because they were the product of police coercion and, therefore, not made following a knowing and voluntary waiver of his *Miranda* rights. We disagree.

The following facts and procedural history are necessary to our resolution of the defendant's claims.¹⁶ Three days after the shooting, the defendant was located by the police and brought to the Hartford Police Department, where he was taken to an interview room, which was equipped with a video camera, for questioning. The video recording of the interview commenced at 2:27 p.m., at which time the defendant was alone in the room. Approximately thirty minutes later, Rykowski and another detective entered the room with the defendant's father, and Rykowski proceeded to review a parental consent form with the father,¹⁷ followed by his review of a waiver of rights form with the defendant. Both the defendant and his father signed their respective forms. Subsequently, the police and the defendant's

¹⁶ Our recitation of the relevant facts is predicated on the findings of the trial court as set forth in its memorandum of decision denying the defendant's motion to suppress and on our independent review of the video recording of the police interview. Although the recording of the interview was not introduced into evidence at the defendant's trial, the state did introduce the recording at the hearing on the defendant's motion to suppress, and the court relied on the recording in denying that motion.

¹⁷ Although the defendant had turned eighteen years old the day before, on July 18, 2017, his father was present while the defendant was being advised of his rights because Rykowski believed that it would be best to advise the defendant as a juvenile.

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father left the interview room, and at 3:20 p.m., Rykowski returned to the room with his partner, Detective Jeffrey Pethigal,¹⁸ at which time they began questioning the defendant. At 3:35 p.m., Rykowski told the defendant that he was under arrest for murder and summarized the evidence that the police had against him. After that, Rykowski and Pethigal again departed the interview room until 4:26 p.m., when Pethigal returned with the defendant's father and questioned the defendant about his cell phone.

The following colloquy then transpired between the defendant and Pethigal:

“[The Defendant]: But is there like any way, cause this is a serious matter, and I feel like just so I'm ok with my like future and stuff, cause I don't know [what] the outcome of this [is] gonna be, *is there any way I could get like a lawyer in here*, so I know what's going on 'n stuff?

“[Pethigal]: What's that?

“[The Defendant]: 'Cause I don't really understand like what's going on and like and that's why I was saying I wanted my father in here.

“[Pethigal]: You can talk to your father, it's whatever you want to do.

“[The Defendant]: *Could we have a lawyer in here*, 'cause this is a serious matter.

“[Pethigal]: Yeah, you have your rights waiver, right?

“[The Defendant]: Huh?

“[Pethigal]: The rights waiver you signed.

“[The Defendant]: Um-hmm. It said I could have a lawyer.

¹⁸ The defendant's father did not join Rykowski and Pethigal when they reentered the interview room at this time.

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“[Pethigal]: Exactly, you understood it.

“[The Defendant]: Could you have—*could you have a lawyer come in here?*”

“[Pethigal]: Ok If that’s what you want?”

“[The Defendant]: Yeah, because it don’t wanna . . . I don’t wanna, you get what I’m sayin? This is a serious matter.

“[Pethigal]: Alright, hold on” (Emphasis added.)

Thereafter, Pethigal ceased questioning and left the interview room, followed by the defendant’s father. Several minutes later, Sergeant Rivera¹⁹ opened the door to the room and told the defendant to “come on,” to which the defendant replied, “where am I going?” Rivera explained to the defendant that he was taking him to the booking room to be processed because he was under arrest. When the defendant expressed confusion, Rivera told the defendant that he would have Pethigal and Rykowski explain the charges to him. Shortly thereafter, while Rivera and the defendant were still in the interview room, Pethigal returned and the following colloquy took place:

“[Pethigal]: Did you not understand us?”

“[The Defendant]: You all said that . . . somebody said I did that. I didn’t do anything.

“[Pethigal]: You are under arrest for murder.

“[The Defendant]: How [am I] under arrest for . . .

“[Pethigal]: Listen, you asked for a lawyer, I can’t speak to you, ok?”

“[The Defendant]: What . . . did I do?”

¹⁹ Sergeant Rivera’s first name is not apparent from the record.

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“[Pethigal]: Listen, I would love to discuss this more but you asked for a lawyer and I can’t speak to you.

“[Rivera]: You have to stand up, come on.

“[The Defendant]: How am I getting arrested for murder

“[Rivera]: You requested an attorney, we cannot discuss this further with you. . . . You had your opportunity to speak to us. You requested a lawyer. We are done talking with you, sir.

“[The Defendant]: If I want to talk to you guys, can we talk about it?”

Neither Pethigal nor Rivera responded directly to the defendant’s question, instead directing him to stand up and put his hands behind his back.

Thereafter, the defendant was escorted out of the interview room for booking. According to testimony by Rykowski at the hearing on the motion to suppress, when Rivera and the defendant were both in the booking room, the defendant told Rivera that he wanted to speak with Rykowski. Because there was no video camera in the booking room, the defendant’s statement to Rivera was not recorded.

Upon completion of the booking process, the defendant was returned to the interview room. Rykowski returned to the room, as well, and asked the defendant to clarify whether he wanted to speak to him, to which the defendant responded, “I do, ‘cause I didn’t even do anything.” Rykowski continued to question the defendant to make sure that he wanted to speak further to the police without an attorney present. After that exchange, the defendant’s father entered the interview room, and Rykowski again explained the waiver of rights and parental consent forms to the defendant and his father, respectively. The defendant’s father again

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signed a parental consent form, and the defendant completed and signed another waiver of rights form. Rykowski thereafter read the defendant his *Miranda* rights for a second time, and the defendant initialed a form indicating that he had been advised of his rights and understood them. Thereafter, the interrogation of the defendant recommenced, and the defendant eventually admitted to being in the Ford Escape on the day of the shooting, and he gave the police a signed, written statement to that effect. He also told Rykowski that the intended target of the shooting was Deandre Johnson, a rival gang member.

The defendant filed a motion in advance of trial seeking to suppress the statements he made to the police following his invocation of his right to counsel but after he told the police that he wanted to continue to talk with them.²⁰ In support of his motion, the defendant argued that the police had improperly induced him to speak despite his expressed desire to have counsel present and that the efforts by the police to do so had rendered his *Miranda* waiver involuntary. Following a hearing, the court denied the defendant's motion. Expressly finding Rykowski to be a credible witness, the court concluded that the defendant had waived his rights knowingly, intelligently and voluntarily. The court further found that the defendant himself had "initiated the continued communication with the police" and that "[t]here [was] no evidence . . . that would indicate that the defendant's will was overborne and the decision to speak to the police was anything other than the result of his free, considered, and unconstrained choice."

Subsequently, at trial, the state adduced testimony from Rykowski that the defendant had acknowledged

²⁰ The defendant did not seek to suppress any statements that he made prior to invoking his right to counsel, and those statements are not the subject of this appeal.

that he was in the Ford Escape on the day of the shooting. Rykowski further testified that he believed that the defendant also told him the name of the intended target of the shooting. On appeal, the defendant contends that the trial court incorrectly refused to suppress the statements at issue, and he renews the arguments that he made in the trial court in support of his claim. The state maintains that the court properly denied the defendant's motion to suppress his statements and, further, that any possible impropriety was harmless beyond a reasonable doubt. For the reasons that follow, we agree with the state.

Preliminarily, however, we set forth our standard of review and certain legal principles that govern our consideration of the defendant's claims. The standard of review of the trial court's denial of the defendant's motion to suppress is well settled. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record [W]hen [however] a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set [forth] in the memorandum of decision" (Internal quotation marks omitted.) *State v. Gonzalez*, 302 Conn. 287, 295–96, 25 A.3d 648 (2011).

With respect to the law applicable to the defendant's claims challenging the trial court's denial of his motion to suppress, "[t]he [f]ifth [a]mendment [to] the United

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States [c]onstitution provides: '[n]o person . . . shall be compelled in any criminal case to be a witness against himself' To protect this constitutional right against self-incrimination, the Supreme Court's landmark decision in *Miranda v. Arizona* [supra, 384 U.S. 444] established certain 'procedural safeguards' that officers must comply with to subject a suspect to custodial interrogation." (Citation omitted.) *United States v. Abdallah*, 911 F.3d 201, 209–10 (4th Cir. 2018). Among them, an accused has the right to have an attorney present during custodial police interrogation; *Miranda v. Arizona*, supra, 444; and if the accused requests an attorney, "interrogation must cease until an attorney is present." *Id.*, 474. "It is well established that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. [*Id.*, 444.] Two threshold conditions must be satisfied in order to invoke the warnings constitutionally required by *Miranda*: (1) the defendant must have been in custody;²¹ and (2) the defendant must have been subjected to police interrogation." (Footnote added; internal quotation marks omitted.) *State v. Gonzalez*, supra, 302 Conn. 294.

"A defendant in custody is subject to interrogation not only in the face of express questioning by police but also when subjected to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . [W]hether a defendant was subjected to interrogation . . . involves a . . . two step inquiry in which the court must determine first, the

²¹ In the present case, there is no dispute that the defendant was in custody at all relevant times.

factual circumstances of the police conduct in question, and second, whether such conduct is normally attendant to arrest and custody or whether the police should know that it is reasonably likely to elicit an incriminating response.” (Citations omitted; internal quotation marks omitted.) *Id.*, 295; see also *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (exempting from definition of interrogation words and actions that are “normally attendant to arrest and custody”).

In *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the United States Supreme Court amplified the safeguards that must be afforded an accused who requests counsel during custodial interrogation. Specifically, the court in *Edwards* held that, “when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [The court] further [held] that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” (Footnote omitted.) *Id.*, 484–85. With these principles in mind, we turn to the defendant’s claims.

A

The defendant first claims that the police violated his fifth amendment right to counsel by failing to honor his invocation of his right to counsel by questioning him after he had done so. More specifically, the defendant contends that, insofar as he initiated communication with the police after his earlier request for counsel, he did so only because the police had impermissibly

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induced him to speak to them. He therefore argues that he is entitled to suppression of the statements he made to the police after he resumed talking to them. We are not persuaded by the defendant's claim.

As we have explained, after the defendant was brought to the police station, he was informed of his *Miranda* rights, signed a waiver of rights form, and was questioned by the police. At approximately 4:28 p.m., the defendant asked: “[I]s there any way I could get like a lawyer in here?” That question was followed by two more requests for counsel, made in close succession, in which he asked, “[c]ould we have a lawyer in here?” and “could you have a lawyer come in here?” Under the fifth amendment, although “police officers conducting a custodial interrogation have no obligation to stop and clarify an ambiguous invocation by the defendant of his right to have counsel present . . . they must cease interrogation . . . upon an objectively unambiguous, unequivocal invocation of that right.” *State v. Purcell*, 331 Conn. 318, 320–21, 203 A.3d 542 (2019). For purposes of this appeal, there is no dispute that the defendant's statements constituted a sufficiently clear and unequivocal request for an attorney that required a halt to all questioning. Although the defendant contends that Pethigal's immediate response to the defendant's invocation of his right to counsel—Pethigal reminded the defendant that he previously had waived that right—was designed to prompt the defendant to continue speaking to the police, no actual questioning took place and the defendant made no incriminating statements until several hours later, after he had reinitiated communication with the police. The crux of the defendant's claim, therefore, is that he resumed speaking to the police only because the police themselves induced him to do so in derogation of his right to counsel.

As noted previously, under *Edwards*, once a defendant has requested counsel, the police may not question

him further until counsel is present unless the accused himself initiates further communication with the police. *Edwards v. Arizona*, supra, 451 U.S. 484–85. In *Smith v. Illinois*, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984), the United States Supreme Court clarified the rule in *Edwards*, stating: “[The] rigid prophylactic rule [set forth in *Edwards*] . . . embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.” (Citations omitted; internal quotation marks omitted.) *Id.*, 95. The court in *Smith* further explained: “*Edwards* set forth a bright-line rule that all questioning must cease after an accused requests counsel. . . . In the absence of such a bright-line prohibition, the authorities through badger[ing] or overreaching—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel’s assistance.” (Citation omitted; emphasis in original; internal quotation marks omitted.) *Id.*, 98. Thus, “[w]hen officers fail to scrupulously honor a suspect’s invocation of the right to counsel, the suspect’s subsequent waiver of that right—and any confession that follows—is presumptively invalid.” (Internal quotation marks omitted.) *Rodriguez v. McDonald*, 872 F.3d 908, 926 (9th Cir. 2017). Our Supreme Court has explained that “[t]he initiation of conversation includes inquiries that can be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation.” (Internal quotation marks omitted.) *State v. Canales*, 281 Conn. 572, 591, 916 A.2d 767 (2007). For example, in *Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.

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Ct. 2830, 77 L. Ed. 2d 405 (1983), the United States Supreme Court held that the defendant initiated further conversation with the police when he asked, “[w]ell, what is going to happen to me now?” Id., 1045; see also *State v. Hafford*, 252 Conn. 274, 294, 746 A.2d 150 (defendant’s question concerning what would happen to him next constituted initiation under *Edwards*), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000).

Because the inquiry required by the defendant’s claim is necessarily fact specific, we set forth the facts and circumstances relevant to our resolution of the claim. The video recording of the defendant’s interview with the police reveals that he invoked his right to have counsel present at 4:28 p.m. and that, following a brief exchange with Pethigal, all questioning ceased and Pethigal left the interview room at 4:29 p.m. Thereafter, commencing at 5:05 p.m., the defendant had a brief conversation with Rivera during which the defendant expressed his concern as to why he was being taken to the booking room, and Rivera and Pethigal explained that they could not speak with him because he had invoked his right to counsel. At 5:08 p.m., the defendant was placed in handcuffs and taken out of the room to be processed.

At the hearing on the motion to suppress, Rykowski testified that Rivera had informed him that, when the defendant “was being processed, he expressed his desire to continue to talk to me. So, once the processing of [the defendant] was complete . . . I asked that he be put back in that interview room . . . to confirm the information that . . . Rivera had given [to] me.” As we have indicated, the defendant’s overture to Rivera was not recorded.

At 5:25 p.m., Rykowski reentered the interview room and asked the defendant, who, by then, had been returned

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to that room, to clarify whether he wanted to speak with the police again. The following colloquy took place:

“[Rykowski]: Deykevious, I just want to make sure I understand, do you want to talk to us again right now?”

“[The Defendant]: I do ‘cause I didn’t even do anything. I don’t understand why you guys are saying that I murdered someone. I didn’t murder anyone.

“[Rykowski]: Ok, so, as I mentioned before, you asked about an attorney before.

“[The Defendant]: Only because I was scared. This is serious.

“[Rykowski]: Ok, I just wanna understand. Do you want to talk to us right now, without an attorney?”

“[The Defendant]: If it helps clear stuff up.

“[Rykowski]: I mean, obviously, I want to get your side of this.

“[The Defendant]: But listen, if I could talk to you guys and you guys can see that I really have nothing to do with this, yes I will talk to you. My dad can clarify everything that I’ve been doing.

“[Rykowski]: No problem. I want to talk to you, ok?”

“[The Defendant]: . . . I just turned eighteen yesterday, this is my life, I’m trying to do good and now everything messes up.

“[Rykowski]: Right . . . let me bring your father back in, we gotta go over those forms again, alright?”

“[The Defendant]: Ok.

“[Rykowski]: If you want to, I’m not pushing you to talk to me.

“[The Defendant]: I want to cause I don’t wanna go to jail for something I didn’t do.”

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Following that brief discussion, Rykowski explained that he would be readvising the defendant of his *Miranda* rights. At 5:38 p.m., those rights were read to him again, and he reviewed and signed the waiver of rights form. After that, interrogation resumed.

On the basis of Rykowski's testimony, which the court expressly credited, and the court's review of the video recording of the defendant's police interview, the court found that, "[w]hen the defendant [was] presented for booking, he indicate[d] to . . . Rivera that he [wanted] to speak with the detectives. This information [was] brought to . . . Rykowski, who question[ed] the defendant about the request. The defendant indicate[d] that he [did want to talk] . . . if it would help. . . . Rykowski continue[d] to inquire about his desire to speak without a lawyer present. The defendant [was] again advised of his *Miranda* rights and waive[d] them." The court further stated: "The evidence indicates that [when] a lawyer was requested, questioning by the police ceased. The defendant requested further discussion, first with the officer [who] took him to booking and then to . . . Rykowski in the interview room and recorded on state's exhibit 1. Initiation can be said to represent a desire by a suspect to open up a more generalized discussion related to the investigation. . . . The court finds that the defendant initiated the continued communication with the police."

We conclude that the record fully supports the court's finding that the defendant initiated further communication with the police of his own accord. Although the defendant's discussion with Rivera during the booking process was not recorded, the court found credible Rykowski's testimony that the defendant told Rivera that he wanted to speak with the police notwithstanding his earlier invocation of his right to counsel, and we will not second-guess the court's credibility determination. See *State v. Shin*, 193 Conn. App. 348, 359, 219 A.3d

432 (“[b]ecause it is the sole province of the trier of fact to assess the credibility of witnesses, it is not our role to second-guess such credibility determinations” (internal quotation marks omitted)), cert. denied, 333 Conn. 943, 219 A.3d 374 (2019). Indeed, the defendant does not challenge the accuracy or truthfulness of Rykowski’s testimony regarding the defendant’s conversation with Rivera in the booking room, which plainly established that the defendant had decided to resume speaking to the police without counsel present. Nor does he contest that the statements he made to Rykowski in the interview room confirm those that he had made only moments before to Rivera. See *United States v. Carpentino*, 948 F.3d 10, 22 (1st Cir. 2020) (“a suspect opens the door to further questioning if his comments ‘evinced . . . a willingness and a desire for a generalized discussion about the investigation’ ”); see also *Oregon v. Bradshaw*, supra, 462 U.S. 1045–46 (no *Edwards* violation when accused initiated further conversation with police by inquiring as to what would be happening to him, which evinced “willingness and a desire for a generalized discussion about the investigation . . . [and] was not merely a necessary inquiry arising out of the incidents of the custodial relationship”).

It is the defendant’s position, nevertheless, that the conduct of the police just prior to the defendant’s departure from the interview room to be booked and immediately after he was returned to the interview room supports his claim that “the officers should have known their actions and statements, which occurred after Pethigal left the room, were likely to get him to talk without an attorney.” Specifically, he points to the facts that the police removed his father from the room and left the defendant alone there for thirty minutes without providing him with any means to contact an attorney; the officers made statements suggesting that the “defendant could have helped himself if he spoke to them,

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but because he [had] asked for an attorney, they were booking him for murder”;²² and the officers’ statements suggested that the defendant’s situation could well improve if he spoke with the police at that time. The defendant further alleges that “[t]heir persistent statements that they needed to talk to him coupled with confronting him with the evidence against him undoubtedly wore [him] down until he agreed to talk without an attorney.” According to the defendant, under these circumstances, the court incorrectly concluded that the defendant knowingly and voluntarily initiated further communication with the police. We are not persuaded by the defendant’s argument.

First, the defendant has provided no authority for the proposition that the officers were required to provide him with an attorney or a means to contact one during the thirty minutes he was left alone in the interview room. Indeed, the defendant did not ask the police for permission to contact anyone, and his father was at the police station and had visited with the defendant. Moreover, the record does not bear out the defendant’s contention of persistent statements by the officers that they wanted to talk to the defendant, and the brief outline of the incriminating evidence that the police gave the defendant was made in response to a question from the defendant himself as to why he was being held for murder.

The defendant’s reliance on *State v. Gonzalez*, supra, 302 Conn. 287, and *Martinez v. Cate*, 903 F.3d 982 (9th Cir. 2018), to support his claim that the statements of the police constituted interrogation is misplaced because

²² The defendant’s claim concerns Pethigal’s statements to the defendant that he could not speak with the defendant because the defendant had asked for an attorney and that Pethigal would “love to discuss this more” but could not in light of the defendant’s request, as well as Rivera’s statement: “You had your opportunity to speak to us. You requested a lawyer. We are done talking with you, sir.”

those cases are distinguishable from the present case. In *Gonzalez*,²³ our Supreme Court held that the statement of a police sergeant to the defendant, who was in custody but had not been advised of his *Miranda* rights, “that it was the defendant’s opportunity to tell his side of the story was the functional equivalent of interrogation because the police should have known that the phrase was reasonably likely to invite the defendant to respond by making possibly incriminating statements.” *State v. Gonzalez*, supra, 299. The court in *Gonzalez* concluded that “at the onset of the interview the police improperly subjected the defendant to custodial interrogation without the benefit of *Miranda* warnings”; (emphasis omitted) id., 301; and that the defendant’s “request to remain silent was not scrupulously honored because no steps were undertaken to conclude the interrogation or belatedly advise the defendant of his *Miranda* rights.” Id., 302. In contrast, in the present case, the defendant was informed of his *Miranda* rights when the interview commenced and signed a waiver of rights form, and the police stopped questioning him

²³ The defendant in *Gonzalez* had been brought to the police station for questioning about a murder. *State v. Gonzalez*, supra, 302 Conn. 296. “Although the defendant initially persisted in resisting being interviewed by stating that he wanted an attorney and that he would not speak to the officers, the officers only told the defendant to sit there and wait to be booked, made no effort to honor the defendant’s request for counsel or to explain his rights and remained seated at the table, staring at the defendant in silence. Approximately sixty seconds later, the defendant began making the contested statements.” Id., 296–97. Moreover, “once the defendant commenced narrating his activity on the day of the murder . . . the officers did not ascertain whether the defendant was waiving his prior request for counsel. The officers also never presented the defendant with a waiver of rights form that had been in their possession throughout the interview.” Id., 302–303. Those facts are notably different from the facts of the present case, in which the defendant was advised twice of his *Miranda* rights and twice signed a waiver of rights form before making any incriminating statements, the officers ascertained that the defendant wanted to speak to them despite his prior request for counsel, and the officers left the interview room and the interview ceased for a period of time after the defendant’s invocation of his right to counsel.

