CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ANDREA ULANOFF *v.* BECKER SALON, LLC, ET AL.
(AC 42834)

Elgo, Cradle and Suarez, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, a salon and one of its owners, for injuries that she sustained when she walked into the glass doors at the entrance of the salon while attempting to enter the premises. Prior to trial, the defendants filed a motion in limine, seeking to prevent the plaintiff from entering into evidence a photograph of the entrance to the salon, which she had obtained from the salon's website. The photograph depicted the glass doors without any signage or handles. The defendants claimed that the photograph was irrelevant and unduly prejudicial, as it had been taken long after the date of the accident and had been photoshopped to remove signage and the handles from the doors. The trial court granted the defendants' motion. At trial, one of the plaintiff's witnesses, S, testified that she had helped to decorate the salon prior to its opening, approximately three weeks before the plaintiff's accident. Following the objection of the defendants' counsel, the trial court precluded the plaintiff from asking S about the appearance of the salon's entrance when she had been working there, including whether the doors had signage or handles. The jury returned a verdict for the defendants, and the trial court rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held*:

1. The trial court improperly granted the defendants' motion to preclude the plaintiff from offering into evidence the photograph obtained from the salon's website: the defendants' counsel conceded that the trial court erred in determining that the plaintiff needed to establish the chain of custody of the photograph prior to introducing it into evidence; moreover, it was indisputable that the photograph was relevant, as it depicted

the salon's doors, the appearance of which was central to the plaintiff's case; furthermore, the plaintiff had personal knowledge of the entrance to the salon and was prepared to testify that the photograph was a fair and accurate representation of the salon's doors on the day of her accident, and whether the photograph had been photoshopped and the extent to which it may have been altered went not to its admissibility but was a matter for the jury to consider in determining its evidentiary weight.

2. The trial court abused its discretion when it prevented the plaintiff from asking S about the appearance of the doors at the time she was decorating the salon: S's testimony regarding whether there were handles on the glass doors was relevant to a central issue in the case, and may have aided the jury in assessing the credibility of other witnesses who had testified about the appearance of the doors prior to the date of the accident.

3. The preclusion of evidence central to the plaintiff's case may have affected the outcome of the trial; accordingly, the plaintiff was entitled to a new trial.

Argued January 4—officially released September 28, 2021

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, brought to the Superior Court in the judicial district of Fairfield, where the matter was tried to the jury before *Bruno*, *J.*; verdict and judgment for the defendants, from which the plaintiff appealed to this court. *Reversed*; *new trial.*

Igor G. Kuperman, for the appellant (plaintiff).

Cara K. Hale, for the appellees (defendants).

Opinion

ELGO, J. The plaintiff, Andrea Ulanoff, who alleges she was injured when she walked into a set of glass doors, appeals from the judgment of the trial court, rendered following a jury trial, in favor of the defendants, Becker Salon, LLC (salon), and Becker Chicaiza.[1]

[1] In her operative complaint, which was her third revised complaint, the plaintiff did not advance a claim against Chicaiza. Nevertheless, Chicaiza remains a defendant in the case because the plaintiff did not file a withdrawal of the action as to him. See Withdrawal, CT Judicial Branch Form JD-CV-41, available at https://www.jud.ct.gov/webforms/forms/CV041.pdf (last

On appeal, the plaintiff claims that the court erred when it precluded her from (1) introducing into evidence a photograph of the entrance to the salon, showing see-through glass doors with no lettering or handles, that was on the salon's website, and (2) questioning her witness, Vanessa Savio, about the appearance of the glass doors on a date previous to the date of the plaintiff's accident. She further claims that the cumulative effect of the court's erroneous rulings was harmful and likely affected the outcome of the trial.[2] We agree with the plaintiff's claims and, accordingly, reverse the judgment of the trial court.