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after he invoked his right to counsel just prior to being removed from the interview room for booking.

Martinez is similarly inapposite to the present case. In *Martinez*, after the petitioner had requested that an attorney be present during his questioning by the police regarding a shooting incident, a detective stated: “All I wanted was your side of the story. That’s it. O[k]. So, I’m pretty much done with you then. Um, I guess I don’t know another option but to go ahead and book you. O[k]. Because . . . [you’re] going to be booked for murder because I only got one side of the story. O[k].” (Footnote omitted; internal quotation marks omitted.) *Martinez v. Cate*, supra, 903 F.3d 988. The United States Court of Appeals for the Ninth Circuit held that the detective’s statements constituted interrogation because the detective, by virtue of those statements, suggested that the petitioner might not be charged if he spoke to the police and gave them his side of the story. *Id.*, 994–95. Accordingly, the detective’s statements were “‘reasonably likely to elicit an incriminating response.’” *Id.*, 995.

In the present case, the defendant was informed at 3:35 p.m., while he was being interviewed and long before he invoked his right to counsel, that he was under arrest for murder. Consequently, this case does not involve a situation in which the police suggested that the defendant was being arrested and booked only because he would not talk to them without an attorney.²⁴ See *Rodriguez v. McDonald*, supra, 872 F.3d 924 (“by suggesting to [the petitioner] that he would be imminently charged with murder but that cooperation would

²⁴ This determination is supported by the fact that, later in the interview, the defendant asked: “If we clear everything up will I still have to go to jail?” In response to that question and again thereafter, Rykowski explained to the defendant that there was an active warrant for his arrest, that Rykowski could not change that fact, and that the defendant would be placed under arrest and booked at that time regardless of what he told the police about the shooting incident.

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result in more lenient treatment from the court, the probation office, and from the police themselves, the officers ‘effectively told [the petitioner] he would be penalized if he exercised rights guaranteed to him under the [c]onstitution of the United States’ ”). On the contrary, in the present case, the court expressly found that “there [was] no evidence . . . that there are any police tactics designed to deflect the defendant from clearly invoking his right to counsel”

We conclude that the record supports the court’s findings with respect to the officers’ statements, which must be examined in the context in which they were made. When the defendant was informed that he was under arrest and about to be booked for murder, he became very upset, started crying, stated that he didn’t do anything wrong and asked why he was being arrested. In response to *the defendant’s* questions, he was informed that, because he had requested an attorney, the police could no longer speak with him. Within a very short period of time, at 5:08 p.m., he was placed in handcuffs and taken out of the interview room for booking. Only after this break in questioning did the defendant initiate further communication with the police, telling them that he again wanted to speak to them. See *Martinez v. Cate*, supra, 903 F.3d 997 (“[i]n every other case where the Supreme Court has held that a defendant initiated the communication with the police, there was some break in questioning”). The defendant’s claim, which essentially ignores his own statements to the police, is unavailing.²⁵

²⁵ We note that the defendant requested, for the first time at oral argument before this court and subsequently in a written motion filed shortly thereafter, that he be permitted to submit a supplemental brief raising an *Edwards* claim under article first, § 8, of the Connecticut constitution. See *State v. Purcell*, supra, 331 Conn. 362 (article first, § 8, of Connecticut constitution provides greater rights than federal constitution insofar as that state constitutional provision “requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect’s desire for counsel” (internal quotation marks omitted)).

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B

We next must determine whether the defendant's second waiver of his right to counsel was valid because he relinquished that right knowingly, intelligently, and voluntarily. The defendant contends that, even if he initiated the conversation with the police, his subsequent statement acknowledging that he was in the Ford Escape on the day of the shooting should have been suppressed because it was the product of police coercion and, consequently, not made knowingly and voluntarily. We disagree.

“Pursuant to the fifth and fourteenth amendments to the United States constitution, a statement made by a defendant during custodial interrogation is admissible only upon proof that he . . . waived his rights [under *Miranda*] To be valid, a waiver must be voluntary, knowing and intelligent. . . . The state has the burden of proving by a preponderance of the evidence that the defendant voluntarily, knowingly and intelligently waived his *Miranda* rights. . . . Whether a purported waiver satisfies those requirements is a question of fact that depends on the circumstances of the particu-

More specifically, the defendant sought to raise and brief the claim that the statement he made after booking that he wanted to resume speaking to the police “if it helps clear stuff up” was equivocal, thereby triggering a state constitutional duty on the part of the police to inquire further solely for the purpose of clarifying the defendant's statement. Ordinarily, we will not entertain claims raised for the first time at oral argument. See, e.g., *State v. Cicarella*, 203 Conn. App. 811, 817 n.5, 251 A.3d 94, cert. denied, 337 Conn. 902, 252 A.3d 364 (2021). Upon consideration of the defendant's request in the present case, we concluded that there was no need to address the merits of the motion in light of our determination—explained more fully in part II C of this opinion and equally applicable to a claim under the state constitution—that, even if the defendant could establish that the police violated his right to counsel by questioning him following his invocation of that right and after he had been booked, the violation would be harmless beyond a reasonable doubt due to the overwhelming independent evidence of the defendant's guilt. We therefore denied the defendant's motion to raise an *Edwards* claim under article first, § 8, of the Connecticut constitution because he could not prevail on that claim.

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lar case. . . . Although the issue is therefore ultimately factual, our usual deference to fact-finding by the trial court is qualified, on questions of this nature, by the necessity for a scrupulous examination of the record to ascertain whether such a factual finding is supported by substantial evidence. . . .

“Whether the defendant has knowingly and intelligently waived his rights under *Miranda* depends in part on the competency of the defendant, or, in other words, on his ability to understand and act upon his constitutional rights.” (Citations omitted; internal quotation marks omitted.) *State v. Fernandez*, 52 Conn. App. 599, 610, 728 A.2d 1, cert. denied, 249 Conn. 913, 733 A.2d 229, cert. denied, 528 U.S. 939, 120 S. Ct. 348, 145 L. Ed. 2d 272 (1999). “In considering the validity of a waiver, we look to the totality of the circumstances of the claimed waiver. . . . Factors used to assess the totality of the circumstances include the age of the accused, the extent of his education, evidence concerning advisement of constitutional rights and the length and nature of the interrogation.” (Citation omitted; internal quotation marks omitted.) *State v. Miller*, 137 Conn. App. 520, 531, 48 A.3d 748, cert. denied, 307 Conn. 914, 54 A.3d 179 (2012). With respect to voluntariness, the “test . . . is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the accused’s] will to resist and bring about confessions not freely self-determined” (Internal quotation marks omitted.) *State v. Azukas*, 278 Conn. 267, 290, 897 A.2d 554 (2006). In other words, “[a] statement is voluntary if it is the product of an essentially free and unconstrained choice by its maker” (Citation omitted; internal quotation marks omitted.) *State v. Fernandez*, *supra*, 612.

In finding that the defendant made a knowing, intelligent and voluntary waiver of his rights, the court exam-

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ined the totality of the circumstances and found as follows: “[T]he defendant was eighteen years [old], he had been through the eleventh grade, [and he] was able to read and write. There was no indication that the defendant was under the influence of any type of substance, be it alcohol, narcotics, or that he was in any other way impaired. He was advised of his rights not once, but twice, and each time he initialed each of the rights acknowledging that right, and then finally signed off at the end indicating he was willing to speak with the officers.

“There was no evidence of threats or physical force to coerce him to waive his rights or to make a statement. In fact, the entire tenor of the interview [of] the defendant was completely conversational and generally lacked confrontation. The defendant had his father present the two times that he was advised of his rights and waived them. His father gave parental consent on both occasions. The evidence established that he understood those rights from his own comment. He asked if it was possible to get a lawyer the first time. It was the exercise of those rights which leads the court to infer that he understood them.” The court further noted that the defendant had prior experience with law enforcement, such that he was not “a novice to the advisement process,” and that, even though he was emotional, “there [was] no evidence that his emotion prevented him from understanding his rights.”

The court also examined other factors, stating: “[T]here was no evidence presented that the defendant was lacking in intelligence or suffered from a mental deficiency, or that intellectual limitations influenced his judgment at the time he was with . . . Rykowski and Pethigal. . . . There was nothing in the evidence for the court to conclude that the defendant was sleep deprived or in need of food or bathroom relief. The record indicates [that] the defendant was given drink, offered food, and

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[given the] opportunity to make bathroom visits. During the time that [the defendant] was being interviewed by . . . Rykowski, there was no indication [that] the defendant was subjected to any exhausting or incessant questioning or treatment.” The court concluded that there was nothing in the record to substantiate the claim that the police had overborne the defendant’s will or that his statements were not otherwise the product “of his free, considered, and unconstrained choice.” Accordingly, the court rejected the defendant’s claim that his waiver was involuntary because it was based on police pressure, intimidation or manipulation.

We agree with the state that, under the totality of the circumstances, there is substantial evidence to support the court’s finding that the defendant’s waiver of his *Miranda* rights was voluntary and intelligent, as required by *Edwards*. The record shows that the defendant twice signed a waiver of rights form after being advised of his *Miranda* rights. See *State v. Miller*, supra, 137 Conn. App. 530 (“[a] defendant’s express written and oral waiver is strong proof that the waiver is valid” (internal quotation marks omitted)). Moreover, our careful examination of the record reveals that it supports the court’s determination that there was no showing that the police threatened the defendant or employed other coercive or improper tactics to obtain the waiver. See *State v. Madera*, 210 Conn. 22, 49–50, 554 A.2d 263 (1989) (“court correctly factored into its determination of the *Miranda* issue that there was ‘no evidence that the defendant was in any way threatened, intimidated, coerced or abused’ ”).

We disagree with the defendant’s argument that the fact that he had just turned eighteen years old the day before the interrogation requires a different conclusion. As the court found, the defendant had an eleventh grade education, could read and write, was not impaired in any way, signed two waiver of rights forms after having

been informed, twice, of his *Miranda* rights, and, after previously having agreed to speak with police, asserted his right to counsel. His assertion of his right to counsel, after having been advised of his *Miranda* rights the first time, was a clear indication that he understood those rights. See *State v. Mercer*, 208 Conn. 52, 71, 544 A.2d 611 (1988) (“[W]e have held that the assertion of the right to remain silent after an initial willingness to speak with police is a strong indication that the defendant understood his rights. . . . The initial invocation of the right to counsel similarly serves to demonstrate that a defendant acted knowingly and intelligently in subsequently deciding to waive that right.” (Citation omitted; internal quotation marks omitted.)); *Pickens v. Gibson*, 206 F.3d 988, 995 (10th Cir. 2000) (“[p]etitioner’s initial refusal to make a statement and his request for an attorney indicate he ‘understood . . . both the nature and consequences of his right to remain silent and his right to counsel’ ”); *United States v. Velasquez*, 885 F.2d 1076, 1087 (3d Cir. 1989) (“[the defendant] evidently understood the import of the *Miranda* warnings . . . because she invoked her right to counsel [one-half hour] before she made her incriminating statements”), cert. denied, 494 U.S. 1017, 110 S. Ct. 1321, 108 L. Ed. 2d 497 (1990); see also *State v. Fernandez*, supra, 52 Conn. App. 611 (waiver was not invalid when defendant “was eighteen years old at the time of the incident . . . had completed the tenth grade, [and] testified that he knew how to read and write English”).

We also are not persuaded by the defendant’s contention that the court was required to find that his will was overborne because the police failed to contact a lawyer for him and, for a period of time, left him alone in the interview room, separated from his father. Although the surroundings and circumstances of the defendant’s interview by the police—including the fact that he knew that he was being arrested and booked for murder—

were hardly comfortable, that simply does not mean that the defendant necessarily was unable to decide for himself, in an informed and unconstrained manner, whether to resume speaking to the police without a lawyer.

We therefore conclude, in light of all of the relevant facts adduced at the suppression hearing, that the state has met its burden of demonstrating a knowing, intelligent and voluntary waiver by the defendant of his *Miranda* rights. See *United States v. Carpentino*, supra, 948 F.3d 26 (knowing and voluntary waiver of *Miranda* rights by defendant when he initiated second phase of custodial interview, was told by troopers that questioning would stop if he wanted to talk with his lawyer, troopers read defendant his *Miranda* rights twice, and defendant confirmed that he understood those rights, signed waiver of rights form and agreed to speak with troopers). Accordingly, the defendant has not established that he was entitled to have his statements excluded due to police coercion or intimidation.

C

Finally, the state argues that, even if a violation of the defendant's *Miranda* rights had occurred, any error in the court's admission of Rykowski's testimony regarding the defendant's acknowledgment that he was in the Ford Escape on the day of the shooting and his identification of the intended victim as a rival gang member was harmless beyond a reasonable doubt. Even though we find no *Miranda* violation, we, nevertheless, address the harmless error argument. In support of its contention, the state maintains that the other evidence of the defendant's guilt was overwhelming, such that that testimony had no material bearing on the jury verdict. The defendant asserts that the challenged evidence was harmful because there was no eyewitness testimony identifying him as the shooter, there was no physical evidence confirming his presence in the Ford Escape

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at the time of the incident, the witnesses who implicated the defendant in the shooting had a motivation to do so, and the testimony of Shaw and Jonathan Vellon contained inconsistencies. We agree with the state.

The standard governing our review of this issue is well established. “[I]f statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine.” (Internal quotation marks omitted.) *State v. Tony M.*, 332 Conn. 810, 822, 213 A.3d 1128 (2019). “The harmless error doctrine is rooted in the fundamental purpose of the criminal justice system, namely, to convict the guilty and acquit the innocent. . . . Therefore, whether an error is harmful depends on its impact on the trier of fact and the result of the case. . . . [Our Supreme Court] has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . [W]e must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record [including the strength of the state’s case without the evidence admitted in error].” (Internal quotation marks omitted.) *State v. Gonzalez*, supra, 302 Conn. 306–307. “Whether [an] error is harmless in a particular case depends upon a number of factors, such as the importance of the witness’ testimony in the prosecution’s case [and] whether the testimony was cumulative” (Internal quotation marks omitted.) *State v. Tony M.*, supra, 822.

In the present case, there was compelling independent evidence that the defendant was a passenger in

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the Ford Escape not only on the day of the shooting but at the time of the shooting, as well, such that the defendant's statement to Rykowski acknowledging that he was in the vehicle that day was merely cumulative. At trial, Simpson and Shaw, who were in the Ford Escape when the shooting took place, both testified that the defendant was with them in the vehicle at that time. Although Jonathan Vellon refused to identify anyone else in the vehicle in his trial testimony, including the defendant, his signed, sworn statement to the police identifying the defendant as a rear seat passenger in the vehicle at the time of the shooting was admitted into evidence as a full exhibit and read to the jury. Rykowski also testified that both Pipkin and Osvaldo Vellon had provided statements to the police identifying the defendant as a passenger in the Ford Escape when the gunshot that killed the victim was fired.

With respect to Rykowski's testimony that he believed that the defendant had told him that Johnson²⁶ was the intended victim of the shooting, it bears emphasis that, before invoking his right to counsel, the defendant—who maintained his innocence throughout his interview with the police—already had told Rykowski that he did not get along with people at Westland Street, whom he referred to as the "G's," and that he knew a person by the name of Deandre.²⁷ The fact that the defendant apparently told Rykowski later in the interview that Johnson was the intended victim does not establish that the defendant was present when the shooting took place because that statement itself contains no indication as to how the defendant became aware of the

²⁶ Although Rykowski testified that the name of the intended target was Andre Johnson, the intended target was identified in the record numerous times as Deandre Johnson.

²⁷ Because these statements were made before the defendant indicated he wanted a lawyer, they were not the subject of the defendant's motion to suppress.

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identity of the intended victim.²⁸ Because the defendant's statement to Rykowski about Johnson could very well have been based on information that the defendant learned secondhand, after the shooting incident occurred, about Johnson's identity as the intended victim, the statement was hardly persuasive evidence of the defendant's actual participation in the shooting.

Moreover, the state was not required to establish the shooter's identity for purposes of the conspiracy to commit murder charge, and the evidence was clear that, even if the defendant did not fire the gunshot that killed the victim, the gunshot was fired from the Ford Escape. In addition, the inconsistencies in the testimony of Shaw and Jonathan Vellon related to collateral issues and were inconsequential, except insofar as Jonathan Vellon testified that the defendant was not in the Ford Escape at the time of the shooting. Jonathan Vellon's trial testimony in this regard, however, was flatly contradicted by the sworn statement that he gave to the police immediately after the shooting. Because Jonathan Vellon's written statement was made so soon after the incident and was corroborated by the statements of at least four other eyewitnesses, and because he was so evasive in his trial testimony, there is a high probability that the jury credited that statement over his testimony, which could well have appeared to the jury as motivated by a desire to protect the defendant. Finally, because Simpson, Shaw and Jonathan Vellon, like all of the other witnesses, were subject to extensive cross-examination about whatever interest or motive they may have had to falsely implicate the defendant

²⁸ Although, in his police interview and written statement, the defendant ultimately acknowledged that he was present in the Ford Escape at the time of the shooting and claimed that a passenger nicknamed "Hazy" was the shooter, the recording of the police interview and the defendant's written statement were never admitted into evidence at the defendant's criminal trial. Consequently, the jury never was apprised of that information, and, for that reason, it does not factor into our harmless error analysis.

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in the shooting, the jury was well aware of any such interest or motive.

For all these reasons, we conclude that the admission of Rykowski's challenged testimony had no bearing on the outcome of the defendant's trial, and, consequently, its use by the state was harmless beyond a reasonable doubt. Accordingly, the defendant is not entitled to a new trial even if the admission of the testimony was improper.

The judgment is affirmed.

In this opinion the other judges concurred.

JOAQUIN SANTIAGO *v.* COMMISSIONER
OF CORRECTION
(AC 44533)

Elgo, Cradle and Alexander, Js.

Syllabus

The petitioner, who had been convicted of, inter alia, felony murder, and sentenced to fifty years' incarceration, sought a writ of habeas corpus, claiming ineffective assistance of his trial counsel for failure to preserve his direct appeal. Following the imposition of his sentence, the trial court clerk handed the petitioner notices of the right to appeal and the right to sentence review and informed the petitioner that by signing the documents, he acknowledged receipt of them. The petitioner's trial counsel, a special public defender, explained to the petitioner what the documents were and also what had to be done to initiate the appeal, in particular that in order for the appellate process to start in motion, an application for waiver of costs and fees and appointment of appellate counsel had to be filed. After receiving this information, the petitioner signed the notice forms. Trial counsel then asked the petitioner if he wanted him to initiate the appeal process or forward the matter to the Office of the Chief Public Defender so that the appellate unit might begin an appeal. Angered by the verdict and lengthy sentence imposed, the petitioner abruptly told his trial counsel that he wanted him to have no contact with his case any longer. Despite the advice of the trial clerk, his trial counsel, and the contents of the notice itself, the petitioner mistakenly believed that signing the notice of right to appeal form was all that was necessary to begin his appeal. The habeas court, after a

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hearing at which the petitioner and his trial counsel testified, dismissed the petition for a writ of habeas corpus and denied the petition for certification to appeal. The petitioner did not immediately appeal from the judgment of the habeas court. Approximately twenty-five years later, the petitioner filed an application for waiver of fees and for appointment of counsel to appeal the judgment of the habeas court. Subsequently, the court granted the petitioner's application for waiver of fees and referred his petition for appointment of appellate counsel to the Office of the Chief Public Defender, which appointed counsel. On the petitioner's appeal to this court, *held*:

1. The petitioner failed to establish that the habeas court abused its discretion in denying his petition for certification to appeal, the petitioner having failed to establish that the issues raised were debatable among jurists of reason, that they reasonably could be resolved by a court differently, or that they raised questions deserving further appellate scrutiny.
2. The petitioner could not prevail on his claim that the habeas court's conclusion that he was not denied the effective assistance of trial counsel rested on clearly erroneous factual findings concerning his trial counsel's representations to him during his sentencing proceeding, a careful review of the record, including the transcript of the habeas trial, having revealed that the court's findings were supported by the evidence in the record; the court's factual findings set forth in its memorandum of decision were derived directly from the testimony of the petitioner's trial counsel at the habeas trial, the court had discretion to credit or discredit the witnesses who testified and was the sole arbiter of the weight to be given to witness testimony, and, in light of the testimony, there was ample evidence in the record to support the court's findings that the petitioner's trial counsel advised the petitioner regarding the initiation of the appeals process and offered to initiate the appeals process on the petitioner's behalf or forward the matter to the Office of the Chief Public Defender.
3. The petitioner could not prevail on his claim that the habeas court erred in concluding that his trial counsel's representation was not deficient and therefore that the petitioner failed to satisfy the performance prong of *Strickland v. Washington* (466 U.S. 668): it was undisputed that the petitioner expressly discharged his trial counsel following the imposition of his sentence, and it was reasonable for trial counsel to believe that initiating an appeal on the petitioner's behalf would contradict the petitioner's explicit instructions and violate his ethical duty to the petitioner, and it was clear that trial counsel was prepared to assist the petitioner in initiating the appeals process but ultimately deferred to the petitioner's instructions to not handle his file any longer.

Argued March 1—officially released June 21, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland

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and tried to the court, *Sferrazza, J.*; judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Deborah G. Stevenson, assigned counsel, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, was *Sharmese L. Walcott*, state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Joaquin Santiago, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification and improperly dismissed his petition for a writ of habeas corpus by concluding that he was not denied the effective assistance of his trial counsel, Special Public Defender John Stawicki, with respect to Stawicki's failure to preserve the petitioner's direct appeal. We disagree and, accordingly, dismiss the appeal.

The following facts and procedural history are relevant to our disposition of the petitioner's claim. Following a jury trial, at which the petitioner was represented by Stawicki, the petitioner was convicted of one count of felony murder in violation of General Statutes (Rev. to 1991) § 53a-54c, and four other related charges. On May 21, 1992, the trial court, *Miano, J.*, sentenced the petitioner to a total effective sentence of fifty years of incarceration.

"On May 26, 1993, the petitioner filed [a pro se petition for a writ of habeas corpus]" on the ground that he had been denied his constitutional right to the effective assistance of counsel. The petitioner was subsequently

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appointed counsel and, in his amended petition, claimed that Stawicki rendered deficient performance by failing to preserve his right to appeal from the judgment of conviction after sentencing.

A habeas trial was held on August 24, 1995, whereby the petitioner presented the testimony of two witnesses, himself and Stawicki. On August 28, 1995, the habeas court, *Sferrazza, J.*, dismissed the petition for a writ of habeas corpus. In its memorandum of decision, the court found as follows: “Stawicki was appointed to represent the petitioner as a special public defender. Stawicki handled the petitioner’s case for over a year, which case culminated in a jury trial at which the petitioner was found guilty of felony murder and related charges. . . . Following imposition of the sentence, the court clerk handed to the petitioner notices of the right to appeal and the right to sentence review. The clerk informed the petitioner that by signing these documents, the petitioner would be acknowledging receipt of them. Before the petitioner signed the documents, Stawicki explained to the petitioner what [the documents] were and also what had to be done to initiate the appeal. In particular, Stawicki explained that, in order for the appellate process to start in motion, an application for waiver of costs and fees and appointment of appellate counsel had to be filed. After receiving this information the petitioner signed the notice forms.

“Stawicki then asked the petitioner if he wanted Stawicki to initiate the appeal process or forward the matter to the [Office of the Chief Public Defender] so that the appellate unit at that office might begin the appeal. Angered by the verdict and lengthy sentence imposed, the petitioner abruptly told Stawicki that he wanted Stawicki to have no contact with his case any longer. Stawicki respected the petitioner’s desire and had no further communication with the petitioner regarding the case. . . . Despite the advice of the clerk,

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Stawicki, and the contents of the notice itself, the petitioner mistakenly believed that signing the notice of right to appeal form was all that was necessary to begin his appeal.”

Applying the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the court then determined that the petitioner had failed to demonstrate that he had been denied the effective assistance of counsel. Specifically, the court held that Stawicki properly had advised the petitioner regarding the initiation of the appeals process and willingly had offered to assist the petitioner in filing the application for waiver of costs and fees and the appointment of appellate counsel, or in having the appellate unit of the Office of the Chief Public Defender process the petitioner’s appeal. The court also determined that the petitioner “out of anger and frustration curtly refused Stawicki’s assistance and discharged him” and that it was “the petitioner’s errors, not his counsel’s, which resulted in the failure to file a timely appeal.” The court concluded, accordingly, that Stawicki did not render deficient performance.¹ The petitioner subsequently filed a petition for certification to appeal from the decision of the habeas court, which the habeas court denied.

The petitioner did not immediately appeal from the judgment of the habeas court. Instead, on or about July 21, 2020, the petitioner filed an application for waiver of fees and for appointment of counsel to appeal the judgment of the habeas court. The habeas court subsequently returned the application to the petitioner and

¹ Having concluded that Stawicki did not render deficient performance, the court declined to address the prejudice prong of the *Strickland* test. See *Chance v. Commissioner of Correction*, 184 Conn. App. 524, 534, 195 A.3d 422 (“[t]he court . . . can find against a petitioner . . . on either the performance prong or the prejudice prong” (internal quotation marks omitted)), cert. denied, 330 Conn. 934, 194 A.3d 1196 (2018).

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informed the petitioner that his file was destroyed on November 16, 2006, pursuant to Practice Book §§ 7-10² and 7-11.³

On August 24, 2020, the petitioner filed with this court a motion for review of the return of his application for waiver of fees and for appointment of counsel. In his motion, the petitioner requested that this court “remand the fee waiver back to the trial court for approval to appeal the [habeas] court’s improper dismissal of [his] habeas petition.” The respondent, the Commissioner of Correction, subsequently filed an opposition to the petitioner’s motion in which he argued, *inter alia*, that this court should deny the petitioner’s motion because his attempt to appeal the dismissal of his petition for a writ of habeas corpus was untimely. The respondent also contended that granting the petitioner’s requested relief would prejudice the respondent given that approximately twenty-five years had passed “since the matter was heard and the fact that the habeas file was [subsequently] destroyed”⁴

On October 7, 2020, this court granted the petitioner’s motion for review and vacated the habeas court’s return

² Practice Book § 7-10 provides: “The files in all civil, family and juvenile actions, including summary process and small claims, which, before a final judgment has been rendered on the issues, have been terminated by the filing of a withdrawal or by a judgment of dismissal or nonsuit when the issues have not been resolved on the merits or upon motion by any party or the court, or in which judgment for money damages only has been rendered and a full satisfaction of such judgment has been filed, may be destroyed upon the expiration of one year after such termination or the rendition of such judgment.”

³ Practice Book § 7-11 provides in relevant part: “(a) With the exception of actions which affect the title to land and actions which have been disposed of pursuant to Section 7-10, the files in civil, family and juvenile actions in which judgment has been rendered may be stripped and destroyed pursuant to the schedule set forth in subsection (d), except that requests relating to discovery, responses and objections thereto may be stripped after the expiration of the appeal period. . . .”

⁴ At oral argument before this court, the respondent stipulated that the petitioner’s appeal was reviewable and properly before the court for consideration on the merits.

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of the application for waiver of fees. This court also ordered, *sua sponte*, that the petitioner file with the habeas court an application for waiver of fees to file an appeal on or before November 18, 2020, and that the petitioner's application be referred to the presiding judge of the habeas court. The habeas court, *Oliver, J.*, subsequently granted the petitioner's application for waiver of fees, but denied the appointment of appellate counsel.

On December 2, 2020, the petitioner filed a motion for extension of time to file a motion to review the habeas court's denial of appellate counsel. On December 8, 2020, this court denied the petitioner's motion without prejudice to the petitioner filing with the trial court a request for a hearing on the denial of his application for appointment of appellate counsel on or before January 8, 2021. The petitioner subsequently filed a request for a hearing on the denial of his application for appointment of appellate counsel.

On January 20, 2021, the trial court, *Oliver J.*, held a hearing on the petitioner's motion for appointment of appellate counsel. In an oral ruling, the court ordered that the petitioner's application be referred to the Office of the Chief Public Defender for an expedited investigation. Appellate counsel subsequently was appointed and the petitioner filed the present appeal as to the dismissal of his 1995 habeas petition and the denial of certification to appeal.

On appeal, the petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal because it improperly concluded that he was not denied the effective assistance of counsel at his criminal trial. More specifically, the petitioner argues that (1) the habeas court's conclusion that Stawicki did not render deficient performance rested on clearly erroneous factual findings, and (2) the court improperly

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determined that Stawicki did not render deficient performance by failing either to perfect the petitioner's direct appeal or to forward the petitioner's file to the Office of the Chief Public Defender, so that the office could preserve the petitioner's right to appeal and appoint new counsel to represent the petitioner. We disagree.

We first set forth the standard of review relevant to our resolution of this appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard

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of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland v. Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the Strickland test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

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. . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner’s failure to prove either is fatal to a habeas petition.” (Citations omitted; internal quotation marks omitted.) *Anderson v. Commissioner of Correction*, 201 Conn. App. 1, 11–13, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

“In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause. Moreover, the purpose of the effective assistance guarantee of the [s]ixth [a]mendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

“Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court,

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examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (Citations omitted.) *Strickland v. Washington*, supra, 466 U.S. 688–89.

I

The petitioner first claims that the court's conclusion that he was not denied the effective assistance of counsel rested upon clearly erroneous factual findings concerning Stawicki's representations to the petitioner during his sentencing proceeding. Specifically, the petitioner alleges that the court erred in finding that Stawicki "properly advised the petitioner regarding the initiation of the appeals process" and offered "to initiate the appeal process [on the petitioner's behalf] or forward the matter to the [Office of the Chief Public Defender]" We are not persuaded.

It is well established that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility

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of witnesses and the weight to be given to their testimony. . . . Thus, the court’s factual findings are entitled to great weight. . . . Furthermore, [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.) *David P. v. Commissioner of Correction*, 167 Conn. App. 455, 470, 143 A.3d 1158, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016).

Our careful review of the record, including the transcript of the habeas trial, reveals that the court’s findings are supported by the evidence in the record. At the habeas trial, Stawicki testified: “I explained to [the petitioner] . . . as I usually do . . . that I can file these papers; that either myself or somebody from the Public Defender’s Office—since I was an appointed special public defender in this case—would handle his appeal.” When Stawicki was asked specifically whether he would handle the petitioner’s appeal, he responded, “I believe the fairer characterization would be that somebody would handle his appeal. *If he would like me to handle it, I would handle it. And my recollection of the reaction was that he was so dissatisfied, he would take care of things himself.*” (Emphasis added.) On cross-examination, Stawicki reiterated, “I explained to [the petitioner] that he had a right of sentence review. I went through what the notice entailed. I also told [the petitioner] that he had a right to appeal. It was an absolute right. I told [the petitioner] that before he could file the appeal and have representation from the [Office of the Chief Public Defender] that there would have to be a waiver of costs and fees granted. My recollection is that [the petitioner] was not listening extremely closely. [The petitioner] was quite upset about his sentence,

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and he indicated to me that he didn't want me further handling his case; but I did go through the paperwork.”

It is clear that the court's factual findings set forth in its memorandum of decision derive directly from Stawicki's testimony at the habeas trial. Indeed, it is well established that the habeas court has discretion to credit or discredit the witnesses who testify at the habeas trial and is the “sole arbiter of . . . the weight to be given to [witness] testimony.” (Internal quotation marks omitted.) *David P. v. Commissioner of Correction*, supra, 167 Conn. App. 470; see also *Crespo v. Commissioner of Correction*, 292 Conn. 804, 810 n.5, 975 A.2d 42 (2009). In light of Stawicki's testimony, there was ample evidence in the record to support the habeas court's findings that Stawicki advised the petitioner “regarding the initiation of the appeals process” and offered “to initiate the appeal process [on the petitioner's behalf] or forward the matter to the [Office of the Chief Public Defender]” We conclude, therefore, that the court's factual findings were not clearly erroneous.

II

The petitioner's second claim is that the habeas court erred in concluding that Stawicki's representation of the petitioner was not deficient and, therefore, that the petitioner failed to satisfy the performance prong of *Strickland*. In particular, the petitioner contends that Stawicki's performance fell below an objective standard of reasonableness because Stawicki had an “affirmative duty” to preserve the petitioner's right to appeal or to forward the petitioner's file to the Office of the Chief Public Defender. We are not persuaded.

The United States Supreme Court has established that, although a lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner; see *Rodriguez v. United States*, 395 U.S. 327, 328–30, 332, 89 S. Ct. 1715,

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23 L. Ed. 2d 340 (1969); a defendant who explicitly instructs his attorney not to file an appeal on his behalf cannot later complain that, by following those instructions, his counsel performed deficiently. See *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (accused has ultimate authority to make certain fundamental decisions regarding case, including whether to take appeal).

In the present case, it is undisputed that the petitioner expressly discharged Stawicki following the imposition of his sentence. Specifically, the petitioner told Stawicki that “he didn’t want [Stawicki] to handle his file any longer” and that “he wanted [Stawicki] to have nothing more to do with his case. Period.” In light of these statements, it was reasonable for Stawicki to believe, based on his experience representing criminal defendants,⁵ that initiating an appeal on the petitioner’s behalf would contradict the petitioner’s explicit instructions and violate his ethical duty to the petitioner.⁶

⁵ Stawicki testified that he had previously represented clients who instructed Stawicki not to file an appeal on their behalf. Specifically, Stawicki testified that he “had several clients who did not want appeals. I’ve had others who, although they’ve been unhappy with the result, have still had me file appeals. I’ve had some just have me file the waiver of costs and fees, and then I send . . . my file down to New Haven to the appellate office.” Accordingly, Stawicki understood the petitioner’s statements that he did not want Stawicki to “handle his file any longer” or “have [anything] more to do with his case” as explicit instructions not to file the petitioner’s appeal.

⁶ We note that the petitioner’s instruction that Stawicki “play no further role” in handling his case distinguishes the present situation from our Supreme Court’s decision in *Fredericks v. Reincke*, 152 Conn. 501, 208 A.2d 756 (1965), on which the petitioner relies. In that case, the special public defender appointed to represent the plaintiff disregarded the plaintiff’s explicit request to pursue an appeal on his behalf. *Id.*, 503–504. Rather, the plaintiff’s counsel determined that the plaintiff’s appeal was frivolous and withdrew from the representation. *Id.*, 504. Our Supreme Court, relying on *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), held that “when the special public defender who conducted the plaintiff’s defense at his trial came to the conclusion that he could not conscientiously proceed with the appeal which he had taken to preserve the plaintiff’s rights, and for which he had obtained an extension of time within which to file the papers essential to the processing of the appeal, and had notified both

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Nevertheless, the petitioner contends that Stawicki had a professional responsibility, even after being discharged from the representation, to either preserve the petitioner's appellate rights, contact the Office of the Chief Public Defender concerning the petitioner's appellate rights, or better explain the nature of the appeals process. In support of his claim, the petitioner cites several professional rules and guidelines⁷ to

the plaintiff and the court of his decision, the plaintiff was entitled to have competent counsel appointed to represent him on the appeal." *Fredericks v. Reincke*, supra, 505. In the present case, Stawicki was prepared to either represent the petitioner on appeal, or to forward the petitioner's file to the Office of the Chief Public Defender, so that another attorney could represent the petitioner throughout the appeals process. The petitioner, however, discharged Stawicki from the representation and informed Stawicki that "he would take care of things himself." We cannot conclude that Stawicki performed unreasonably by following the petitioner's explicit instruction.

⁷In particular, the petitioner cites to the Connecticut Public Defender Services Commission Guidelines on Indigent Defense §§ 1.3 and 10.2 (guidelines); available at <https://portal.ct.gov/-/media/OCPD/Important-Information/PDGuidelinespdf.pdf> (last visited June 16, 2022); and rules 1.4 and 1.16 of the Rules of Professional Conduct. The Public Defender Services Commission, however, did not promulgate the guidelines until 1997, two years after the habeas court denied the petitioner's writ of habeas corpus. See Division of Public Defender Services, "30 Years in Review," available at <https://portal.ct.gov/OCPD/Org-and-Admin/30-Years-in-Review> (last visited June 16, 2022). Accordingly, the court could not have considered the guidelines in determining that Stawicki rendered adequate performance.

At the time of the petitioner's habeas trial, rule 1.4 of the Rules of Professional Conduct provided in relevant part: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information . . . [and] shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rules of Professional Conduct (1978-97) 1.4.

At the time of petitioner's habeas trial, rule 1.16 of the Rules of Professional Conduct provided in relevant part: "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . .

(3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) The client has used the lawyer's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

advance the argument that Stawicki's performance fell below an objective standard of reasonableness.⁸ The habeas court found, however, that Stawicki adequately had explained the nature of the appeals forms to the petitioner, instructed the petitioner that the forms would have to be filed in order to perfect his appeal, and informed the petitioner that either he or another attorney from the public defender's office could represent the petitioner on appeal. The court also determined that the petitioner had discharged Stawicki under rule 1.16 (a) (3) of the Rules of Professional Conduct and

(4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law." Rules of Professional Conduct (1978-97) 1.16.

⁸ In his brief to this court, the petitioner also cites to the United States Supreme Court decisions in *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), and *Garza v. Idaho*, U.S. , 139 S. Ct. 738, 203 L. Ed. 2d 77 (2019), to argue that Stawicki's failure to take reasonable steps to preserve his right to appeal (1) falls below an objective standard of reasonableness as measured by prevailing professional norms and (2) entitles him to a "presumption of prejudice." These decisions, however, were released several years after the habeas court issued its memorandum of decision denying the petitioner's writ of habeas corpus in 1995. The petitioner has not raised the claim, pursuant to the framework set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and adopted by our courts in *Thiersaint v. Commissioner of Correction*, 316 Conn. 89, 113, 111 A.3d 829 (2015) ("[w]e therefore adopt the framework established in *Teague*, with the caveat that, while federal decisions applying *Teague* may be instructive, this court will not be bound by those decisions in any particular case, but will conduct an independent analysis and application of *Teague*"), that the decisions in *Flores-Ortega* and *Garza* apply retroactively to his petition for a writ of habeas corpus. Accordingly, we decline to review such a claim. See *Jobe v. Commissioner of Correction*, 334 Conn. 636, 659 n.9, 224 A.3d 147 (2020).

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explicitly directed Stawicki to “play no further role in his case.” Accordingly, it is clear that Stawicki was prepared to assist the petitioner initiate the appeals process, but ultimately deferred to the petitioner’s instructions to not “handle his file any longer.”

Even if we assume that Stawicki violated one of the cited provisions, it is well established that professional rules and guidelines do not establish the constitutional requirements for adequate performance. Rather, “[p]revaling norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, *but they are only guides*. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” (Citation omitted; emphasis added.) *Strickland v. Washington*, supra, 466 U.S. 688–89.

Considering the circumstances of this case, particularly the court’s finding that the petitioner discharged Stawicki and directed him to take no further action on the petitioner’s behalf, we cannot conclude that Stawicki’s performance was so egregious that he was not “functioning as counsel” *Ostolaza v. Warden*, 26 Conn. App. 758, 761, 603 A.2d 768, cert. denied, 222 Conn. 906, 608 A.2d 692 (1992). Indeed, Stawicki explained the appellate process to the petitioner and offered either to represent the petitioner on appeal, or to forward the petitioner’s file to the Office of the Chief Public Defender. Despite these representations, the petitioner discharged Stawicki, instructed Stawicki to have nothing more to do with his case, and told Stawicki that he would personally handle his own appeal. To reiterate, a defendant has the ultimate authority to make certain fundamental decisions in his case, including the decision of whether to take an appeal. See *Jones v.*

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Barnes, supra, 463 U.S. 751. Therefore, it was not unreasonable for Stawicki to believe that the petitioner would represent himself on appeal or find alternative representation. We conclude, accordingly, that the habeas court did not abuse its discretion in determining that Stawicki did not render deficient performance.⁹

For the foregoing reasons, we conclude that the petitioner has failed to establish that the issues raised are debatable among jurists of reason, that they reasonably could be resolved by a court differently, or that they raise questions deserving further appellate scrutiny. Accordingly, the petitioner has failed to establish that the court abused its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

JOHN J. PARROTT ET AL. v.
AL L. COLON ET AL.
(AC 44178)

Bright, C. J., and Alexander and Bishop, Js.

Syllabus

The plaintiff tenants, J and S, sought, inter alia, an order to compel the defendants to use the money collected from them for rent to make certain repairs to their leased premises. The plaintiffs, who had entered into a residential lease agreement with the defendants, filed a complaint for housing code enforcement, pursuant to the applicable statute (§ 47a-14h), with the town in which the premises was located, alleging that the defendants had violated the statute (§ 47a-7) when they failed to

⁹ Because we conclude that the court properly found that the petitioner failed to demonstrate that Stawicki's performance fell below an objectively reasonable standard, we do not address the prejudice prong of the *Strickland* test. See *Anderson v. Commissioner of Correction*, supra, 201 Conn. App. 13 ("a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition" (internal quotation marks omitted)).

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repair and maintain certain conditions at the premises, including, *inter alia*, the swimming pool, furnace, and chimneys. The trial court determined that only the plaintiffs' alleged violations concerning the furnace and chimneys arguably fell within the statutory criteria. During the bench trial, W, a town building official, testified that he notified D, a sanitarian for the local health district that enforces the health code, of the complaint because the alleged issues were property maintenance matters to be addressed by the local health district. D attested that after reviewing the complaint and speaking to J on the phone, she concluded that the alleged violations did not rise to the level of a health, fitness, or habitability concern and further determined that the defendants could not be cited for any code violations as the furnace reached a level of sixty-five degrees, which was legally sufficient, especially in July, and the housing code did not require chimneys or fireplaces to be provided or maintained. In its memorandum of decision, the court determined, *inter alia*, that based on the record and the evidence presented, the plaintiffs failed to prove by a fair preponderance of the evidence that the violations alleged in the complaint rose to the level of violations materially affecting the health, safety, and habitability of the premises and, therefore, rendered judgment in favor of the defendants. Thereafter, the plaintiffs appealed to this court, arguing that their claims regarding the swimming pool, furnace, and chimneys did not need to constitute violations of the housing code or rise to a level affecting the health, safety, and habitability of the premises to prevail on their complaint pursuant to § 47a-14h alleging violations of § 47a-7. *Held* that the trial court's finding that the plaintiffs failed to establish that their allegations constituted violations of the housing code or materially affected the health, safety, and habitability of the premises as required under § 47a-7 was not clearly erroneous: to trigger the sanctions available for a violation of § 47a-7, the plaintiffs were required to show more than dissatisfaction with the condition and operation of the pool, furnace, and chimneys and, instead, were required to adduce evidence that established a substantial violation or series of violations of housing and health codes that created a material risk or hazard to the plaintiffs as occupants; moreover, the evidence in the record demonstrated that the plaintiffs failed to establish that any of their allegations constituted a violation of § 47a-7, as the furnace reached a legally sufficient level of temperature, the lack of repairs to the pool was not a health, safety, or habitability issue, especially considering that the parties' signed agreement provided that the pool was strictly an amenity, of which use was not guaranteed, and J testified that the plaintiffs did not suffer any injury or illness as a result of the defendants' alleged failure to clean the chimneys.