The following facts, which reasonably could have been found by the jury, inform our review. Chicaiza and his business partner, Nathali Ocampo, owned and operated the salon, which opened at its 380 Greenwich Avenue location on January 22, 2015, in the town of Greenwich. The salon was located on the second floor of the building near the elevator, with at least one other business also on the second floor, which was operated by an investment manager, Krishen Sud. The plaintiff was a longtime customer of Chicaiza, who is a hair stylist, having utilized his services for many years, approximately three times per week, at the salon's previous location, which had been on Mason Street in Greenwich. After the salon opened at its Greenwich Avenue location, the plaintiff visited the salon at least twice, and as many as nine times, in the three weeks following the salon's January 22, 2015 opening.

On the morning of February 11, 2015, the plaintiff's friend, Mary Ida Piacente, drove the plaintiff to the salon. The plaintiff, a jewelry designer who owns a company in New York City, was on her way to a large

visited September 17, 2021). In this appeal, an appearance also was filed on Chicaiza's behalf.

[2] Because we conclude that these rulings were improper and were harmful, we need not consider the plaintiff's additional claims.

jewelry show in Florida and wanted to get her hair done before her afternoon flight. Armand Delarosa was working at the salon's front desk when he heard the elevator open, and he briefly looked up to see the plaintiff rushing out of the elevator, with her head down, as she looked at her cell phone. Delarosa, who was on the telephone, then heard a loud bang. When Delarosa looked toward the entrance to the salon, he saw the plaintiff on the floor in the hallway. The plaintiff described the accident to the jury as follows: "I saw Armand Delarosa at the reception desk and walked right into the door—the glass doors that were not—not realizing they were glass doors and they were closed and walked into them."

Sud, the operator of the business adjacent to the salon, heard a commotion and went into the hallway. He saw the plaintiff on the floor and helped her to sit up against a wall. Chicaiza and others from the salon also were in the hallway attempting to help the plaintiff. Chicaiza asked the plaintiff if she was okay and if she needed an ambulance. The plaintiff told the jury that she responded, "I'm fine, I'm fine. I think I'm fine. I don't know. I think I'm fine." The plaintiff then rose to her feet and made a call on her cell phone. Sud, seeing that the plaintiff was okay and on the phone, went back into his place of business. Chicaiza and others assisted the plaintiff into the waxing room of the salon. She had a large bump on her head, and Chicaiza tended to her. The plaintiff insisted she was "fine," and she wanted Chicaiza to style her hair. When Piacente came into the salon, she saw the plaintiff with ice on her head and on her knee. She waited while Chicaiza styled the plaintiff's hair. Piacente thereafter drove the plaintiff to Westchester Airport, where the plaintiff boarded a plane to Florida. The plaintiff later sought treatment for her claimed injuries.

On January 18, 2017, the plaintiff commenced the present case against both defendants, which sounds in negligence. The defendants asserted the special defense of comparative fault. Thereafter, the defendants, before the start of evidence, filed a motion in limine, which they later supplemented,[3] seeking to preclude the plaintiff from, inter alia, introducing into evidence a photograph of the entrance to the salon, which, the defendants asserted, had been taken long after the accident and had been photoshopped to remove the signage and the handles from the door before the photograph was uploaded to the salon's website. In their motion, the defendants argued that such evidence either was irrelevant or unduly prejudicial. The plaintiff filed an objection, arguing in relevant part that the photograph "supports the plaintiff's testimony that there [were] no door handles on the entrance glass doors on February 11, 2015," and, if the photograph was altered, such alterations were done by the defendants and not by the plaintiff. During a September 11, 2018 hearing on the motions in limine, the plaintiff's counsel argued that the plaintiff would testify that this photograph was a fair and accurate representation of the entrance to the salon on the date of her accident. The court granted the defendants' motion and precluded the plaintiff from attempting to offer the photograph into evidence during trial.

After trial commenced, one of the plaintiff's witnesses, Savio, who is the daughter of Piacente, was called to testify. Savio testified that she had helped to decorate the salon prior to its January 22, 2015 opening. When the plaintiff attempted to question Savio about the glass doors to the salon—whether they had signage or handles during the times she was at the salon—the defendants objected, and the court excused the jury.

[3] The plaintiff also filed five motions in limine, which are not relevant to the claims on appeal.

Following the argument of counsel, the court precluded such questions.