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Procedural History

Action for housing code enforcement, and for other relief, brought to the Superior Court in the judicial district of Middlesex, Housing Session at Middletown, and tried to the court, *Woods, J.*; judgment for the defendants, from which the plaintiffs appealed to this court. *Affirmed.*

Robert J. Hale, Jr., for the appellants (plaintiffs).

David E. Rosenberg, for the appellees (defendants).

Opinion

ALEXANDER, J. In this housing code enforcement action, the plaintiffs, John J. Parrott and Solanyi A. Parrott-Rosario, appeal from the judgment of the trial court, rendered after a bench trial, in favor of the defendants, Al L. Colon, Karen J. Colon (landlord), and Robert C. White & Company, LLC (property manager). The plaintiffs claim that the court incorrectly construed General Statutes § 47a-7 when it required them to prove by a fair preponderance of the evidence that their allegations constituted violations of the housing code or materially affected the health, safety and habitability of the premises. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. In July, 2018, the plaintiffs and the landlord, the owner of the premises, entered into a residential lease agreement for a single-family home located at 7 Redberry Lane in Portland (premises). The plaintiffs, as tenants, agreed to lease the premises from the landlord for the period of July 13, 2018, to June 30, 2019, for a rent of \$2500 per month. Thereafter, the plaintiffs and the landlord agreed to extend the period of the lease agreement to June 30, 2020. In July, 2019, the plaintiffs filed a complaint form with the town of Portland's Building & Land Use Division, in which they

alleged certain issues with the premises that the landlord and the property manager had failed to rectify. In August, 2019, the plaintiffs initiated this action¹ by filing a complaint for housing code enforcement pursuant to General Statutes § 47a-14h in which they alleged that the landlord had violated § 47a-7. In their complaint, the plaintiffs claimed that the defendants failed to repair and/or maintain: (1) the plumbing and filtration system for the swimming pool; (2) the furnace providing heat to the second floor; (3) the trash compactor; (4) the patio lights; (5) the front doorbell; and (6) the chimneys. The plaintiffs sought: (1) an order requiring the defendants to make repairs and/or an order requiring a receiver to collect rents and correct the identified conditions with the money collected for rent; (2) money, which may include reimbursement of the money paid to the court pursuant to § 47a-14h (h);² and (3) attorney's fees and expenses pursuant to General Statutes § 42-150bb.³ As a result of the plaintiffs' complaint and pursuant to § 47a-14h, the plaintiffs began paying their monthly rent to the clerk of the court instead of to the property manager. By the last day of trial, the plaintiffs had paid \$10,000 in rent payments to the clerk of the court.

A trial on the plaintiffs' complaint was held on September 9, October 25 and December 13, 2019. At trial,

¹ The plaintiffs maintained this action in the trial court as self-represented parties and brought this appeal in that capacity. After the appeal was filed, the plaintiffs retained counsel.

² General Statutes § 47a-14h (h) provides in relevant part: "On each rent due date on or after the date when the complaint is filed with the clerk of the court, or within nine days thereafter, the tenant shall deposit with the clerk of the court an amount equal to the last agreed-upon rent. . . . Payment to the clerk shall, for all purposes, be the equivalent of having made payment to the landlord himself."

³ General Statutes § 42-150bb provides in relevant part: "Whenever any contract or lease entered into . . . provides for the attorney's fee of the commercial party to be paid by the consumer, an attorney's fee shall be awarded as a matter of law to the consumer who successfully prosecutes or defends an action or a counterclaim based upon the contract or lease. . . ."

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the court heard testimony from John Parrott, Elizabeth Davidson, a sanitarian III for the Chatham Health District for the town of Portland, and Lincoln Bond White, a building official for the town of Portland.

The court summarized the relevant testimony as follows. “White testified that he received the complaint from [John Parrott] and sent a request for voluntary compliance to the [defendants]. After conferring with the [defendants], White determined that there were no violations of the state building code because the property was not under construction. He testified that, pursuant to the state building code, he was required to investigate complaints of newly constructed or newly installed items. White further testified that, as a building official with the town of Portland, he therefore had no authority to investigate the plaintiffs’ complaint and said issues were property maintenance matters to be addressed, instead, by the Chatham Health District. White testified that, upon reaching these conclusions, he notified Davidson, of the housing code enforcement division, of the plaintiffs’ complaint. White also testified that, based on his experience, nothing in the complaint rose to [the] level of [a] health, fitness or habitability [concern].

“Davidson testified that, as the official at the Chatham Health District that includes the town of Portland and enforces the Chatham Health Code, she reviewed the plaintiffs’ complaint and spoke with [John Parrott] over the phone. She concluded that none of the six violations alleged by the plaintiffs rose to the level of a health, fitness or habitability concern. As a result, Davidson determined that the [defendants] could not be cited for any code violations based on the nature of the plaintiffs’ complaint.”

The court determined that only the plaintiffs’ second and sixth alleged violations, concerning the furnace and

the chimneys, arguably fell within the statutory criteria. In analyzing the allegations regarding the second purported violation, that the defendants failed to repair and maintain the furnace on the second floor of the premises, the court noted that John Parrott “testified that the furnace did not heat the second floor of his house sufficiently. In response to this claim, Davidson testified that, on its face, failure to maintain a furnace in the middle of July was not indicative of a health, safety or habitability issue. Davidson also testified that, according to [John Parrott], with whom she had spoken . . . the furnace worked and there was heat being provided to the area in question on the second floor. Davidson testified that the furnace reached a level of sixty-five degrees, which was legally sufficient, particularly in July, when the complaint was made. . . . Davidson ultimately determined that there were no health concerns or health issues raised by the [plaintiffs] regarding the performance of the furnace.”

In analyzing the allegations regarding the sixth purported violation, that the defendants failed to have the chimneys cleaned, the court noted that John Parrott “testified that soot and smoke came down the chimney and into the house during a temperature inversion. In response to this claim, Davidson testified that nothing in the housing code requires chimneys or fireplaces to be provided or maintained. She further testified that cleaning of chimneys does not come under the jurisdiction of the public health code, and, therefore, does not create a health, safety or habitability issue [John Parrott] further testified that neither he nor anyone else residing in the home suffered any injury, respiratory problems, or required the care of a physician as the result of any problems with the chimneys.”

As to each of these claims, the court determined that “none of the plaintiffs’ claims are so significant or so substantial that living under said conditions would be

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detrimental to the safety and welfare of the [plaintiffs]” and found the testimony of the town officials to be “both compelling and persuasive.” It concluded that “[b]ased upon the record and the evidence presented at trial . . . the [plaintiffs] failed to prove by a fair preponderance of the evidence that the violations alleged in [the] complaint rise to the level of violations materially affecting the health, safety and habitability of the premises” The court accordingly rendered judgment for the defendants and ordered that the \$27,500 in rent payments that the plaintiffs paid to the clerk of the court be disbursed to the property manager.

On appeal, the plaintiffs contend that their claims regarding the swimming pool, furnace and chimneys⁴ need not constitute violations of the housing code or rise to the level of materially affecting the health, safety and habitability of the premises to prevail on their complaint brought pursuant to § 47a-14h alleging violations of § 47a-7. Specifically, the plaintiffs claim that there is nothing “to indicate that the landlord’s responsibilities under § 47a-7 are limited to those set forth in the applicable building and housing codes nor that they are limited to those materially affecting health and safety” and that “[a]n action by [an] individual tenant to enforce [a] landlord’s responsibilities under . . . § 47a-14h is not the same thing as an action for breach of the lease contract but neither is it incompatible with an action

⁴ The plaintiffs only challenge on appeal the court’s conclusion as to their claims relating to the swimming pool, the furnace and the chimneys, and have abandoned the remaining claims set forth in the complaint. In their brief, the plaintiffs acknowledge that they “did not present any substantial evidence to support their allegations with regard to the defendants’ failure to maintain the trash compactor, the patio lights, nor the front doorbell” They state, however, that they have “certainly proved, by a fair preponderance of the evidence, their factual allegations of the landlord’s failure to maintain (1) the pool; (2) the furnace providing heat to the second floor; and (6) the chimneys.” Therefore, we need not address the additional claims related to the trash compactor, patio lights and front doorbell.

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against the landlord for violation of the lease.” We disagree.

The issue in this case is whether, pursuant to § 47a-7, the plaintiffs were required to show that the alleged breaches of the lease constituted violations of the housing or building code, or a threat to the health, safety or habitability of the premises. “We are therefore faced with an issue of statutory construction requiring a conclusion of law. When construing a statute, we adhere to fundamental principles of statutory construction . . . over which our review is plenary.” (Internal quotation marks omitted.) 777 *Residential, LLC v. Metropolitan District Commission*, 336 Conn. 819, 827, 251 A.3d 56 (2021).

“When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common-law principles governing the same general

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subject matter” (Internal quotation marks omitted.) *Lagueux v. Leonardi*, 148 Conn. App. 234, 239–40, 85 A.3d 13 (2014).

We next set forth the relevant language of the statutes. Section 47a-14h⁵ permits a tenant to institute an action when a landlord has failed to perform his or her legal duties as required by § 47a-7. Section 47a-7 (a) provides: “A landlord shall: (1) Comply with the requirements of chapter 368o and all applicable building and housing codes materially affecting health and safety of both the state or any political subdivision thereof; (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition, except where the premises are intentionally rendered unfit or uninhabitable by the tenant, a member of his family or other person on the premises with his consent, in which case such duty shall be the responsibility of the tenant; (3) keep all common areas of the premises in a clean and safe condition; (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances and elevators, supplied or required to be supplied by him; (5) provide and maintain appropriate receptacles for the removal of ashes, garbage,

⁵ General Statutes § 47a-14h provides in relevant part: “(a) Any tenant who claims that the landlord has failed to perform his or her legal duties, as required by section 47a-7 . . . may institute an action in the superior court having jurisdiction over housing matters in the judicial district in which such tenant resides to obtain the relief authorized by this section and sections 47a-7a, 47a-20 and 47a-68

“(b) . . . The complaint shall also allege that at least twenty-one days prior to the date on which the complaint is filed, the tenant made a complaint concerning the premises to the municipal agency, in the municipality where the premises are located, responsible for enforcement of the housing code or, if no housing code exists, of the public health code, or to the agency responsible for enforcement of the code or ordinance alleged to have been violated, or to another municipal agency which referred such complaint to the municipal agency responsible for enforcement of such code or ordinance. . . .”

rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and (6) supply running water and reasonable amounts of hot water at all times and reasonable heat except if the building which includes the dwelling unit is not required by law to be equipped for that purpose or if the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant or supplied by a direct public utility connection.”

In construing the statute, this court previously has stated that § 47a-7 (a) requires that a landlord maintain his or her leased premises in “a fit and habitable condition.” *Visco v. Cody*, 16 Conn. App. 444, 451, 547 A.2d 935 (1988). Although this court in *Visco* did not address the specific claim raised by the plaintiffs in the present appeal, we are “bound by our previous judicial interpretations of the language and the purpose of the statute.” *Kasica v. Columbia*, 309 Conn. 85, 93–94, 70 A.3d 1 (2013). In *Visco*, the defendants, month-to-month tenants living in an apartment owned by the plaintiff, had requested that the plaintiff landlord make various repairs to their apartment. *Visco v. Cody*, supra, 445. The requests for repairs began in October, 1986, and were made at various times thereafter. *Id.* On April 14, 1987, the plaintiff caused a notice to quit to be served on the defendants and when the defendants failed to vacate, the plaintiff initiated a summary process action. *Id.* In their answer, the defendants raised a special defense in which they asserted that pursuant to General Statutes § 47a-20,⁶ the summary process action was

⁶ General Statutes § 47a-20 provides: “A landlord shall not maintain an action or proceeding against a tenant to recover possession of a dwelling unit, demand an increase in rent from the tenant, or decrease the services to which the tenant has been entitled within six months after: (1) The tenant has in good faith attempted to remedy by any lawful means, including contacting officials of the state or of any town, city or borough or public agency or filing a complaint with a fair rent commission, any condition constituting a violation of any provisions of chapter 368o, or of chapter 412, or of any other state statute or regulation, or of the housing and health ordinances of the municipality wherein the premises which are the subject

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commenced within six months of the defendants' request for repairs and, therefore, the action was barred. *Id.*, 446. At trial, the plaintiff testified that at the defendants' request, he "bled the bathroom radiator, tightened the bedroom windows and replaced the sash cords, weath-erstripped the front door to eliminate drafts, fixed some loose tiles on the bathroom floor and provided paint to the defendants so that they could repaint the kitchen. On the basis of this evidence, the trial court determined that the protection afforded by . . . § 47a-20 had not been triggered, because the requested repairs did not relate to defects which materially affect health and safety." (Internal quotation marks omitted.) *Id.*

On appeal, the defendants argued that they need only prove a good faith request for repairs in order to invoke the protection of § 47a-20. *Id.*, 446–47. This court affirmed the judgment of the trial court, explaining that "[i]f we were to adopt the defendants' argument, we would have to acknowledge a greater duty to make repairs as set forth in § 47a-20 than that which is specified in § 47a-7 (a). The latter obliges a landlord to maintain his leased premises in a fit and habitable condition; the former, under the defendants' construction, would also oblige the landlord to make any cosmetic or aesthetic repairs, solely at the tenant's good faith behest. This is not to say that a tenant does not have the right to request aesthetic repairs; rather, the tenant cannot avoid eviction, using § 47a-20 as a shield, on the grounds that he requested such repairs in good faith." *Id.*, 451. This court further explained that the repair at issue was not required to be of a substantial code violation. *Id.*, 453. "An adequate and fair balancing of the rights

of the complaint lie; (2) any municipal agency or official has filed a notice, complaint or order regarding such a violation; (3) the tenant has in good faith requested the landlord to make repairs; (4) the tenant has in good faith instituted an action under subsections (a) to (i), inclusive, of section 47a-14h; or (5) the tenant has organized or become a member of a tenants' union."

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involved may be achieved by requiring the requested repair to be one necessary to put and keep the premises in a fit and habitable condition.” (Internal quotation marks omitted.) *Id.* Additionally, this court stated that “the sanctions in these sections are not triggered until and unless evidence is adduced at trial establishing that there is a substantial violation or series of violations of housing and health codes creating a material risk or hazard to the occupant.” (Internal quotation marks omitted.) *Id.*, 450–51.

In the present case, the plaintiffs contend that their complaint specifically alleged violations of § 47a-7 (a) (4) and that this section does not require them to “prove a violation of the applicable building and housing codes or a condition materially affecting health and safety” The relevant subsection provides that a landlord shall “maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances and elevators, supplied or required to be supplied by him” General Statutes § 47a-7 (a) (4). This subsection plainly states that the landlord’s duty is to “maintain [the premises] in good and safe working order and condition” Such a standard clearly requires the plaintiffs to show more than their dissatisfaction with the condition and operation of the swimming pool, furnace and chimneys. Furthermore, as this court stated in *Visco v. Cody*, *supra*, 16 Conn. App. 450–51, the sanctions available for a violation of § 47a-7 “are not triggered until and unless evidence is adduced at trial establishing that there is a substantial violation or series of violations of housing and health codes *creating a material risk or hazard to the occupant*” (Emphasis added; internal quotation marks omitted.) Consequently, we conclude that to prevail in their action alleging violations of § 47a-7, the plaintiffs were required to demonstrate that the lack of repairs made to the swimming

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pool, furnace and chimneys affected the health, safety or habitability of the premises.

To the extent that the plaintiffs challenge the court's factual findings, after our thorough review of the record, we conclude that the court properly determined that the plaintiffs failed to establish that any of the alleged violations affected the health, safety or habitability of the premises, as required under § 47a-7. "In a case tried before the court, the trial judge is the sole arbiter of the credibility of witnesses and the weight to be afforded to specific testimony. . . . [When] the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. . . . 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Citation omitted; internal quotation marks omitted.) *Village Mortgage Co. v. Veneziano*, 175 Conn. App. 59, 69, 167 A.3d 430, cert. denied, 327 Conn. 957, 172 A.3d 205 (2017).

The plaintiffs contend that they have "presented substantial, uncontroverted evidence" to support their claims relating to the pool,⁷ the furnace and the chimneys. None of their evidence, however, related to the

⁷ The court determined that the plaintiffs' claims alleging violations of § 47a-7 relating to the pool did not have merit. At trial, the parties stipulated that "the pool was not in working order, at least not to the plaintiffs' satisfaction" They further stipulated that the plaintiffs had signed a pool/spa

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safety, health or habitability of the premises. To the contrary, the court credited Davidson’s testimony that the furnace did in fact function, and “reached a level of sixty-five degrees, which was legally sufficient, particularly in July” and that the failure to maintain the furnace in July did not constitute a threat to the health, safety or habitability of the premises. As to the chimneys, the court credited John Parrott’s testimony that the plaintiffs did not suffer any injury or illness as a result of any issues with the chimneys and Davidson’s testimony that the failure to clean the chimneys did not create a health, safety or habitability issue.

The court determined that none of the plaintiffs’ claims was “so significant or so substantial that living under said conditions would be detrimental to the safety and welfare of the [plaintiffs]” and found that the plaintiffs “failed to prove by a fair preponderance of the evidence that the violations alleged in [their] complaint [rose] to the level of violations materially affecting the health, safety and habitability of the premises” We conclude that there was sufficient evidence in the record to support the court’s determination that the plaintiffs failed to establish that any of their allegations constituted a violation of § 47a-7.

The judgment is affirmed.

In this opinion the other judges concurred.

addendum that provided that the pool was “strictly an amenity and that the use of the amenity is not guaranteed under the terms of the lease.” On the basis of this evidence, we conclude that the court properly determined that the plaintiffs’ allegations regarding the swimming pool did not constitute a violation of § 47a-7 because the lack of repairs made to the swimming pool did not affect the health, safety or habitability of the premises, especially in light of the parties’ agreement that the swimming pool was “strictly an amenity”

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ORAL CARE DENTAL GROUP II, LLC v.
SHANTEEMA PALLET ET AL.
(AC 43877)

Bright, C. J., Elgo and Suarez, Js.

Syllabus

The defendant Commission on Human Rights and Opportunities appealed from the judgment of the trial court vacating the damages award granted by its human rights referee to the defendant employee, P, for garden-variety emotional distress in a sexual harassment complaint against the plaintiff employer. During a public hearing before the referee, P testified that the harassing and discriminatory conduct of M, who was her direct supervisor while she was employed by the plaintiff, made her feel uncomfortable, stressed, and nervous and caused her to become depressed. On direct examination, she was not asked about, and did not testify regarding, any medical treatment that she received relating to her depression. On cross-examination, however, the plaintiff's counsel questioned P regarding the professional treatment that she sought as a result of the emotional distress M had caused and asked why she had not produced any medical records relating to such treatment. The plaintiff's counsel continued this line of questioning even after the referee ruled that P was not required to produce any medical records because she was claiming only garden-variety emotional distress. With the exception of her testimony in response to the questions of the plaintiff's counsel, P did not offer any evidence regarding her medical treatment. The referee found in favor of P and awarded her back pay and damages for garden-variety emotional distress. The plaintiff appealed to the trial court, which vacated the referee's damages award, and the commission appealed to this court. *Held* that the trial court erred when it vacated the referee's damages award because it incorrectly concluded that the plaintiff was prejudiced by P's failure to disclose her medical records: the referee did not abuse her discretion when she awarded P damages for garden-variety emotional distress because our Supreme Court in *Connecticut Judicial Branch v. Gilbert* (343 Conn. 90) made clear that, where a claimant limits her claim to one for garden-variety emotional distress damages, her medical records have no relevance, and P's allegations in her complaint and her testimony on direct examination, redirect examination, and in response to the referee's questions during the hearing were consistent with a claim for garden-variety emotional distress and the referee's final decision clearly indicated that her award was limited to damages for garden-variety emotional distress; moreover, a new hearing in damages was not required because, unlike in *Gilbert*,

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any prejudice that may have resulted from P's testimony regarding her psychiatric treatment and medication was caused solely by the plaintiff's counsel, who insisted on questioning P about her treatment even though the subject was not raised in her direct testimony and he was informed multiple times that such evidence was not relevant; furthermore, contrary to the plaintiff's claim, our Supreme Court in *Gilbert* did not state that a hearing on medical records was a prerequisite to allowing a complainant to present evidence of garden-variety emotional distress; accordingly, the plaintiff did not have a right to P's medical records and could not have been prejudiced by P's failure to produce them.

Argued January 6—officially released June 21, 2022

Procedural History

Appeal from the decision of the defendant Commission on Human Rights and Opportunities awarding the named defendant back pay and certain damages, brought to the Superior Court in the judicial district of New Britain, and tried to the court, *Cordani, J.*; judgment sustaining in part the appeal and vacating the damages award, from which the defendant Commission on Human Rights and Opportunities appealed to this court. *Reversed in part; judgment directed.*

Michael E. Roberts, human rights attorney, with whom, on the brief, was *Charles Krich*, principal attorney, for the appellant (defendant Commission on Human Rights and Opportunities).

David L. Gussak, with whom, on the brief, was *Gary Greene*, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. The defendant Commission on Human Rights and Opportunities (commission) appeals from the judgment of the trial court vacating the human rights referee's damages award for garden-variety emotional

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distress to the defendant Shanteema Pallet,¹ in her sexual harassment complaint against the plaintiff, Oral Care Dental Group II, LLC. On appeal, the commission claims that the court erred when it vacated the damages award after concluding that the plaintiff was prejudiced by Pallet's failure to produce certain medical records.² We agree with the commission and, accordingly, reverse in part the judgment of the trial court and remand the case to the trial court with direction to deny the plaintiff's administrative appeal.

The following facts, as found by the referee, and procedural history are relevant to our analysis of the commission's claim. Pallet worked as a marketer for the plaintiff from April 16 to December 15, 2012. During that time, Christopher Mertens was Pallet's direct supervisor. Shortly after Pallet began working for the plaintiff, Mertens started to sexually harass her, both at work and after hours. He regularly commented on Pallet's appearance, made sexually explicit comments to her, ordered her to dress a certain way, invited her to private lunches and dinners, and repeatedly called and texted her, often to ask her out on dates. At one point, after Mertens learned that Pallet was dating someone else, he punished her by cutting her hours and taking away her weekly gas cards. This led Pallet to tell Mertens, falsely, that she no longer had a boyfriend so that she could get her hours and gas cards back. After learning that Pallet was still dating her boyfriend, Mertens fired her in December, 2012.

Thereafter, "[o]n June 13, 2013, [Pallet] filed a complaint with the [commission] alleging employment based sexual harassment and discrimination in viola-

¹ Following her marriage, Pallet took the surname Graham but she did not amend her complaint to reflect that change. We thus refer to her as Pallet throughout this opinion.

² The plaintiff and Pallet both originally filed cross appeals in this action but those cross appeals were later withdrawn.

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tion of General Statutes §§ 46a-60³ and 46a-58 (a)⁴ with a deprivation of rights secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (Title VII),⁵ as its factual predicate.” (Footnotes added.) In her complaint, Pallet specifically alleged that Mertens had sexually harassed her by commenting on her appearance and her body, regularly asking her out on dates, and calling and texting her during nonwork hours. Pallet further alleged that Mertens had discriminated against her after she rebuffed his repeated advances, first by reducing her hours and taking away her gas cards, then by firing her, and that “the [plaintiff’s] actions have caused me to suffer monetary damages and emotional distress.” The plaintiff summarily denied the allegations of sexual harassment and discrimination in Pallet’s complaint.

³ General Statutes § 46a-60 (b) provides in relevant part: “It shall be a discriminatory practice in violation of this section . . . (1) [f]or an employer . . . except in the case of a bona fide occupational qualification or need . . . to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual’s . . . sex”

Although the legislature has amended § 46a-60 since the events underlying this appeal; see Public Acts 2017, No. 17-118, § 1; Public Acts 2017, No. 17-127, § 4; Public Acts 2019, No. 19-16, § 4; Public Acts 2019, No. 19-93, § 8; Public Acts 2021, No. 21-69, § 1; those amendments have no bearing on the outcome of this appeal. All references herein to § 46a-60 are to the current revision of the statute.

⁴ General Statutes § 46a-58 (a) provides in relevant part: “It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . sex”

Although the legislature has amended § 46a-58 since the events underlying this appeal; see Public Acts, Spec. Sess., June, 2015, No. 15-5, § 73; Public Acts 2017, No. 17-111, § 1; Public Acts 2017, No. 17-127, § 2; those amendments have no bearing on the outcome of this appeal. All references herein to § 46a-58 are to the current revision of the statute.

⁵ Title 42 of the United States Code, § 2000e-2 (a), provides in relevant part: “It shall be an unlawful employment practice for an employer- (1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex”

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The commission scheduled a public hearing, which was held before a referee on March 28, 29 and 30, 2017, and on June 30, 2017. At the hearing, Pallet first testified as to Mertens' harassing and discriminatory conduct.⁶ As to the effects Mertens' conduct had on her, Pallet testified on direct examination that Mertens' conduct made her uncomfortable and stressed her out. Specifically, she testified: "The way he wanted me to dress is not usually how I would dress. The shorter outfits when it was cold [were] uncomfortable, extremely uncomfortable. When he just gawked at me when I wore them was demeaning, like I felt less than, like, I felt . . . like a piece of meat, like, I felt dirty." She also testified that her communications with Mertens made her nervous and made her feel like her job was not secure unless she did what he wanted her to do. Pallet further testified that when Mertens fired her after learning that she was still dating her boyfriend: "[I]t just made me question . . . my ability to work around men and be comfortable doing it. It made me feel disgusted with myself and depressed." When asked to describe how the firing affected her life, Pallet testified that she "got really depressed" and felt "worthless . . ." She testified that her depression caused her to lose interest in things, including engaging in activities with her son, and affected her ability to raise him. She further testified that what happened to her while working for the plaintiff caused her to look for work in just "the medical field with elderly people that . . . maybe don't have any sexual wants or needs."

During her direct examination, Pallet was not asked about and did not testify about any medical treatment that she received to treat her depression. On cross-examination, however, the plaintiff's counsel asked Pallet whether she had ever sought professional help for

⁶ Despite the issuance of two subpoenas, Mertens failed to appear at the hearing.

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the emotional distress Mertens had caused, and Pallet admitted that she had seen a psychiatrist. The plaintiff's counsel then asked Pallet why she had not produced medical records related to that treatment despite the plaintiff requesting such documents.⁷ Pallet's counsel objected, and the referee ruled that, because Pallet was claiming garden-variety emotional distress only, she was not required to produce any medical records. Despite this ruling, the plaintiff's counsel continued to cross-examine Pallet about her psychiatric treatment, and Pallet testified in response to a question by the plaintiff's counsel that the psychiatrist had prescribed her Zoloft. The plaintiff's counsel then commented, apparently directed at Pallet's counsel, "[s]omething else you didn't produce my friend," which led the referee to again state that Pallet was not required to disclose her medical records. On redirect examination, Pallet was not asked any further questions and did not provide any further testimony regarding any medical treatment she received for her depression. Furthermore, although the referee asked Pallet a few questions about payments she received from the plaintiff during her employment, she did not ask questions about the emotional distress the plaintiff claimed or any issues of treatment brought out by the plaintiff's counsel during cross-examination. Pallet did not offer any other evidence regarding any treatment she received for her depression.

In a memorandum of decision dated May 16, 2018, the referee found in favor of Pallet, concluding that she had demonstrated "by a preponderance of the evidence [that she] suffered illegal sexual harassment"

⁷ During discovery, the plaintiff made a request for production of "copies of all medical reports or medical bills received by you for treatment, consultation, or diagnosis of injuries or conditions, which you claim are, or may be related to any claim for injuries you claim you were caused by the actions of the [plaintiff]." Pallet responded: "None."

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The referee awarded Pallet \$40,398 in back pay and \$25,000 in damages for garden-variety emotional distress. The referee's award made no reference to any medical treatment Pallet received for her depression.

Thereafter, the plaintiff appealed to the trial court. On appeal, the plaintiff challenged the referee's damages award for garden-variety emotional distress, claiming that (1) Connecticut does not recognize a claim for garden-variety emotional distress and Pallet did not allege such distress, (2) emotional distress and the associated damages were not proven, and (3) the plaintiff was prejudiced by Pallet's failure to produce her medical records.⁸ In their briefs to the trial court, Pallet and the commission argued that the referee's award of garden-variety emotional distress damages was proper because (1) a claim for garden-variety emotional distress damages has long been recognized and (2) proving such damages does not require medical records or expert testimony.

The court disagreed with the plaintiff's first and second claims but agreed that the plaintiff had been substantially prejudiced by Pallet's failure to produce her medical records. More specifically, the court held that the plaintiff was prejudiced because the lack of those records prevented it from fully understanding the treatment Pallet received and inhibited the plaintiff's ability to "effectively cross-examine [Pallet] and offer counter evidence." The court also held that "[l]imiting [Pallet's] claim to garden-variety emotional distress damages did not undo the prejudice" because, "[a]lthough emotional

⁸ In its appeal to the trial court, the plaintiff also challenged several other aspects of the referee's final decision, claiming that the referee (1) erred in awarding back pay despite the lack of evidence supporting such an award, (2) improperly made an adverse inference based on Mertens' failure to appear at the hearing, and (3) made numerous erroneous evidentiary rulings. The court rejected these additional claims, and the plaintiff does not challenge on appeal the court's decisions as to those claims.

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distress damages may be proven without the need for expert medical evidence, unjustifiably withholding discoverable evidence relevant to the claim and the related damages is a separate issue, and may still impact the ability to defend that claim.” On the basis of that prejudice, the court vacated the referee’s damages award for garden-variety emotional distress. The commission then appealed to this court.

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. “It is well established that [j]udicial review of [an administrative agency’s] action is governed by the Uniform Administrative Procedure Act [(UAPA) General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . [F]or conclusions of law, [t]he court’s ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts.” (Citation omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities v. Cantillon*, 207 Conn. App. 668, 672, 263 A.3d 887, cert. granted, 340 Conn. 909, 264 A.3d 94 (2021).⁹

⁹ The Supreme Court granted certification limited to the following issue: “Did the Appellate Court correctly conclude that the trial court had properly determined that the human rights referee adjudicating the underlying housing discrimination claim applied the proper legal principles in awarding the claimant ‘garden-variety’ damages for emotional distress in the amount of \$15,000 against the named defendant, a neighbor who repeatedly subjected the claimant to racially motivated verbal and physical harassment?” *Commission on Human Rights & Opportunities v. Cantillon*, 340 Conn. 909, 909–10, 264 A.3d 94 (2021).

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Claims for garden-variety emotional distress “are cognizable under Connecticut law.” *Connecticut Judicial Branch v. Gilbert*, 343 Conn. 90, 127 n.25, 272 A.3d 603 (2022). Such claims “refer to claims for compensation for nothing more than the distress that any healthy, well-adjusted person would likely feel as a result of being so victimized” (Internal quotation marks omitted.) *Equal Employment Opportunity Commission v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 121 (W.D.N.Y. 2009); see also *Ruhlmann v. Ulster County Dept. of Social Services*, 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000) (“[g]arden-variety emotional distress is that which [is] simple or usual”). A plaintiff’s recovery for garden-variety emotional distress “is not preconditioned on whether [the plaintiff] underwent treatment, psychiatric or otherwise.” (Internal quotation marks omitted.) *Olsen v. County of Nassau*, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009). Instead, “the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. . . . Such claims typically [lack] extraordinary circumstances and are not supported by any medical corroboration.” (Citations omitted; internal quotation marks omitted.) *Id.*; see also *Patino v. Birken Mfg. Co.*, 304 Conn. 679, 706–707, 41 A.3d 1013 (2012) (plaintiff’s testimony about mental suffering was sufficient on its own to support claim for garden-variety emotional distress).

On appeal, the commission claims that the court erred when it found that the plaintiff was substantially prejudiced by Pallet’s failure to disclose her medical records because Pallet was not required to disclose those records, given that she was asserting a claim only for garden-variety emotional distress. We agree.

Our Supreme Court’s recently released decision in *Connecticut Judicial Branch v. Gilbert*, *supra*, 343

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Conn. 90, is instructive. In *Gilbert*, the complainant, a judicial marshal who was employed by the Connecticut Judicial Branch, “brought a claim with the commission alleging that another judicial marshal, Gordon Marco, subjected her to severe and pervasive sexual harassment and unwanted sexual contact, potentially rising to the level of sexual assault, at various times between 2006 and 2012, while she was stationed primarily at the Danielson courthouse. The complainant alleged that the branch discriminated against her on the basis of her gender by, among other things, subjecting her to a hostile work environment, failing to adequately investigate her allegations, and failing to take adequate remedial steps to protect her. The complainant also claimed that the branch had retaliated by altering the conditions of her employment in response to her complaint . . . [by relocating her to courthouses that were] significantly farther from her residence.” *Id.*, 97–98.

After the public hearing before the commission, the referee found that the complainant’s allegations were substantiated. *Id.*, 98. The referee awarded the complainant back pay with prejudgment and postjudgment interest, \$47,637 in attorney’s fees, and \$50,000 in damages for emotional distress. *Id.* The referee also granted the complainant injunctive relief in the form of an order that “[t]he [branch] shall give the complainant the option of returning to the Danielson courthouse.” *Id.*

Thereafter, the branch appealed to the trial court claiming, inter alia, that “the referee’s award of emotional distress damages . . . was improper because the complainant refused to provide the branch with her psychological and medical records, allegedly in violation of the referee’s discovery orders” *Id.*, 99. The court agreed with the branch’s discovery claim and, accordingly, vacated the referee’s damages award for emotional distress. *Id.*

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On appeal, our Supreme Court reversed the trial court's judgment with respect to, inter alia, its decision to vacate the damages award.¹⁰ *Id.*, 97. The court first provided some additional facts and procedural history relevant to this issue, which we summarize at length. During the proceedings before the commission, the branch issued the following discovery request to the complainant and the commission: " 'Please produce all medical records, counseling records, office notes, or other documents, if any, identifying any and all medical professionals who[m] the complainant consulted with or was treated by for emotional damages and/or physical damages that the complainant contends are related to [her] claims of discrimination.' " *Id.*, 128. No records were ever produced in response to this request. *Id.* The complainant's initial witness lists, however, included a therapist and a psychologist who had provided mental

¹⁰ In the branch's appeal to the trial court, the branch made the following additional claims of error: "(1) . . . prior to 2019, the commission was not authorized to award attorney's fees and emotional distress damages to victims of employment discrimination under either § 46a-58 (a) or § 46a-60, (2) the award of prejudgment and postjudgment interest against the state under [General Statutes] § 46a-86 (b) is barred by the state's sovereign immunity . . . and (4) the referee exceeded her legal authority in ordering the branch to reinstate the complainant to her position at the Danielson courthouse." (Footnote omitted.) *Connecticut Judicial Branch v. Gilbert*, supra, 343 Conn. 99.

The trial court disagreed with the branch's first claim, concluding that, although "emotional damages and attorney's fees are unavailable for violations of § 46a-60 that occurred before 2019," such remedies are available to victims of employment discrimination when those victims also allege violations of federal employment discrimination laws, as was the case in *Gilbert*. *Id.*, 99–100. With respect to the second claim, the court again disagreed with the branch, finding that "the state ha[d] waived its sovereign immunity as to prejudgment and postjudgment interest for civil rights violations." *Id.*, 100. As to the branch's fourth claim, the court agreed with the branch and, accordingly, also vacated the referee's injunction. *Id.*, 99.

Our Supreme Court then affirmed the trial court's holding on the first claim, reversed the trial court's holding on the second claim, and remanded for further proceedings on the fourth claim. *Id.*, 97. Because none of these holdings is central to the issues implicated in the present case, we do not discuss them in detail in this opinion.

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health treatment to the complainant and whom she intended to call in support of her claim for emotional distress damages. *Id.* The branch objected to this proposed testimony because the complainant had failed to provide any records related to either witness. *Id.*

The referee in *Gilbert* ruled on the branch's objection off the record and, according to the branch's characterization of that ruling, ordered that “*if the complainant intended on pursuing anything other than garden-variety emotional distress [damages], she needed to provide copies of her psychological or mental health records.*” (Emphasis in original.) *Id.*, 129. Despite this order, the complainant still did not produce her complete medical records and, instead, ultimately produced a single record, which she alleged was her psychologist's original treatment notes. *Id.*, 129–30. Accordingly, prior to the hearing, the referee ruled that the complainant could “put on evidence in support of her claim for garden-variety emotional distress but could not introduce medical records or other treatment related evidence of emotional distress damages [unless the complainant first produced her entire medical records].” *Id.*, 131.

“At the hearing, the branch repeatedly objected to the admission of the complainant's evidence [as to garden-variety emotional distress] on two grounds. First . . . the branch argued that the complainant should be barred from introducing evidence even of garden-variety emotional distress. It contended that, without access to the complainant's medical records, it could not adequately cross-examine her regarding those claimed damages. The referee overruled those objections, stating that, in her view, the branch had an adequate opportunity for cross-examination without the records. Accordingly, the complainant was permitted to testify that she felt ‘dirty,’ victimized, embarrassed, ashamed, and fearful as a result of Marco's conduct

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and the branch's inadequate response. She [also] testified that, following the incidents, she had ceased to be a happy person; she suffered anxiety and nervousness, and would wake in the night crying. . . .

“Second, the branch contended that some of the testimony by the complainant and her lay witnesses crossed the threshold from garden-variety to treatment related emotional distress damages because the testimony occasionally alluded to or directly referenced the complainant's use of mental health counseling and pharmaceuticals to treat her emotional distress. The referee's response to this second category of objections was not a model of clarity or consistency. When the branch objected to the complainant's testimony that her physician had prescribed daily Lexapro for depression and anxiety, the referee allowed her to testify as to the medication but not the amount. When the branch objected to testimony that the complainant saw [a therapist], the referee allowed the complainant . . . to testify that she went to [a therapist] but not about the ‘particulars’ as to what occurred at the therapist's office. When the branch objected to testimony that the complainant was taking Tylenol PM and prescription sleep aids, the referee responded: ‘We really can't get into too much medical information, because we're not doing this based on her treatment. . . . [L]et's rephrase; just the over-the-counter [medications] that you know of . . . which does not have anything to do with records.’ Finally, when the branch objected to testimony regarding the complainant's use of Xanax, the referee ruled: ‘I think we're not getting into physician visits. I outlined in the beginning what garden-variety emotional distress is and how it's analyzed. I really don't think [that] taking a medic[ation] necessitates a review of medical records, but I don't want to get into more treatment or anything that happened with a doctor. . . . I really don't understand [the branch's] objection because . . . I'm not letting in any evidence that pertains to [the complainant's]

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treatment. I know [that her husband] mentioned a prescription. We can strike that prescription . . . from the record” *Id.*, 131–33.

In her memorandum of decision, the referee in *Gilbert* largely avoided any mention of the complainant’s use of medication or counseling services. *Id.*, 133. Her factual findings, however, did include “three references to the complainant’s use of ‘a prescription drug’ or ‘medication’ to treat insomnia, anxiety, and chest pains arising from the alleged abuse.” *Id.*, 133–34. “Ultimately, the referee found that the complainant had suffered emotional distress as a result of the branch’s discriminatory treatment . . . [and] awarded the complainant \$50,000 in emotional distress damages.” *Id.*, 134.

On appeal to the trial court, the court concluded that the referee’s damages award was an abuse of discretion and, accordingly, vacated the award, stating: “[The complainant] withheld clearly discoverable, nonprivileged information without justification and despite the referee’s order otherwise. . . . [T]he court cannot allow such unilateral, unjustified and fundamentally unfair action to go without consequence, particularly when it prejudices the other side. . . . The referee should have precluded all evidence concerning emotional and physical distress unless the proper discovery was provided. The referee’s decision to allow garden-variety emotional distress evidence was made pursuant to improper procedure [and] was a clear error of law” *Id.*¹¹

¹¹ We note that the same trial court, *Cordani, J.*, decided the administrative appeals in both *Gilbert* and the present case. We further note that the quoted language of the trial court’s order in *Gilbert* is strikingly similar to the court’s order in the present case: “Complainant withheld clearly discoverable, nonprivileged information without justification. The court cannot allow such unilateral, unjustified and fundamentally unfair action to go without consequence, particularly when it prejudices the other side.” These similarities make our Supreme Court’s analysis and decision in *Gilbert* all the more relevant in the present case.

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The Supreme Court in *Gilbert* disagreed, concluding that “the trial court’s judgment rests on a flawed analysis.” *Id.*, 134. According to the court, the complainant’s testimony on garden-variety emotional distress was proper despite her failure to disclose the majority of her medical records because when complainants are seeking damages only for garden-variety emotional distress, they are not required to disclose their medical records. *Id.*, 136–38 (complainant was permissibly “given a choice by the referee that allowed her to refuse production of [her] medical records without violating the [referee’s] order [which limited the complainant to garden-variety emotional distress damages]”).¹² Thus, a complainant claiming only garden-variety emotional distress who fails to disclose his or her medical records properly is allowed to testify about “the sorts of everyday emotional and physical reactions to trauma that a jury reasonably could be expected to assess without the assistance of expert testimony . . . [as long as that testimony] does not involve a claim . . . that the emotional distress required professional medical/psychological diagnosis, treatment, or medication.” *Id.*, 127 n.25, 136–38. Testimony regarding a complainant’s use of medications, counseling, or other medical treatment, however, “crosses the line into treatment related emotional distress and, thus, places [the complainant’s] medical history at issue.” *Id.*, 138. In such cases, a complainant is required to disclose his or her medical records in order to obtain a damages award for that treatment related emotional distress. See *id.*

¹² We note that this holding in *Gilbert* is consistent with the holding of the United States Court of Appeals for the Second Circuit on the same issue. See *In re Sims*, 534 F.3d 117, 134, 141 (2d Cir. 2008) (when complainant makes claim only for garden-variety emotional distress, complainant is not required to disclose, and opposing party does not have legal right to, complainant’s medical or psychiatric records); see also *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390, 415, 944 A.2d 925 (2008) (Connecticut’s appellate courts “review federal precedent concerning employment discrimination for guidance in enforcing our own antidiscrimination statutes”).