Also during trial, the plaintiff filed a third amended complaint, removing all allegations against Chicaiza. The defendants again filed an answer and a comparative negligence special defense. The jury, on September 21, 2018, rendered a defendants' verdict, which was accepted by the court. This appeal followed. Additional facts will be set forth as necessary to our consideration of the plaintiff's claims.

On appeal, the plaintiff claims in relevant part that the trial court erred when it precluded her from (1) introducing into evidence a photograph of glass doors that had been obtained from the salon's website, and (2) asking Savio about the appearance of the glass doors prior to the plaintiff's accident. Additionally, the plaintiff claims that the cumulative effect of the court's erroneous rulings was harmful. After setting forth our standard of review, we will address each claim in turn.

"To the extent [that] a trial court's admission of evidence is based on an interpretation of [our law of evidence], our standard of review is plenary. . . . We review the trial court's decision to admit [or to exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

"The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings

will be overturned on appeal only where there was an abuse of discretion and a showing by the [appellant] of substantial prejudice or injustice." (Internal quotation marks omitted.) *Quaranta* v. *King*, 133 Conn. App. 565, 567, 36 A.3d 264 (2012).

I

The plaintiff first claims that the court improperly precluded her from introducing into evidence a photograph that had been obtained from the salon's website, showing the entrance to the salon, including the glass doors. She argues that "the trial [court insisted that] the plaintiff [had] to establish the 'chain of custody' [of] the photograph, or bring in a witness to testify about when and how the photograph was taken, [which] is a clear misapplication of evidentiary law." Additionally, the plaintiff contends that the photograph was relevant and "[t]he condition and appearance of the doors on the date of the accident was a crucial issue in this case." The defendants argue that the photograph cannot be authenticated because it "was not a fair and accurate representation of the door in question" due to the fact that the plaintiff did not take the photograph herself, she could not identify the actual photographer, and there was no dispute that the original photograph had been altered before being placed on the salon's website. We conclude that the court improperly granted the defendants' motion to preclude the plaintiff from offering into evidence the photograph obtained from the salon's website.

Initially, we find it unnecessary to consider the plaintiff's argument that the court erred in determining that the plaintiff needed to establish the chain of custody of the photograph. The defendants' counsel, during oral argument before this court, readily conceded that the court erred in that respect. See Conn. Code Evid. § 9-1 (a) ("[t]he requirement of authentication as a condition

precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be"). Moreover, insofar as the court's discussion at the hearing could be read to imply that it also was holding that the photograph was not admissible because it had not been taken on the day of the accident, such a ruling clearly would be a misapplication of our law, and the defendants do not argue otherwise. See, e.g., *Booker* v. *Stern*, 19 Conn. App. 322, 333, 563 A.2d 305 (1989) ("fact that the photographs were taken a year [later] . . . goes to the weight that should be afforded that evidence, not to the issue of authenticity").

The defendants, however, continue to maintain their argument that the photograph could not be authenticated because it is not an accurate representation of the doors, there being no dispute that the photograph had been altered before being uploaded to the salon's website. We are not persuaded by the defendants' argument.

"Authentication . . . is viewed as a subset of relevancy, because evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims. . . . Our Code of Evidence [§ 9-1 (a)] provides that [t]he requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be. . . . Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege. . . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing . . . is made to the court, the evidence, as long as it is otherwise admissible, goes to the jury, which will ultimately

determine its authenticity. . . . [C]ompliance with [§] 9-1 (a) does not automatically guarantee that the fact finder will accept the proffered evidence as genuine. . . . It is widely recognized that a prima facie showing of authenticity is a low burden." (Citations omitted; internal quotation marks omitted.) *State* v. *Manuel T.*, 337 Conn. 429, 453–54, 254 A.3d 278 (2020); see also *S. A.* v. *D. G.*, 198 Conn. App. 170, 183–84, 232 A.3d 1110 (2020).

In the present case, it is beyond dispute that the glass doors were central to the plaintiff's case. Accordingly, a photograph of these glass doors indisputably was relevant. See *State* v. *Kelly*, 256 Conn. 23, 64–65, 770 A.2d 908 (2001) ("photographic evidence is admissible where the photograph has a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry . . . [and] it is not necessary [for the proponent] to show that the photographic evidence is essential to the case in order for it to be admissible" (citations omitted; internal quotation marks omitted)).