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Accordingly, in *Gilbert*, the complainant's testimony that she felt " 'dirty,' victimized, embarrassed, ashamed, and fearful," suffered "anxiety and nervousness," and "ceased to be a happy person," all because of the harassment; *id.*, 132; was properly admitted and could form the basis for the referee's garden-variety emotional distress damages award, even though the complainant produced almost none of her medical records, because such testimony was limited to garden-variety emotional distress. See *id.*, 136–38; see also *Equal Employment Opportunity Commission v. Nichols Gas & Oil, Inc.*, supra, 256 F.R.D. 121 (garden-variety emotional distress is distress that " 'any healthy, well-adjusted person would likely feel as a result of being . . . victimized' "). The complainant's testimony about "her use of various over-the-counter and prescription medications to treat her insomnia and anxiety," however, crossed the line from garden-variety emotional distress into treatment related emotional distress. See *Connecticut Judicial Branch v. Gilbert*, supra, 343 Conn. 138–39. Consequently, the court held that, given the lack of medical records, allowing the complainant to testify about medications she had taken was an abuse of discretion because such testimony was not limited to garden-variety emotional distress. *Id.* The court further held that, although it was a close call, the erroneous admission of this testimony was not harmless because the referee had made several factual findings regarding the complainant's need for medication and the court was unable to conclude "that the improperly admitted evidence did not factor into her damages calculation." *Id.*, 139–40. Therefore, the court remanded the matter for a new hearing in damages where the complainant would be allowed to present evidence only of garden-variety emotional distress and the referee would be limited to awarding damages for such emotional distress. *Id.*, 140.

On April 27, 2022, following the release of our Supreme Court's opinion in *Gilbert*, we ordered the

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parties in the present case to submit supplemental briefs addressing the impact, if any, of *Gilbert* on the commission's claim on appeal. The parties thereafter filed supplemental briefs in accordance with this court's order. In the supplemental brief filed by the commission, the commission argues that *Gilbert* supports its claim that the trial court erred in vacating Pallet's damages award because the result in *Gilbert* makes clear that, when a complainant seeks only garden-variety emotional distress damages—as Pallet did here—the complainant is not required to disclose his or her medical records. The commission also argues that a new damages hearing is not required in the present case because here, unlike in *Gilbert*, (1) it was only opposing counsel who solicited testimony about Pallet's medical history and (2) the referee did not reference that medical history in either her findings or her decision. Conversely, the supplemental brief filed by the plaintiff claims that the present case is distinguishable from *Gilbert* and that *Gilbert* “does not impact the decision rendered by the court below which is the subject of [the present] appeal.” More specifically, the plaintiff contends that the court's decision to vacate Pallet's damages award was proper, even in light of *Gilbert*, because the court “found that discoverable documents were inappropriately withheld . . . [which] clearly prejudiced the [plaintiff]” and the referee in the underlying proceedings never held a hearing on Pallet's medical records. We agree with the commission.

On the basis of our Supreme Court's decision in *Gilbert*, we conclude that the court in the present case erred when it held that the plaintiff was prejudiced by Pallet's failure to produce her medical records because Pallet's allegations and her direct testimony at the public hearing were limited to garden-variety emotional distress, and the referee's decision and damages award were also so limited. We further hold that, unlike in

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Gilbert, a new damages hearing is not required because the plaintiff is in no position to complain about Pallet's testimony regarding medical treatment when its counsel, after being instructed that such evidence was not relevant, insisted on asking questions that resulted in that testimony, and there is nothing in the record that establishes that the referee relied on such evidence when awarding Pallet damages for garden-variety emotional distress.

Specifically, in the present case, unlike in *Gilbert*, Pallet never gave any indication throughout the entire proceedings before the commission that she was seeking anything other than garden-variety emotional distress damages. In her complaint, Pallet stated that she suffered emotional distress as a result of Mertens' harassment. The complaint did not assert an independent cause of action for emotional distress or any claims for a specific mental disorder or condition. Further, Pallet did not allege that Mertens' conduct had a significant impact on her physical health. Accordingly, the allegations in her complaint were consistent with a claim for garden-variety emotional distress. See *Connecticut Judicial Branch v. Gilbert*, supra, 343 Conn. 132, 136–39 (testimony that sexual harassment caused anxiety and sadness was consistent with claim for garden-variety emotional distress); see also *Safeco Ins. Co. of America v. Vecsey*, 259 F.R.D. 23, 30 (D. Conn. 2009) (complainant's allegation of mental distress, "which [was] unaccompanied by any independent cause of action for mental distress . . . or claim for a specific mental disorder or condition," was claim for garden-variety emotional distress); *Olsen v. County of Nassau*, supra, 615 F. Supp. 2d 47 (treatment related emotional distress claims generally involve "outrageous or shocking discriminatory conduct or a significant impact on the [complainant's] physical health" (internal quotation marks omitted)).

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Pallet’s testimony during the hearing, specifically that Mertens’ harassment caused her to feel nervous, dirty, “like a piece of meat,” worthless and disgusted with herself, and caused her to be depressed and to lose interest in things, also was consistent with a claim for garden-variety emotional distress. See *Connecticut Judicial Branch v. Gilbert*, supra, 343 Conn. 132, 136–39; see also *Equal Employment Opportunity Commission v. Nichols Gas & Oil, Inc.*, supra, 256 F.R.D. 121 (garden-variety emotional distress refers to distress that “‘any healthy, well-adjusted person would likely feel as result of being . . . victimized’”). Unlike the complainant in *Gilbert*, who erroneously was allowed to testify, over the branch’s objection, that she had taken medication to manage her anxiety and depression; *Connecticut Judicial Branch v. Gilbert*, supra, 138–39; Pallet did not testify on direct examination at all about any medical or psychiatric treatment. The topic was never raised by her, her counsel, or the referee. Instead, Pallet merely testified about how Mertens’ harassment made her feel. Such testimony, in the absence of any mention of medical intervention, is not enough to cross the line into testimony about treatment related emotional distress. See *id.*, 132, 136–39 (complainant’s testimony that “she had ceased to be a happy person” constituted garden-variety emotional distress). Instead, such testimony is consistent with a claim for garden-variety emotional distress. See *id.*; see also *In re Sims*, 534 F.3d 117, 133–34 (2d Cir. 2008) (complainant who states that he or she suffers from depression makes claim only for garden-variety emotional distress). Pallet did not offer any other evidence regarding her medical treatment.

The plaintiff is correct that, at one point during the proceedings, Pallet testified that she had seen a psychiatrist and had been prescribed Zoloft. This testimony, however, occurred during cross-examination and was

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in response to questions that the *plaintiff's counsel* asked, despite being repeatedly cautioned by the referee that the proceeding was limited to garden-variety emotional distress. The fact that Pallet's testimony about medical treatment occurred during cross-examination distinguishes it from the testimony that our Supreme Court found improper in *Gilbert*. In *Gilbert*, it was the complainant and her witnesses who introduced inadmissible evidence about her use of medication through their testimony on direct examination, over the branch's objections. *Connecticut Judicial Branch v. Gilbert*, supra, 343 Conn. 138–39. In the present case, however, any prejudice that might have resulted from Pallet's testimony about psychiatric treatment and medication was caused solely by the plaintiff because its counsel inquired into Pallet's medical treatment and elicited testimony about that treatment even though the subject was never raised in Pallet's direct testimony and the referee repeatedly told the plaintiff's counsel that such evidence and records were not relevant. We simply are unpersuaded by the plaintiff's claim of harm that was self-inflicted.

Furthermore, on redirect examination, Pallet was not asked any questions about the treatment the plaintiff's counsel brought out on cross-examination. Moreover, although the referee asked Pallet questions on another topic, she did not ask her questions about any medical treatment she received.

Finally, the referee in the present case took great pains to ensure that the hearing and her eventual decision and damages award were limited to garden-variety emotional distress. During the hearing, the referee repeatedly characterized Pallet's complaint as alleging only garden-variety emotional distress, a characterization that neither Pallet nor her counsel ever disputed. Moreover, and again unlike in *Gilbert*, the referee in

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the present case did not make any factual findings about the complainant receiving psychiatric treatment or taking medication to manage her emotional distress. In fact, a review of the referee's final decision makes clear that the referee's damages award was limited to damages for garden-variety emotional distress and that the award was exclusively based on Pallet's testimony about the depression and other distress she had experienced because of Mertens' harassment.

Accordingly, because it is clear from the record that Pallet was making a claim only for garden-variety emotional distress, she was not required to disclose her medical records and the plaintiff, thus, was not entitled to receive those records. See *id.*, 136–38 (complainant is limited to garden-variety emotional distress damages when he or she declines to provide his or her full medical records); see also *Olsen v. County of Nassau*, *supra*, 615 F. Supp. 2d 46 (“[i]n garden-variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff” (internal quotation marks omitted)). Therefore, because the plaintiff did not have a right to Pallet's medical records, the plaintiff could not have been prejudiced by Pallet's failure to produce those records.¹³

We are equally unpersuaded by the plaintiff's claim, made in its supplemental brief, that Pallet should not have been allowed to present evidence on garden-variety emotional distress at all because the referee never held a hearing to determine which medical records Pallet was or was not required to produce. According to the plaintiff, such a hearing was held in *Gilbert* and it was only because of that hearing that the complainant was allowed to present evidence on garden-variety emo-

¹³ We also note that, at oral argument before this court, the plaintiff conceded that it would have no right to Pallet's medical records if all that Pallet was claiming was garden-variety emotional distress.

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tional distress. Thus, the plaintiff contends that, because no such hearing was held in the present case, Pallet was barred from testifying about garden-variety emotional distress. We disagree. Nowhere in *Gilbert* did our Supreme Court state that a hearing on medical records is a prerequisite to a complainant being allowed to present evidence of garden-variety emotional distress. See *Connecticut Judicial Branch v. Gilbert*, supra, 343 Conn. 136–40. To the contrary, the court’s holding in *Gilbert* is clear that when a claimant limits her claim to one for garden-variety emotional distress damages, her medical records have no relevance. See *id.* Hence, there is no need for such a hearing.

In sum, the referee did not abuse her discretion when she awarded Pallet damages for garden-variety emotional distress because, as explained in *Gilbert*, Pallet was permitted to testify about her depression without first disclosing her medical records, given that such testimony went to garden-variety, and not treatment related, emotional distress. See *id.*, 136–38. In addition, the plaintiff was not prejudiced by Pallet’s failure to disclose her medical records because Pallet confined her claim and evidence to garden-variety emotional distress and the referee confined the hearing, her decision, and her damages award to garden-variety emotional distress, which the referee had every right to do. See *id.* (referees can properly limit proceeding to claim for garden-variety emotional damages). Furthermore, any prejudice that the plaintiff may have experienced was caused solely by its counsel’s actions and cannot properly be attributed to either Pallet or the referee. Last, a new hearing in damages is not required in the present case, even though one was required in *Gilbert*, because the record here makes clear that the referee did not rely on any testimony about treatment related emotional distress in reaching her decision. Thus, the court erred when it vacated the referee’s damages award because

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it incorrectly concluded that the plaintiff was prejudiced by Pallet's failure to disclose her medical records.¹⁴

The judgment is reversed with respect to the decision vacating the damages award, and the case is remanded to the trial court with direction to deny the plaintiff's administrative appeal.

In this opinion the other judges concurred.

EARL W. SWAIN *v.* TINA N. SWAIN
(AC 44591)

Elgo, Alexander and Harper Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court granting in part the defendant's motion to modify the existing child support, custody, visitation and parental access orders with regard to the parties' four minor children. Pursuant to those orders, the plaintiff had sole legal custody and primary physical residence of the children, with a specific visiting and access schedule for the defendant and payment of child support from the defendant to the plaintiff. The defendant's motion requested, *inter alia*, sole custody of the children and a suspension of the support order. After a hearing, the court granted the defendant's motion to modify as to access and visitation, issued a revised parenting schedule and reduced her weekly support obligation. On the plaintiff's appeal to this court, *held* that the plaintiff could not prevail on his claim that the trial court improperly modified the orders as to visitation, the parental access plan and child support because the defendant's motion sought to modify only custody: the plain language of the defendant's motion placed before the court the issues of custody, visitation and the parental access schedule, the defendant testified at the hearing that she had difficulties complying with the orders as to child support and the parental access schedule and proposed a new visitation and access schedule, and the plaintiff declined to present rebuttal witnesses to the defendant's testimony; moreover, none of the

¹⁴ In light of our conclusion that the court erred in vacating the referee's damages award because the plaintiff was not prejudiced by Pallet's failure to disclose her medical records, we do not address the commission's alternative argument that the plaintiff did not adequately brief its claim of prejudice before the trial court.

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requests by the plaintiff's counsel for clarifications of the court's oral ruling concerned the scope of the ruling compared to the motion to modify.

Argued February 1—officially released June 21, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Shluger, J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Diana, J.*, granted in part the defendant's motion to modify child support, custody and visitation, and the plaintiff appealed to this court. *Affirmed.*

Gregory A. Allen, with whom were *Lauren E. Higgs*, and, on the brief, *Alissa M. Korwek*, for the appellant (plaintiff).

Opinion

ELGO, J. The plaintiff, Earl W. Swain, appeals from the judgment of the trial court granting in part a post-judgment motion to modify filed by the self-represented defendant, Tina N. Swain.¹ On appeal, the plaintiff claims that the court improperly modified the existing orders as to visitation, the parental access plan, and child support because the defendant's motion to modify sought only to modify custody.² We disagree and, accordingly, affirm the judgment of the court.

¹ The defendant, now known as Tina Perez-Ocasio, has not participated in this appeal. Accordingly, we decide this appeal on the basis of the record, the plaintiff's appellate brief, and the plaintiff's oral argument.

² The plaintiff organizes his appeal into two different claims challenging the court's orders on (1) visitation and parental access, and (2) child support. To avoid substantive overlap, we consider the plaintiff's claims together. See *Rozbicki v. Gisselbrecht*, 152 Conn. App. 840, 845, 100 A.3d 909 (2014) (reorganizing claims on appeal), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015).

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The following facts and procedural history are relevant to our resolution of this appeal.³ On December 15, 2015, the court, after a contested trial, rendered judgment dissolving the parties' marriage by way of memorandum of decision. The court originally awarded the parties' joint legal custody of their four minor children, who were born in 2007, 2010, 2012, and 2013, with final decision-making authority and primary residence awarded to the plaintiff. The court ordered that the defendant, who was then residing in Maine, shall have visitation with the children on certain prescribed dates and shall pay the plaintiff \$164 per week in child support. The court further ordered that the parties shall have telephone access with the children when not physically with them.

Following the dissolution of their marriage, the parties engaged in seven years of contentious postdissolution proceedings. On February 22, 2018, the court, after another contested hearing, awarded the plaintiff sole

³ At the outset, we note that the appendix to the plaintiff's appellate brief is incomplete, as it selectively excerpts portions of the record referenced in his appellate brief, contains only photographs of certain filings, and does not include a full copy of the defendant's December 14, 2020 motion for modification that is the subject of this appeal. See Practice Book (2021) § 67-8 (b) (1) (directing that appellant's appendix shall contain "in chronological order, all relevant pleadings, including the operative complaint and any other complaint at issue, motions, requests, findings, and opinions or decisions of the trial court or other decision-making body"). At oral argument before this court, the plaintiff's counsel indicated that the selective incorporation of filings in his appendix was due to the manner in which he received the filings from the defendant. The plaintiff's incomplete appendix unnecessarily complicates our review, and we do not condone the plaintiff's noncompliance. This deficiency, however, does not preclude our review of the plaintiff's claim on appeal because we are able to examine the physical trial court file for the many filings not contained within his appendix. See Practice Book § 60-2 (2) (this court may "consider any matter in the record of the proceedings below necessary for the review of the issues presented by any appeal, regardless of whether the matter has been included in any party appendix"); see also *State v. Lawler*, 30 Conn. App. 827, 828 n.2, 622 A.2d 1040 (1993) (excusing appellant's failure to include pertinent material in his appendix).

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legal custody and primary residence of the parties' four children. As for visitation and access, the court ordered that the defendant, who was still residing in Maine, shall have visitation with the children at specific times on certain holidays and periods during the summer. The court ordered that the defendant shall be responsible for all transportation related to her access, and that the exchanges shall occur at the plaintiff's residence in Connecticut. As for child support, the court ordered that the defendant shall pay the plaintiff \$70 per week, suspended during the defendant's access periods.

On November 25, 2019, the court issued a postjudgment order, pursuant to the parties' agreement, modifying the visitation and access schedule. Particularly, the court ordered that the defendant, who had moved to Virginia, shall have visitation with the children in Connecticut for the weekends of Columbus Day, Martin Luther King, Jr., Day, Presidents Day, Easter, and Thanksgiving; Christmas between December 26 and January 1; and the weeklong April vacation. The new parental access plan also afforded the defendant visitation with the children in Virginia for summer vacation during the month of July.

On December 14, 2020, the defendant filed a motion to modify the existing child support, custody, visitation, and parental access orders.⁴ In that motion, the defendant asserted that there was a substantial change in circumstances because the plaintiff and his mother "are incapacitated [with] COVID-19, put the children's lives in danger, [and] violated [Connecticut] rules." As for child support, the defendant sought that the court "suspend [the] current support order." As for custody, the defendant requested that the court award "sole custody

⁴The plaintiff on appeal construes the defendant's motion to modify as seeking only to obtain sole legal custody of the children, and his appendix contains a photograph of only the first page of this motion. That characterization is unsupported by the content of the defendant's motion to modify.

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to [the] defendant mother.” As for visitation and the parental access schedule, the defendant requested that the court order “no visitation for [the] plaintiff father at this time due to contagious COVID-19 infection until proof of negative test results” and that “after negative test results [the] plaintiff to have same visitation schedule that the defendant had.”

On January 15, 2021, the court held a remote hearing as to five pending motions, including the defendant’s motion to modify.⁵ The plaintiff presented the testimony of Old Saybrook Police Officer Charles Kostek, the defendant, and Attorney Justine Rakich-Kelly, who was the appointed guardian ad litem for the children, and he also testified. The defendant then presented her case by way of narrative testimony, with certain questions from the court as to the issues raised by each of the five motions at issue. The defendant relevantly testified regarding her difficulty complying with the existing orders as to child support and the parental access schedule and her proposal for a new visitation and access schedule. After the defendant rested her case, the plaintiff declined the court’s invitation to present any rebuttal witnesses.

At the conclusion of that hearing, the court issued an oral ruling granting in part the defendant’s December 14, 2020 motion to modify the existing child support, custody, and visitation orders. The court granted the motion to modify as to access and visitation, holding that it “find[s] the testimony of the defendant credible.

⁵ The other four motions heard by the court at the January 15, 2021 hearing were the plaintiff’s August 12, 2020 motion for contempt, the plaintiff’s August 14, 2020 motion for contempt, the plaintiff’s October 2, 2020 motion for modification of visitation, and the plaintiff’s October 16, 2020 motion for modification of visitation. Although the plaintiff’s appellate brief states that the court denied all of his motions, a review of the transcript clearly establishes that the court granted his October 2, 2020 motion to modify visitation in order to ensure the parties’ compliance with COVID-19 safety protocols.

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The parties have four children. The court is going to grant the motion to modify with regard to [the defendant's] access. I believe it's in the best interest of these children, and I want to dial back the temperature on all this." The court issued a revised parental access schedule providing that the defendant shall have visitation with the children "for [the time between] the first five days after the children end school and the five days before they start school," Christmas vacation, Thanksgiving, and spring vacation. The court ordered that transportation for visitation was to be completed on the basis of an agreement of the parties, but, "[i]f there's no agreement on that, then one person drives down and one person drives back." The court also ordered telephone access to be "Monday evening between 6:30 and 8:30, one call [on] Skype a week." The court then denied the defendant's motion to modify as to custody, holding that there was no material change in circumstances to justify her request for sole legal custody. The court's oral decision did not specifically address the defendant's motion to modify as to child support. After the court issued its oral ruling, the plaintiff's counsel confirmed that the court did not "miss a motion," and asked for several clarifications, none of which contested the scope of the court's ruling compared to the relief sought by the defendant's motion to modify.

On the same day as the January 15, 2021 hearing, the court issued a written order further granting the defendant's motion to modify as to visitation and child support.⁶ The court ordered that "the defendant do all the transportation for visitation and thereby reducing

⁶The plaintiff's appellate brief asserts that this written order was not issued until April 8, 2021. It is true that the court later issued a JDNO notice of this January 15, 2021 written order on April 8, 2021. Although the plaintiff may not have been aware of this January 15, 2021 written order until he received the April 8, 2021 JDNO notice, it is apparent from the JDNO notice itself as well as the trial court file that this written order was issued by the court on the same date as its oral ruling at the January 15, 2021 hearing.

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her weekly child support obligation by \$50 per week. [The] [d]efendant’s child support payments to the plaintiff are suspended for any weeks that she has visitation with the children for 5 days or more.”⁷ The plaintiff filed a motion to reargue the court’s decision, which the court denied. This appeal followed.

On appeal, the plaintiff claims that the court improperly modified the existing orders as to visitation, the parental access plan, and child support because the defendant’s motion to modify sought only to modify custody.⁸ In support, the plaintiff argues that, “by the court taking the action it did, the plaintiff was deprived of an opportunity to argue and present evidence as to the details of why the [then existing orders] should not be changed”⁹ We disagree.

⁷ There is some uncertainty within the plaintiff’s appellate brief as to the amount of the defendant’s child support obligation. At the January 15, 2021 hearing, the plaintiff’s counsel questioned the defendant regarding her child support obligations imposed by Magistrate Gilman in the amount of \$209 per week, to commence on November 19, 2020. Conversely, in his appellate brief, the plaintiff does not identify which order was operative, and instead represents that the court “reduced the defendant’s child support obligation from \$164 to \$50 per week” This statement implies that the original child support order of \$164 from the court’s December 15, 2015 judgment of dissolution—not the subsequent November 19, 2020 order by Magistrate Gilman or the February 22, 2018 modification—was operative at the time of the January 15, 2021 hearing. Regardless, the plaintiff misreads the court’s January 15, 2021 written order because that order *reduces* the defendant’s child support obligation “by \$50 per week,” not orders the defendant to *pay* \$50 per week.