On the issue of whether the photograph could be authenticated by the plaintiff, there also was no dispute that the photograph the defendants' sought to preclude was an accurate depiction of the photograph *on the salon's website*. Furthermore, although the defendants repeatedly argued that the photograph had been photoshopped by the salon's photographer before being uploaded to the website, the plaintiff's counsel repeatedly told the court that the plaintiff was prepared to testify that the photograph accurately depicted the glass doors at the time of her accident. Whether the photograph had been photoshopped and the extent to which it had been altered is a matter for the jury's consideration after the presentation of the evidence; what is important to the authentication of the photograph is that the plaintiff, who had personal knowledge of the entrance to

the salon, was prepared to testify that the photograph was a fair and accurate representation of the glass doors at the entrance to the salon on the day of her accident. See *Waldron* v. *Raccio*, 166 Conn. 608, 615, 353 A.2d 770 (1974) (Because "[the witness] testified that [the photographs] were a fair representation, the photographs were clearly admissible. Their evidentiary weight was properly for the jury to consider.").

Provided that the plaintiff's counsel was able, during trial, to establish a proper foundation for the admission of the photograph, it then would be up to the jury to determine the evidentiary weight of the photograph. See id.; see also *State* v. *Manuel T.*, supra, 337 Conn. 461 ("[q]uestions about the integrity of electronic data generally go to the *weight* of electronically based evidence, *not its admissibility*" (emphasis in original; internal quotation marks omitted)). Whether the jury would credit the defendants' purported evidence that the photograph was not a fair and accurate portrayal of glass doors on the date of the accident or whether the jury would credit the plaintiff's purported evidence that the photograph accurately did portray the appearance of the glass doors on the date of her accident was a matter solely for the jury to decide when weighing the evidence and considering the credibility of the witnesses. See *State* v. *Manuel T.*, supra, 461; *Waldron* v. *Raccio*, supra, 166 Conn. 615. On the basis of the foregoing, we conclude that the court improperly granted the defendants' motion to preclude the plaintiff from offering the photograph into evidence.

II

The plaintiff next claims that the court abused its discretion when it prevented her from asking Savio about the appearance of the glass doors, particularly whether there were handles on the doors, at the time Savio was decorating the salon. The plaintiff argues

that, although the court ruled that such testimony would be irrelevant and violate prior orders of the court, the testimony clearly was relevant, and, contrary to what the court stated, it did not violate any prior court orders.[4] The plaintiff further argues that there was testimony concerning whether there were handles on the glass doors prior to the date of the accident, including from Dennis Grimaldi, the owner of the company that installed the doors, and from John Ceruzzi, a representative of the owner of the building in which the salon is located. The defendants argue that Savio's testimony about the glass doors "was irrelevant to the case at hand as . . . Savio's observations were [made] prior to the plaintiff's fall, before the salon was even open." We agree with the plaintiff.

In the present case, the plaintiff subpoenaed Grimaldi to testify at trial. During his testimony, Grimaldi stated that the glass doors at the salon had been installed by his company and that, although he had no personal knowledge of whether handles were on the glass doors at the time of the plaintiff's accident, his company requires that the glass doors be installed with handles. During cross-examination, Grimaldi explained that,

[4] Insofar as the court also stated that testimony from Savio concerning whether the door had signage had been precluded by prior orders of the court, although we conclude that testimony regarding the lack of signage was unnecessary, we have not found any prior orders that forbade it. In the defendants' supplemental motion in limine, the defendants conceded that there was no signage on the door at the time of the plaintiff's accident. Additionally, after Savio testified, the defendants' counsel specifically stipulated that there was no signage on the door on February 11, 2015—thereby making testimony about signage unnecessary. We also note that, contrary to the court's statement that prior orders had forbidden questions about the appearance of the glass doors, we have examined the record and have not discovered any prior orders of the court that addressed whether testimony would be permitted as to the appearance of the doors prior to the plaintiff's accident. Accordingly, this aspect of the court's ruling was improper. We therefore are left to determine whether the court erred when it concluded that Savio's testimony about the door handles was not relevant.

when the salon ordered the doors, four sterling silver ladder door handles also were ordered, each of which was approximately one foot in length.

The next witness called to testify by the plaintiff was Savio. The plaintiff sought to have her testify regarding the appearance of the doors when she was decorating the salon. The defendants objected to this line of questioning, and the court excused the jury. During voir dire, Savio testified that the doors had no handles during the time she was decorating the salon. The plaintiff argued that such testimony was relevant because it demonstrated that the doors actually had been installed without handles. The court ruled in relevant part that such testimony was irrelevant because Savio had no knowledge of whether the glass doors had handles at the time of the accident because she had last been to the salon approximately three weeks before the accident.

Thereafter, the defendants called Ceruzzi, a representative of the owner of the building, to testify. Ceruzzi testified that he had performed three or four walk-throughs of the salon between January 22 and February 11, 2015. Although he initially told the jury that he no longer recalled whether the glass doors to the salon had handles during his walk-throughs, the defendants refreshed his recollection with his deposition testimony wherein he had testified that the glass doors had handles during his walk-throughs.

Section 4-1 of the Connecticut Code of Evidence provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Further, "[a]ll relevant evidence is admissible, except as otherwise provided by the constitution of the United States, the constitution of the state of Connecticut, the Code, the General Statutes or the common law.

Evidence that is not relevant is inadmissible." Conn. Code Evid. § 4-2.

"One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence *tend to support* a relevant fact even to a slight degree, [as] long as it is not prejudicial or merely cumulative." (Emphasis added; internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 461, 93 A.3d 1076 (2014).

"Relevance does not exist in a vacuum. . . . To determine whether a fact is material . . . it is necessary to examine the issues in the case, as defined by the underlying substantive law, the pleadings, applicable pretrial orders, and events that develop during the trial. Thus, the relevance of an offer of evidence must be assessed against the elements of the cause of action, crime, or defenses at issue in the trial. The connection to an element need not be direct, so long as it exists. *Once a witness has testified to certain facts, for example, his credibility is a fact that is of consequence to* [*or material to*] *the determination of the action, and evidence relating to his credibility is therefore relevant*—but only if the facts to which the witness has already testified are themselves relevant to . . . [a] cause of action, or [a] defense in the case." (Emphasis added; internal quotation marks omitted.) *S. A.* v. *D. G.*, supra, 198 Conn. App. 183–84.

We conclude that Savio's testimony regarding whether the glass doors had handles during the time she was decorating the salon was relevant to this case and that such testimony also may have aided the jury in assessing the credibility of other witnesses, including Grimaldi. See generally *State* v. *Ferguson*, 260 Conn. 339, 353,

796 A.2d 1118 (2002) (party may impeach its own witness but "trial court must still ascertain whether the evidence sought to be used to impeach the witness is relevant"); *State* v. *McCarthy*, 197 Conn. 166, 176, 496 A.2d 190 (1985) ("The testimony of one witness of a party may be contradicted by the testimony of any other witness offered by that party. . . . Such contradiction, however, must take the form of factual evidence and no witness can be impeached by contradicting his testimony as to a collateral matter. . . . A contradiction is not collateral if it is relevant to a material issue in the case apart from its tendency to contradict the witness." (Citations omitted.)); *Schmeltz* v. *Tracy*, 119 Conn. 492, 498, 177 A. 520 (1935) (party may call witness to contradict another of her witnesses).

Whether there were handles on the glass doors was a central issue in this case. Witnesses, including Grimaldi and Ceruzzi, testified that there were handles on the glass doors before the date of the plaintiff's accident. Although Savio was not at the salon on the day of the plaintiff's accident, neither were Grimaldi or Ceruzzi. The defendants had maintained that the doors were installed with handles and that the handles had remained on the doors. Contrary to the defendants' contention, the plaintiff sought to have Savio testify that handles were not always on the doors. We conclude that the court erred when it determined that Savio's observations about the lack of handles on the glass doors was not relevant.