⁸ The plaintiff on appeal does not challenge the substantive merits of the court’s decision on any other ground, including that the court’s decision was not supported by evidence, the court failed to consider the pertinent statutory factors, the court’s decision contained clearly erroneous factual findings, the court’s decision was beyond the specific grounds for modification alleged in the parties’ motions, or it otherwise was improper. Instead, the plaintiff’s narrow appeal is limited to the scope of the court’s January 15, 2021 orders as compared to the existing orders that the defendant’s motion to modify sought to change.

⁹ The plaintiff in *passim* makes a technical argument that the court improperly modified the existing orders as to visitation and the parental access plan because “both parties could not meet their burden in establishing that a modification was in the best interest of the children because, according to

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We begin with the standard of review and relevant legal principles. Because the plaintiff's claim requires us to interpret both the court's orders as well as the defendant's motion to modify, our review is plenary. See *Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 290, 87 A.3d 534 (2014) (plenary review applies to interpretation of pleadings); *Sosin v. Sosin*, 300 Conn. 205, 217, 14 A.3d 307 (2011) (plenary review applies to interpretation of trial court's judgment).

In general, a court's decision is restricted to those issues raised by the parties in their pleadings and in argument. "[P]leadings have their place in our system

the factual finding of the trial court, no substantial change in circumstances existed at the time of trial." This argument conflates the differing standards required to modify visitation, child support, and custody. See, e.g., *Balaska v. Balaska*, 130 Conn. App. 510, 515, 25 A.3d 680 (2011) ("[i]n ruling on a motion to modify visitation, the court is not required to find as a threshold matter that a change in circumstances has occurred"). Accordingly, the court's determination that there was no substantial change in circumstances sufficient to modify custody does not necessarily mean that the modification of visitation and access is not supported by the best interests of the children.

At oral argument before this court, the plaintiff's counsel repeatedly represented that the cases cited in his brief stand for the proposition that a court must make the determination that a substantial change in circumstances has occurred to modify an existing visitation order. A review of these cases does not support the representations made by the plaintiff's counsel. See *Dufresne v. Dufresne*, 191 Conn. App. 532, 538–39, 215 A.3d 1259 (2019) (outlining standard used by underlying trial court decision, which provided that modification of custody requires determination that substantial change in circumstances existed); *Petrov v. Gueorguieva*, 167 Conn. App. 505, 522 n.16, 146 A.3d 26 (2016) (holding that "there is an important distinction to be drawn between motions to modify custody, which generally require a material change in circumstances . . . and motions to modify visitation alone, which *do not require a material change*" (citation omitted; emphasis added)); *Kelly v. Kelly*, 54 Conn. App. 50, 55–57, 732 A.2d 808 (1999) (holding that "material change in circumstances" is required to modify custody and that modification of visitation is guided by best interest of child standard); *Emerick v. Emerick*, 28 Conn. App. 794, 802, 613 A.2d 1351 (holding that "substantial change in circumstances" is required to modify child support order, which "is wholly independent of the right of visitation" (internal quotation marks omitted)), cert. denied, 224 Conn. 915, 617 A.2d 171 (1992).

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of jurisprudence. While they are not held to the strict and artificial standard that once prevailed, we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . It is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]. . . . Facts found but not averred cannot be made the basis for a recovery. . . . Thus, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings. . . . It is equally clear, however, that the court must decide those issues raised in the pleadings. . . . This rationale extends equally to motions.” (Citation omitted; internal quotation marks omitted.) *Wheeler v. Beachcroft, LLC*, 210 Conn. App. 725, 753, 271 A.3d 141 (2022); see also *Doe v. Cochran*, 332 Conn. 325, 333, 210 A.3d 469 (2019) (stating that pleadings should be read broadly and realistically, not narrowly and technically); *Morneau v. State*, 150 Conn. App. 237, 239 n.2, 90 A.3d 1003 (outlining established Connecticut policy of leniency toward self-represented parties), cert. denied, 312 Conn. 926, 95 A.3d 522 (2014).

These pleading requirements in postdissolution matters “historically have been much less circumscribed than in other types of actions.” *Petrov v. Gueorguieva*, 167 Conn. App. 505, 514, 146 A.3d 26 (2016). “[A]lthough a court cannot determine a fact or issue beyond the reasonable cognizance of the parties . . . our rules of pleading are generally less restrictive as to what the court can decide in these matters” because most post-dissolution proceedings “are ultimately governed by the child’s best interests.” (Citation omitted.) *Id.*, 519. Therefore, “[i]n the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded [issue] actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity. . . . In making this

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determination, our courts look not only to what occurred during the hearing itself . . . but also to whether actions occurring prior to the hearing placed the party on notice as to the unpleaded issues or facts.” (Citations omitted; internal quotation marks omitted.) *Id.*, 517.

In the present case, it is clear from the defendant’s motion to modify that she cumulatively sought to modify the existing child support, custody, visitation, and parental access orders. Consequently, the plain language of the defendant’s motion to modify, which she filed as a self-represented party, placed before the court the issues of custody, visitation, and the parental access schedule. Additionally, the transcript of the January 15, 2021 hearing undercuts the plaintiff’s argument that he was surprised that these issues were decided by the court and that he was unable to present contrary evidence. The defendant testified regarding her difficulties complying with the existing orders as to child support and the parental access schedule and her proposal for a new visitation and access schedule.¹⁰ After the defendant’s testimony regarding custody, child support, and the visitation schedule, the plaintiff’s counsel declined to present any rebuttal witnesses and confirmed that the court did not “miss a motion.” The plaintiff’s counsel then asked for several clarifications of the court’s oral ruling, none of which concerned the scope of the court’s ruling compared to the defendant’s motion to modify. On the basis of both the language of the defendant’s motion as well as the parties’ representations at the

¹⁰ At oral argument before this court, the plaintiff’s counsel stated that he was deprived of an opportunity to present evidence as to all of these topics because neither party nor the court questioned Attorney Rakich-Kelly as to the parties’ visitation and access rights. The transcript of the January 15, 2021 hearing, however, reveals that Attorney Rakich-Kelly specifically was questioned by both parties and the court as to the adequacy of the defendant’s visitation and access.

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January 15, 2021 hearing, we summarily reject the plaintiff's claim on appeal.¹¹

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHANIE SZYMONIK v. PETER SZYMONIK
(AC 42601)

Cradle, Alexander and Eveleigh, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgments of the trial court finding him in contempt on two separate occasions and sanctioning him for bad faith litigation. The court granted the plaintiff's motions for contempt, which alleged that the defendant had failed to make certain lump sum payments that the court had ordered him to pay toward a child support arrearage. The court also granted the plaintiff's motion for sanctions, concluding that the defendant had engaged in bad faith litigation because of his repetitive motions that did not raise any colorable claims. The court also awarded the plaintiff attorney's fees with respect to these motions. *Held* that, after a careful review of the record, briefs, oral argument and relevant law, this court concluded that the defendant failed to demonstrate any instance of reversible error by the

¹¹ On the basis of the manner in which the plaintiff's counsel presents this appeal to this court—particularly the misleading statements in his appellate brief and at oral argument before this court; see footnotes 4, 5, 6, 7, 8, and 10 of this opinion; selective excerption of filings within his appendix including the motion that is the subject of this appeal; see footnote 3 of this opinion; and the conflating legal arguments; see footnotes 8 and 9 of this opinion—we are compelled to reiterate the admonition that “[a]ttorneys have an obligation to act fairly and with candor in *all* of their dealings before the court, which includes factual statements made in open court or in pleadings and other written submissions.” (Emphasis in original.) *Cummings Enterprise, Inc. v. Moutinho*, 211 Conn. App. 130, 134, 271 A.3d 1040 (2022); see also *Hartmann v. Prudential Ins. Co. of America*, 9 F.3d 1207, 1214 (7th Cir. 1993) (“we cannot have a rule that . . . an appellant can serve us up a muddle in the hope that we or our law clerks will find somewhere in it a reversible error”). Although it is unfortunate that the defendant, as a self-represented litigant, did not file a brief or appearance in this appeal, that does not obviate, but rather underscores, the duty of candor that the plaintiff's counsel owes to the court.

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trial court, as that court's factual findings were not clearly erroneous and the proper legal standards and analyses were applied to the defendant's claims.

Argued January 26—officially released June 21, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Epstein, J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Klatt, J.*, granted the plaintiff's motion for contempt and awarded the plaintiff attorney's fees, and the defendant appealed to this court; subsequently, the court, *Klatt, J.*, issued its finding regarding the amount of the attorney's fees, and the defendant amended his appeal; thereafter, the court, *Klatt, J.*, sanctioned the defendant for engaging in bad faith litigation, and the defendant amended his appeal; subsequently, the court, *Margaret Murphy, J.*, granted in part the plaintiff's motion for contempt and awarded the plaintiff attorney's fees, and the defendant amended his appeal. *Affirmed.*

Peter Szymonik, self-represented, the appellant (defendant).

Keith Yagaloff, for the appellee (plaintiff).

Opinion

PER CURIAM. In this extensively litigated postdissolution matter, the defendant, Peter Szymonik, challenges the judgments of the trial court finding him in contempt on two separate occasions and sanctioning him for engaging in bad faith litigation. On appeal, the defendant presents a myriad of overlapping and intertwined arguments seeking a reversal of the court's judgments. After a careful review of the file, the memoranda of decision, the appellate briefs, and the parties' oral

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argument before this court, we affirm the judgments of the trial court.

The court, *Epstein, J.*, dissolved the marriage of the plaintiff, Stephanie Szymonik, and the defendant on April 30, 2008. *Szymonik v. Szymonik*, 167 Conn. App. 641, 644, 144 A.3d 457, cert. denied, 323 Conn. 931, 150 A.3d 232 (2016). The parties were granted joint legal custody of their children, with a shared parenting plan. *Id.*, 645. On August 20, 2012, the court, *Carbonneau, J.*, issued an order stating that “neither party shall file any motions with the court without the prior express written approval of the presiding judge because of the interminable numbers of motions filed.” On July 7, 2017, the court, *Simón, J.*, ordered the defendant to pay the plaintiff \$242 per week in child support and an additional \$48 per week toward an arrearage found to be \$40,488. In addition, the court ordered the defendant to reduce the arrearage by making a lump sum payment of \$2500 within thirty days and further payments of \$1500 every six months until the arrearage was paid in full.

On October 11, 2017, the plaintiff filed a motion for contempt, claiming that the defendant had failed to make the lump sum payments required by the court’s July 7, 2017 order. On February 8, 2019, the court, *Klatt, J.*, found that the defendant had the ability to make these payments, failed to do so and, therefore, was in wilful contempt. As a sanction, the court ordered the defendant to pay the attorney’s fees of the plaintiff relating to this contempt motion. The defendant then commenced this appeal. On May 9, 2019, the court found the attorney’s fees of the plaintiff related to the contempt motion to be \$2338, and the defendant amended his appeal to include this finding.

On August 24, 2018, the plaintiff filed a motion for sanctions, alleging that the defendant had engaged in

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litigation misconduct by filing meritless motions, motions for order raising issues that already had been decided, and numerous requests for leave to file additional motions. On August 30, 2019, the court issued a memorandum of decision granting the plaintiff's motion for sanctions. Specifically, the court stated: "In the present motion, the court finds that the defendant's repetitive motions do not raise any colorable claims. . . . [E]ach motion filed raises the same issues that have been determined by trial courts, appellate courts and the federal district court. Despite numerous rulings, the defendant continues to raise the same issues without any basis in law or facts." The court concluded that the defendant had engaged in bad faith litigation and awarded the plaintiff attorney's fees in the amount of \$7150, payable by the defendant within ninety days. The defendant subsequently amended his appeal to challenge the court's August 30, 2019 judgment.

On September 10, 2019, the plaintiff filed a motion for contempt regarding the defendant's noncompliance with the orders relating to the child support arrearage. On October 31, 2019, the court, *M. Murphy, J.*, issued a memorandum of decision, finding that the defendant had not made any lump sum payments toward his arrearage. It found the defendant in contempt with respect to the nonpayment of the July 7, 2017 order relating to the arrearage. The court stated the following in order to enforce the prior orders: "The defendant shall make additional child support arrearage payments of \$75 [per] week by immediate wage withholding through support enforcement services. The \$75 [per] week is in place of the single lump sum payment of \$2500 and the biannual (i.e., twice yearly) lump sum payments of \$1500 The court finds the defendant has the ability to pay. The arrearage payments of \$75 [per] week shall be in addition to any current child support payments and the current weekly arrearage

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payment of \$48 [per] week. The arrearage payments of \$75 [per] week and \$48 [per] week for a total of \$123 [per] week shall be paid until such time as the arrearage is paid in full.” The court also granted the plaintiff’s request for attorney’s fees, which subsequently was determined to be \$600.80. The defendant again amended his appeal to include a challenge to these findings.

On appeal, the defendant challenges the court’s February 8, 2019 memorandum of decision finding him in wilful contempt and the subsequent award of \$2338 in attorney’s fees; the court’s August 30, 2019 memorandum of decision granting the plaintiff’s motion for sanctions and the award of \$7150 in attorney’s fees; and the court’s October 31, 2019 memorandum of decision finding him in wilful contempt, the award of an additional \$75 per week in child support arrearage payments, and the subsequent award of \$600.80 in attorney’s fees. The defendant presents a multitude of arguments as to why the judgments of the trial court should be reversed, challenging their legal conclusions and factual findings.

After a careful review of the record, briefs, oral argument, and relevant law, we conclude that the judgments of the trial court should be affirmed. Despite the numerous arguments advanced by the defendant, he has failed to demonstrate any instance of reversible error by the trial court. We conclude that the court’s factual findings are not clearly erroneous, and that the proper legal standards and analyses were applied to the defendant’s claims. See, e.g., *In re Angelina M.*, 187 Conn App. 801, 803–804, 203 A.3d 698 (2019); *Singh v. CVS*, 174 Conn. App. 841, 842–43, 167 A.3d 461 (2017); *Bridgeport v. Niedzwiecki*, 9 Conn. App. 807, 808, 518 A.2d 406 (1986), cert. denied, 203 Conn. 802, 522 A.2d 292, cert. denied, 484 U.S. 852, 108 S. Ct. 154, 98 L. Ed. 2d 109 (1987). Accordingly, we affirm the judgments of the trial court.

The judgments are affirmed.

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HIGHLAND STREET ASSOCIATES
ET AL. v. COMMISSIONER OF
TRANSPORTATION ET AL.
(AC 44330)

Bright, C. J., and Cradle and DiPentima, Js.

Syllabus

The plaintiffs, two entities that, respectively, owned a parcel of real property and a billboard located on that property, sought a declaratory ruling from the trial court pursuant to statute (§ 4-175) following the failure of the defendant Department of Transportation to act on their petition for a declaratory ruling that they could replace the billboard's existing support structure. The billboard, which was located in a residential zone within 660 feet of a federal highway and had been erected prior to 1968, was a nonconforming grandfathered sign pursuant to the federal Highway Beautification Act of 1965 (23 U.S.C. § 131 et seq.) and related state statute (§ 13a-123). In order to replace the billboard's support structure, the plaintiffs acknowledged that they would need to remove the existing billboard for a short period of time. The department denied the plaintiff's application for a permit to replace the support structure, as a new sign was not permitted pursuant to 23 U.S.C. § 131 et seq. and § 13a-123. The trial court rendered judgment for the plaintiffs, holding that the proposed replacement of the billboard's existing support system constituted permissible maintenance and repair. The court further held that, pursuant to a zoning statute (§ 8-2), the sign's preexisting nonconforming use was a vested right with which the department and the defendant Commissioner of Transportation could not interfere. On the defendants' appeal to this court, *held* that the trial court erred in holding that replacing the billboard's existing support structure constituted maintenance and repair pursuant to federal and state law: although, as a grandfathered nonconforming sign, the billboard could continue to exist, even though it did not comply with state regulations, and it could be maintained and repaired without losing its grandfathered status, replacing the billboard's existing support system was not customary maintenance and repair because such construction would substantially change the billboard and constitute the erection of a new billboard, and all other jurisdictions confronted with similar facts have held that such structural replacement constitutes the erection of a new sign and, thus, the termination of the preexisting sign's nonconforming usage; moreover, this court's determination that reconstructing a billboard with a new support structure did not constitute customary repair and maintenance was consistent with the purpose of 23 U.S.C. § 131 et seq., as the policy behind the act was for billboards located in certain zones along federal highways to cease to exist after they had reached the natural

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end of their lives; furthermore, the court's reliance on § 8-2, which restricts municipal zoning authorities from interfering with nonconforming uses, was misplaced, as that statute applies only in a zoning context and this case was governed by federal and state law and regulations, and, contrary to the plaintiffs' claim, there was no taking of a vested property right, as the defendants did not direct the plaintiffs to remove the billboard.

Argued January 11—officially released June 21, 2022

Procedural History

Action for a judgment declaring, inter alia, that the plaintiffs may replace the existing support structure for a certain nonconforming outdoor advertising sign, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Dale W. Radcliffe*, judge trial referee; judgment for the plaintiffs, from which the defendants appealed to this court. *Reversed; judgment directed.*

Anthony C. Famiglietti, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellants (defendants).

Joel Z. Green, with whom was *Linda Pesce Laske*, for the appellees (plaintiffs).

Opinion

BRIGHT, C. J. In this declaratory judgment action, the defendants, the Commissioner of Transportation (commissioner) and the Department of Transportation (department), appeal from the judgment of the trial court rendered in favor of the plaintiffs, Highland Street Associates (Highland Street) and Barrett Outdoor Communications, Inc. (Barret Outdoor). On appeal, the defendants claim that the court erred in concluding that the replacement of a billboard's existing trestle support structure with a monopole¹ constituted maintenance

¹ A monopole is a singular pole that is used to support a billboard or other advertising structure.

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and repair under the Highway Beautification Act of 1965 (act), 23 U.S.C. § 131 et seq., and General Statutes § 13a-123. We agree and, accordingly, reverse the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. Highland Street owns a parcel of real property located at 215 Webster Street in Bridgeport. Barrett Outdoor owns and operates a billboard that is located on the Webster Street property. The billboard consists of two sign faces that sit atop a trestle support structure that is affixed to the ground. Advertising messages are displayed on the sign faces and are changed frequently. The billboard is located in a residential zone and is also within 660 feet of Interstate 95, a federal highway. A permit for the billboard was issued by the department on May 9, 1966.² Although a new billboard would not be a permitted use at this location, because the billboard at issue was erected prior to 1968, it is undisputed that it is a nonconforming grandfathered sign under the act and § 13a-123.

Recently, Barrett Outdoor decided that it wanted to replace the billboard's existing trestle support structure with a new monopole. To that end, in November, 2017, Barrett Outdoor submitted an "Application for Outdoor Advertising Permit" to the department.³ The application identified the billboard as a "[p]re-existing structure" and stated that "[t]he pole of the structure needs to be replaced." Dennis Buckley, a Bridgeport zoning official, signed off on the plaintiffs' application, attesting that "the structure described [in the application] is in accordance with all local zoning regulations and ordinances concerning off-premise advertising."

² This permit has been in effect since its issuance in 1966 and was still in effect at the time of this appeal.

³ Highland Street also signed the application.

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On January 5, 2018, the department denied the plaintiffs' request for a new permit, stating: "The existing sign . . . does have nonconforming status and will be allowed to be maintained and continued pursuant to [§] 13a-123-12 of the Regulations of Connecticut State Agencies and 23 C.F.R. § 750.707. However, to maintain nonconforming status, a billboard structure must remain 'substantially the same.' Anything beyond customary maintenance and repair, *such as the replacement of the sign with a new structure*, is not permissible under [f]ederal and [s]tate law." (Emphasis added.)

Thereafter, the plaintiffs sent a letter to the department asking it to reconsider the denial of their application because "the present use of the premises at 215 Webster Street . . . for an outdoor advertising structure while nonconforming to the Zoning Regulations of the City of Bridgeport, is a legally and permitted use of the premises at 215 Webster Street . . . [and] there is no contemplated change in the use of the property by virtue of the application including the replacement of the structure supporting the existing outdoor advertising sign which, once again, is specifically permitted under Connecticut law." The department denied that request, stating that the plaintiffs' application did not "request customary maintenance and repair" of the billboard because "[the plaintiffs are] seeking to remove the existing sign structure and replace it with an entirely new structure." In denying the plaintiffs' request for reconsideration, the department specifically relied on this court's decision in *Billboards Divinity, LLC v. Commissioner of Transportation*, 133 Conn. App. 405, 35 A.3d 395, cert. denied, 304 Conn. 916, 40 A.3d 783 (2012), wherein, according to the department's summary of the case, this court defined the phrase " 'maintenance and repair' to mean 'actions taken to perpetuate or to restore a *presently existing* sign.' " (Emphasis in original.)

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Pursuant to General Statutes § 4-176,⁴ the plaintiffs then petitioned the department for a declaratory ruling that they could replace the billboard’s existing trestle support structure with a new monopole. After the department failed to act on the plaintiffs’ petition, the plaintiffs brought a declaratory judgment action in the Superior Court, pursuant to General Statutes § 4-175,⁵ seeking a declaratory ruling that they could replace the billboard’s existing support structure.