III

The plaintiff also claims that the cumulative effect of the court's erroneous rulings was harmful because they likely affected the result of the trial.

"[E]ven if a court has acted improperly in connection with the introduction of evidence, reversal of a judgment is not necessarily mandated because there must

not only be an evidentiary [impropriety], there also must be harm. . . . In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." (Internal quotation marks omitted.) *Quaranta* v. *King*, supra, 133 Conn. App. 568.

In this case, the appearance of the glass doors on the date of the accident was a crucial issue. The plaintiff had testified that on her previous visits to the salon, the doors had remained open, but, on this visit, they were closed, and, having no signage or handles, she did not realize that they were closed when she attempted to enter the salon. Some witnesses testified that the glass doors did have handles—and that they were installed with handles. Other witnesses testified that there were no handles on the doors on the date of the plaintiff's accident. The plaintiff sought to have Savio testify that, even before the salon opened, the doors had no handles, which could have led to an inference that, contrary to Grimaldi's testimony, the glass doors had been installed without handles.

The photograph that had been on the salon's website showed the entrance to the salon with two glass doors, no signage, and no handles. Although the defendants argued that the photograph had been photoshopped by the salon's photographer, the plaintiff was prepared to testify that the photograph was a fair and accurate representation of the glass doors at the entrance to the salon on the day of her accident. The jury, however, never saw a photograph of the entrance to the salon or its glass doors. The jury was required, instead, to try to imagine what the entrance may have looked like, although there was a photograph that the plaintiff's counsel proffered as a fair and accurate representation of how the glass doors appeared on the date of the accident when the plaintiff attempted to enter the salon. Certainly, the defendants could have countered such

evidence with witnesses who supported their argument that the photograph that the plaintiff sought to offer into evidence had been photoshopped. The plaintiff, however, was denied the ability to show the jury what she contended she saw on the date of the accident as she approached the salon entrance. We are persuaded that the preclusion of this evidence, central to the plaintiff's case, may have affected the outcome of the trial. Accordingly, the plaintiff is entitled to a new trial.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

LEONARD TANNENBAUM *v.* STACEY TANNENBAUM (AC 43482)

Elgo, Alexander and Devlin, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying the defendant's motion for contempt, claiming that the court improperly modified the existing travel related custody order for the parties' minor child. The existing order provided that the minor child should be accompanied by a parent during air travel, but that if the plaintiff was unable to accompany the child due to a health, work, or family emergency or commitment, the child could travel by air with one of two specified, nonparent adults. In her motion for contempt, the defendant claimed that the plaintiff violated this order by failing to accompany the child on five separate air travel trips. In its denial of the plaintiff's motion, the court explained that the plaintiff had violated the custody order but that the violations were not wilful, and it ordered the plaintiff henceforth to accompany the child during air travel except in the case of emergency, not based on his convenience. *Held* that the trial court's order denying the defendant's motion for contempt did not improperly modify the existing travel related custody order; the contempt order did not alter the meaning or the substantive terms of the existing order, as the court repeatedly emphasized in the existing order that exceptions to the plaintiff's accompaniment of the child during air travel were to be infrequent and only on an emergency and limited

basis, thus, the court was clarifying rather than modifying the custody order.

Argued May 18—officially released September 28, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Colin*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Colin*, *J.*, granted the plaintiff's motion for modification of custody; subsequently, the court, *Truglia*, *J.*, denied the defendant's motion for contempt, and the plaintiff appealed to this court. *Affirmed.*

Janet A. Battey, with whom, on the brief, was *Olivia M. Eucalitto*, for the appellant (plaintiff).

Jon T. Kukucka, with whom, on the brief, was *Johanna S. Katz*, for the appellee (defendant).