A one day court trial was held on March 10, 2020.⁶ At the trial, Bruce Barrett, the president of Barrett Outdoor, testified on direct examination that Barrett Outdoor submitted an application for a new permit because

⁴ General Statutes § 4-176 provides in relevant part:

“(a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency. . . .

“(e) Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action. . . .

“(i) If an agency does not issue a declaratory ruling within one hundred eighty days after the filing of a petition therefor, or within such longer period as may be agreed by the parties, the agency shall be deemed to have decided not to issue such ruling. . . .”

⁵ General Statutes § 4-175 (a) provides in relevant part: “If a provision of the general statutes, a regulation or a final decision, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff and if an agency . . . is deemed to have decided not to issue a declaratory ruling under subsection (i) of said section 4-176, the petitioner may seek in the Superior Court a declaratory judgment as to the validity of the regulation in question or the applicability of the provision of the general statutes, the regulation or the final decision in question to specified circumstances. . . .”

⁶ Both parties filed motions for summary judgment, but the court, *Hon. Alfred J. Jennings*, judge trial referee, denied the motions.

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“[w]e were being very protective, we wanted to make sure if we disassembled this sign and replaced it that midstream the [department] wouldn’t tell us that we needed a permit.” Barrett also testified on direct examination that, in order to replace the billboard’s existing trestle support structure with a new monopole, the existing sign would need to come down for “a week or two weeks whatever time.” On cross-examination, Barrett stated that, once the existing support structure had been replaced with the monopole, “[t]he [billboard’s] support structure will look different.”

Matthew Geanacopoulos, a department employee, testified that an application for a permit was required only when a sign owner was “erecting a new structure,” and that, if a sign owner simply wanted to perform maintenance or repair on a billboard, the owner did not need to submit anything to the department. Geanacopoulos also testified that the department had denied the plaintiffs’ application because the plaintiffs had “applied for a new permit, and their application said they were going to replace their existing sign,” a request that the department “interpret[ed] . . . as a new structure, new sign” which was not allowed under state and federal law.

In a decision dated September 8, 2020, the court, *Hon. Dale W. Radcliffe*, judge trial referee, rendered judgment for the plaintiffs. The court held that (1) the construction of a monopole in place of the billboard’s existing trestle support system constituted maintenance and repair because “the outdoor advertising sign is slated to remain in the same location, will contain the same dimensions, and will be adjacent to the same interstate highway,” and (2) pursuant to General Statutes § 8-2, the billboard’s preexisting nonconforming use was a vested right with which the department could not interfere. The court also held that this court’s decision in *Billboards Divinity, LLC v. Commissioner of*

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Transportation, supra, 133 Conn. App. 418–19, was distinguishable from the plaintiff’s case because the property owners in *Billboards Divinity, LLC*, “desired to erect two new billboards, after two nonconforming billboards were removed from the site,” whereas in the present case, “the issue involves an existing outdoor advertising sign, which has not been discontinued, or abandoned.” The defendants then appealed.

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. Resolving the defendants’ appeal requires us to interpret and apply the provisions of the act and § 13a-123. “With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule for the interpretation of federal statutes because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit. . . . If the meaning of the text is not plain, however, we must look to the statute as a whole and construct an interpretation that comports with its primary purpose and does not lead to anomalous or unreasonable results.” (Citation omitted; internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission*, 285 Conn. 381, 400–401, 941 A.2d 868 (2008); see also *O’Toole v. Eyelets for Industry, Inc.*, 148 Conn. App. 367, 373, 86 A.3d 475 (2014) (plain meaning rule, as set forth in General Statutes § 1-2z, does not apply when interpreting federal statutes).

Similarly, as to the construction and application of state statutes, “[o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . § 1-2z

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directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . Furthermore, [t]he legislature is always presumed to have created a harmonious and consistent body of law . . . [so that] [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Because issues of statutory construction raise questions of law, they are subject to plenary review on appeal.” (Internal quotation marks omitted.) *Robinson v. Tindill*, 208 Conn. App. 255, 264, 264 A.2d 1063, cert. denied, 340 Conn. 917, 265 A.3d 926 (2021).

“The [act] . . . was enacted to exert federal control over the erection and maintenance of outdoor advertising signs, displays and devices located within 660 feet of the nearest edge of the right-of-way and visible from the traveled portion of interstate and federal-aid primary highways. . . . The act requires states to enter into agreements with the federal government to carry out the provisions and the goals of the act or else risk the loss of a portion of their federal highway funding. . . .

“Section (d) of the act provides [in relevant part]: In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use [as] is to be determined by agreement between the several [s]tates and the Secretary [of Transportation], may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and

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primary systems which are zoned industrial or commercial under authority of [s]tate law, or in unzoned commercial or industrial areas as may be determined by agreement between the several [s]tates and the Secretary [of Transportation]. The [s]tates shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this [a]ct. Whenever a bona fide [s]tate, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. . . . Section (d), therefore, clearly limits the erection of signs falling within the provisions of the act solely to areas that are zoned by state or local authorities for commercial or industrial purposes

“The federal regulations promulgated in support of the act contain a provision addressing the issue of nonconforming signs, which it defines as a sign which was lawfully erected but does not comply with the provisions of [s]tate law or [s]tate regulations passed at a later date or later fails to comply with [s]tate law or [s]tate regulations due to changed conditions. . . . The regulation authorizes each state to include in its agreement with the federal government a so-called grandfather clause to allow for the continuation of nonconforming signs. . . . The clause only provides for the continuance of a sign at its particular location for the duration of its normal life subject to customary maintenance. . . .

“The federal regulations also set forth criteria necessary to maintain and continue a nonconforming sign. For example, the sign must remain substantially the same as it was on the effective date of the [s]tate law or regulations. . . . The regulation authorizes each

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state to develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights. . . . Further, a nonconforming sign can only continue as long as it is not destroyed, abandoned, or discontinued. . . .

“Connecticut entered into an agreement with the federal government pursuant to the act, which led to the enactment of . . . § 13a-123. Section 13a-123 (a) provides in relevant part: The erection of outdoor advertising structures, signs, displays or devices within six hundred sixty feet of the edge of the right-of-way, the advertising message of which is visible from the main traveled way of any portion of the National System of Interstate and Defense Highways, hereinafter referred to as interstate highways, the primary system of federal-aid highways or other limited access state highways, is prohibited except as otherwise provided in or pursuant to this section Section 13a-123 (c) authorizes the commissioner . . . to promulgate regulations for the control of outdoor advertising structures, signs, displays and devices along interstate highways, the primary system of federal-aid highways and other limited access state highways. Such regulations shall be as, but not more, restrictive than the controls required by Title I of the [act] and any amendments thereto with respect to the interstate and primary systems of federal-aid highways Section 13a-123 (e) provides in relevant part: Subject to regulations adopted by the commissioner and except as prohibited by state statute, local ordinance or zoning regulation signs, displays and devices may be erected and maintained within six hundred sixty feet of primary and other limited access state highways in areas which are zoned for industrial or commercial use under authority of law

“Among the regulations promulgated by the commissioner in accordance with § 13a-123 (d), is a grandfather

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clause of the type authorized by 23 C.F.R. § 750.707 (c). . . . The regulation[s] [also define] erect to mean to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish, *but it shall not include* any of the foregoing activities when performed as an incident to the change of advertising message or *customary maintenance or repair* of a sign or sign structure.” (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Billboards Divinity, LLC v. Commissioner of Transportation*, supra, 133 Conn. App. 414–17.

On appeal, the defendants claim that the court erred when it concluded that replacing the billboard’s existing support structure with a new monopole constituted customary repair and maintenance. We agree.

It is undisputed that the billboard in question is a grandfathered nonconforming sign, given that, although it is located in an area zoned for residential use, it existed prior to the enactment of the applicable state regulations. As a grandfathered nonconforming sign, the billboard is allowed to continue to exist even though it does not comply with state regulations. 23 C.F.R. § 750.707 (d); Regs., Conn. State Agencies § 13a-123-12. The billboard also can be maintained and repaired without losing its grandfathered status. 23 C.F.R. § 750.707 (d) (5); Regs., Conn. State Agencies § 13a-123-2 (b). Any alteration beyond maintenance and repair, however, terminates the continuation of the billboard’s grandfathered status and transforms the billboard into a new sign that must comply with the state regulations. See *Billboards Divinity, LLC v. Commissioner of Transportation*, supra, 133 Conn. App. 416. Specifically, although § 13a-123-4 of the Regulations of Connecticut State Agencies prohibits the erection of new signs in protected areas, § 13a-123-12 permits signs erected

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prior to March 19, 1968, to remain in place as nonconforming uses, and § 13a-123-2 excludes from the definition of “‘erect,’” “activities when performed as an incident to the change of advertising message or customary maintenance or repair of a sign or sign structure.” Consequently, consistent with federal law, the plaintiffs’ billboard maintains its grandfathered status so long as the plaintiffs’ activities related to it are limited to customary maintenance and repair of the sign or the sign structure.

In *Billboards Divinity, LLC v. Commissioner of Transportation*, supra, 133 Conn. App. 418, this court specifically addressed the meaning of “‘customary maintenance and repair’” as used in the federal and state regulations. In *Billboards Divinity, LLC*, the plaintiff filed an application with the department for a permit to reconstruct two grandfathered nonconforming billboards as to which its tenant had cancelled the permits and removed from the property. *Id.*, 408. The department denied the plaintiff’s application because the property where the billboards were to be rebuilt was a residential zone and, thus, a prohibited area. *Id.*, 408–409. The plaintiff appealed, claiming that it had a right to continue with a nonconforming use of its property and that the tenant’s removal of the previous billboards had not extinguished that use. *Id.*, 410.

This court determined that, “[p]ursuant to the statutory and regulatory scheme set forth [in the act and state law] . . . the plaintiff’s argument has merit only if its erection of new billboards qualifies as ‘customary maintenance or repair’ of the prior nonconforming signs.” *Id.*, 418. Noting that “[c]ustomary maintenance and repair’ is not defined in the regulations [and] therefore, the term must be construed according to its commonly approved usage,” the court held that “[t]he term ‘maintenance and repair’ as used in reference to nonconforming signs logically refers to actions taken to

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perpetuate or to restore a *presently existing sign*.” (Emphasis added.) *Id.* Given that interpretation, the court held that the plaintiff’s proposed construction of new billboards to replace the previously existing billboards was not maintenance and repair because, “rather than seeking to make repairs to or to maintain an existing, nonconforming billboard, the plaintiff’s application sought a permit to erect two wholly new signs.” *Id.*, 418–19.

The plaintiffs argue, as the trial court held, that *Billboards Divinity, LLC*, is distinguishable from the present case because, in *Billboards Divinity, LLC*, the billboards had been removed and the permits cancelled, whereas here, the billboard is still standing and the permit remains valid. We conclude that any factual differences between the present case and *Billboards Divinity, LLC*, are not material to our analysis. It is undisputed in the present case that the existing billboard and support structure must be taken down in order to *replace* the billboard’s existing trestle support structure with the new monopole. When the billboard is put back up, *now supported by the new monopole*, the billboard is a new sign. See *id.* The erection of a new sign, even when that construction is done to replace a previously existing billboard and even though the owner has never stated an intention to abandon the permit to use a sign at that location, is not maintenance and repair because such construction is not an action taken to “perpetuate or to restore a presently existing sign,” given that the “presently existing sign” no longer exists. *Id.* Thus, as was the case in *Billboards Divinity, LLC*, “rather than seeking to make repairs to or to maintain an existing, nonconforming billboard, the plaintiff’s application sought a permit to erect [a] wholly new [billboard].” *Id.*, 419. Such construction is not maintenance and repair according to that term’s commonly understood usage, and the trial court therefore erred

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in holding that replacing the billboard's existing support structure with a new monopole was maintenance and repair under the act and § 13a-123.

Moreover, replacing the billboard's existing support system with a new monopole is not customary maintenance and repair because such construction would substantially change the billboard. Under the federal regulations, a billboard can be maintained and repaired only to the extent that the sign remains substantially the same as it was when the sign was grandfathered in as a nonconforming sign. See 23 C.F.R. § 750.707 (d) (“[i]n order to maintain and continue a nonconforming sign . . . (5) [t]he sign must remain substantially the same as it was on the effective date of the State law or regulations”). Reconstructing the billboard in the present case with a monopole in place of its existing support structure would result in a billboard that is substantially different in how it is constructed from the grandfathered nonconforming billboard. Indeed, the president of Barrett Outdoor testified at trial that replacing the trestle support structure with a monopole involved disassembling the sign, with the end result being that the billboard's support structure would look different after the trestle structure was replaced with a monopole. Thus, because replacing the billboard's existing support system with a monopole would result in a substantially different sign, such construction is not customary maintenance and repair.

We also are not persuaded by the plaintiffs' argument that the billboard will be substantially the same after the trestle support structure is replaced with a monopole because the dimensions, location, and positioning of the sign portion of the billboard structure will be unchanged. The plaintiffs have not cited, nor have we found, any cases from Connecticut or any other jurisdictions in which a property owner was permitted to maintain their nonconforming use by replacing a billboard's

existing support structure with a new and different support structure.⁷ To the contrary, our research has revealed that all of the other jurisdictions that have been confronted with facts similar to those here have held that replacing a billboard's existing support structure with a new support structure goes beyond maintenance and repair and instead constitutes the erection of a new sign, at which point the preexisting sign's nonconforming use is terminated and the relevant state regulations relating to the construction of the sign apply. See, e.g., *Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, 397–98, 983 P.2d 759 (App. 1999) (replacement of billboard's existing twin I beam support structure with new unipole structure was not reasonable repair); *U.S. Outdoor Advertising Co. v. Indiana Dept. of Transportation*, 714 N.E.2d 1244, 1255 (Ind. App. 1999) (reconstructing billboard's existing support system by removing wooden supports and replacing them with steel supports was not maintenance and repair); *Meredith Outdoor Advertising, Inc. v. Iowa Dept. of Transportation*, 648 N.W.2d 109, 118 (Iowa 2002) (increase in billboard's size and *number of posts supporting sign* was "too extensive to constitute de minimis changes or a mere continuation of the existing sign"); *Zanghi v. State*, 204 App. Div. 2d 313, 314, 611 N.Y.S.2d 263 (1994) (reerecting billboard that tenant had removed constituted "change in existing use" and terminated sign's nonconforming use); *Park Outdoor Advertising Co. v. Commonwealth Dept. of Transportation*, 86 Pa. Commw. 506, 508, 510, 485 A.2d 864 (1984) (new billboard was erected when wooden frame and two support posts were changed to metal frame and one support

⁷ We note, as this court did in *Billboards Divinity, LLC*, that we "need not decide at this time whether the complete replacement of a nonconforming sign that was destroyed by accident, natural disaster, or foul play would constitute customary maintenance and repair of the destroyed sign so as to permit the continuation of the nonconforming use." *Billboards Divinity, LLC v. Commissioner of Transportation*, *supra*, 133 Conn. App. 419 n.5.

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post); cf. *State Dept. of Roads v. World Diversified, Inc.*, 254 Neb. 307, 315, 576 N.W.2d 198 (1998) (converting existing billboard into electronic billboard constituted maintenance and repair when “updates occurred upon the original frame of the sign [and] the sign remained in the same location *on the same support posts*” (emphasis added)). Significantly, we have located no cases that have held to the contrary since this court noted in *Billboards Divinity, LLC*, that “other jurisdictions have found that once nonconforming signs are removed completely, or *they have been repaired substantially or altered in some way*, any right to the continuation of the nonconformity terminates.” (Emphasis added.) *Billboards Divinity, LLC v. Commissioner of Transportation*, supra, 133 Conn. App. 419. Consistent with the holdings in other jurisdictions and our decision in *Billboards Divinity, LLC*, we conclude that replacing the billboard’s preexisting support structure and then installing the newly built structure constitutes both a substantial repair or alteration of the billboard and the erection of a new billboard, all of which is well beyond the customary maintenance and repair permitted by the act, § 13-123, and the corresponding regulations.⁸

Our conclusion that reconstructing a billboard with a new support structure does not constitute customary maintenance and repair is also consistent with the purpose of the act. The policy behind the act was for billboards located in certain zones along our nation’s federal highways to cease to exist after those billboards

⁸ At oral argument before this court, the plaintiffs’ counsel argued that the department has the authority to regulate only the sign face itself and that the department cannot regulate a sign’s support structure. Section 13a-123 (c) is directly to the contrary and makes clear that the department has the authority to regulate both the sign face and the sign’s support structure as they are, essentially, one and the same. See General Statutes § 13a-123 (c) (“[t]he commissioner may promulgate regulations for the control of *outdoor advertising structures, signs, displays and devices along interstate highways*” (emphasis added)).

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had reached the natural end of their lives. In fact, 23 C.F.R. § 750.707 (c), the provision of the Code of Federal Regulations that provides for the grandfathering of non-conforming signs, explicitly provides: “This clause only allows an individual sign at its particular location for the duration of its normal life subject to customary maintenance.” See *Billboards Divinity, LLC v. Commissioner of Transportation*, supra, 133 Conn. App. 415–16; see also *Redpath v. Missouri Highway & Transportation Commission*, 14 S.W.3d 34, 39 (Mo. App. 1999) (act was “intended to reduce the number of signboards crowding the highways”); *National Advertising Co. v. Bradshaw*, 48 N.C. App. 10, 19–20, 268 S.E.2d 816 (“obvious purpose of the [act was] to gradually phase out signs . . . which existed at the time of enactment but which tended to harm the public interest and welfare by causing ugliness, distraction, and safety hazards”), appeal dismissed, 301 N.C. 400, 273 S.E.2d. 446 (1980). Accepting the plaintiffs’ argument would mean that a sign owner could circumvent that purpose and extend forever the nonconforming use by essentially rebuilding a nonconforming sign more than fifty years after it was built and then replacing various parts of the sign as needed until the sign bears no resemblance to its original structure, save for its size and dimensions. We will not interpret the statutes and regulations to reach such an anomalous and unreasonable result, and thus decline to interpret the act and § 13a-123 as permitting the reconstruction of billboards with wholly new support structures. See *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission*, supra, 285 Conn. 400–401; see also *Raftopol v. Ramey*, 299 Conn. 681, 703, 12 A.3d 783 (2011) (“We often have stated that it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results. . . . Accordingly, [w]e construe a statute in a manner that will not . . . lead to

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absurd results.” (Citations omitted; internal quotation marks omitted.)).

We further conclude that the court’s reliance on § 8-2 to hold that the plaintiff could replace the billboard’s existing support structure with a new monopole without the billboard losing its nonconforming status is misplaced. The court reasoned: “It is well settled in this jurisdiction that preexisting nonconforming uses of land involve vested rights. Section 8-2 of the General Statutes restricts municipal zoning authorities from interfering with nonconforming uses.” After discussing several of our Supreme Court’s cases applying § 8-2 and the restrictions on a municipality’s ability to eliminate a nonconforming use, the court concluded: “It cannot be found, based on the evidence adduced at trial, and applicable Connecticut case law, that the proposed change in the support structure forfeits the right of the property owner to continue the lawful nonconforming use of 215 Webster Street.” Relying on this same analysis, the plaintiffs argue that “[t]he policies of the [act] and [§ 13a-123], and the regulations promulgated pursuant to those statutes, provide protections to sign owners that are consistent with the constitutional protections that apply in the zoning context.” We fail to see how § 8-2 or the cases cited by the court are relevant to the legal issues involved in this case.

Section 8-2 provides in relevant part that municipal zoning regulations shall not “[p]rohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations.” There are no municipal zoning regulations at issue in the present case. This case is governed by state and federal law, specifically the act, § 13a-123, and the appropriate state and federal regulations, not by municipal zoning law. Accordingly, § 8-2, which only applies in the zoning context, does not apply here.

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Given that § 8-2 has no application in the present case, the court's reliance on cases that have applied § 8-2 to municipal actions directed toward nonconforming uses is misplaced. Indeed, none of the cases relied on by the court involved billboards, the act, § 13a-123, or any of the applicable regulations.

Finally, we are not persuaded by the plaintiffs' claim that the defendants' denial of their request to *replace* the sign's existing support structure with a monopole constituted "a taking of a vested property right" without just compensation. Section 13a-123 (g) (2) provides in relevant part that the commissioner may "acquire by purchase, gift or condemnation, and shall pay just compensation upon *the removal* of [grandfathered] outdoor advertising structures, signs, displays." (Emphasis added.) In the present case, the defendants have not directed the plaintiffs to remove their sign. In fact, to the contrary, the defendants have recognized the sign's grandfathered status and have made it clear that the sign does not need to be taken down and that the plaintiffs can continue to operate and maintain it, albeit within the confines of § 13a-123-12 of the regulations. There can be no regulatory taking when a sign owner has not been told to take down a sign and, conversely, is explicitly allowed to continue operating the existing sign. See *Lamar Co., LLC v. Arkansas State Highway & Transportation Dept.*, 386 S.W.3d 670, 676 (Ark. App. 2011) (plaintiff's takings claim was premature when defendant had not ordered plaintiff to remove billboards); *U.S. Outdoor Advertising Co. v. Indiana Dept. of Transportation*, supra, 714 N.E.2d 1264 ("[t]he question of taking and compensation is not properly before this [c]ourt because the signs have not yet been removed"; additionally, no authority exists to support assertion that denial of permit amounts to order for removal of sign). Accordingly, we conclude that the plaintiffs' takings claim misses the point, given that the

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defendants have not directed the plaintiffs to take down their sign and have instead said only that the plaintiffs may not remove the sign to reconstruct it with a new and different support structure.

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.