Opinion

ALEXANDER, J. The plaintiff, Leonard Tannenbaum, appeals from the judgment of the trial court denying the motion for contempt filed by the defendant, Stacey Tannenbaum. On appeal, the plaintiff claims that the court improperly modified the existing travel related child custody order by requiring the plaintiff to accompany his minor child on any airline travel, except in the case of an emergency. Specifically, the plaintiff argues that (1) the court's order denying the defendant's motion for contempt constituted a modification because the existing travel related child custody order permitted the child's nanny or driver to accompany the child on air travel in lieu of the plaintiff not only in emergency circumstances, but also when the plaintiff had a health, work, or other family commitment, and (2) the alleged modification was improper because the

court did not make findings that a substantial or material change had occurred, that the existing order was no longer in the child's best interests, or that the modification was in the child's best interests. We disagree that the court's order constituted a modification and, therefore, affirm the judgment of the trial court.

In its January 29, 2018 decision regarding a visitation order contained in the parties' parenting plan, the trial court, *Colin*, *J.*, found the following relevant facts and procedural history. "The parties were divorced on April 26, 2017. At that time, the parties submitted an agreement on all matters including a parenting plan, except that they reserved certain issues for a future determination, including this: whether the parenting plan should require that a parent must accompany the minor child on any airline travel.

"This reserved issue was thereafter heard by [the] court and a decision was entered on June 21, 2017. The court ruled as follows: (1) Unless the parties otherwise agree in writing, a parent shall accompany the minor child on any airline travel; (2) Unless the parties otherwise agree in writing, any driver for the minor child must be at least twenty-one years of age; (3) Either parent may seek a modification of these orders after they first engage in good faith discussions regarding these issues with their coparenting coordinator."[1]

The plaintiff filed a postjudgment amended motion for modification on December 11, 2017, requesting that the court modify the order "to permit the minor child to travel via airplane with the minor child's nanny, the

[1] At the time of this appeal, there are numerous other motions pending with the trial court, including (1) two postjudgment motions to modify the parenting plan filed by the plaintiff, (2) the defendant's postjudgment motion for contempt, and (3) the plaintiff's objection to the defendant's postjudgment motion for contempt. A hearing is currently scheduled on these matters for April 19, 2022.

driver, or any other adult with whom the child is comfortable as it is in the minor child's best interest." The parties, their counsel and the court-appointed guardian ad litem appeared in court on January 25, 2018, for an evidentiary hearing. After hearing testimony from numerous witnesses, the trial court granted the plaintiff's motion on January 29, 2018 (2018 order).

In the 2018 order, the court made the following findings of fact: "The [plaintiff], who resides primarily in Miami Beach, Florida (but who has many homes elsewhere, including in White Plains, New York), wants permission from the court to have his child's nanny and his driver/property manager fly with the child to and from the child's primary residence with his mother in Old Greenwich, Connecticut. The [plaintiff's] parenting time with his son is generally every other Friday at 5 p.m. until Sunday at 5 p.m. as well as holiday and vacation time. The court has reviewed the parties' final parenting plan in general, and paragraph 2.2 (regular parenting schedule) in particular, and infers that the [plaintiff's] regular parenting time will usually take place in the vicinity of White Plains, New York. Thus, the number of times that the child is likely to travel to and from Florida will be limited. This is a reasonable inference since a three year old child should not be required to commute between Connecticut and Florida on alternating weekends and the court is confident that these two fine and caring parents feel the same way.

"The [defendant] objects to the [plaintiff's] request due to the child's age and her concerns about the difficulties that sometimes arise with air travel, such as diversions, delays, etc. She believes that a parent should be present if these travel difficulties occur. . . . The [defendant's] concerns appear to be sincere and genuine. . . .

"The [plaintiff's] position appears to be reasonable. He has an ear problem that is worsened during some

air travel. This ear problem, as well as his work and other family commitments, may sometimes impact his ability to fly from Florida to Connecticut and back in a short time period. He has missed some parenting time as a result. His nanny and driver are both well known to the child. The child seems to enjoy spending time with them. The nanny, in particular, presented a very thorough and impressive description of how she plans for airline travel with the child. She has flown with the child (in the presence of the plaintiff and others) on private planes but never on commercial flights. It is clear that she knows how to properly care for the parties' child and is able to handle the usual and customary travel related difficulties that sometimes arise. She appeared to be an extremely competent, experienced and caring childcare professional.

"The [guardian ad litem] supports the plaintiff's requests. The [guardian ad litem] had the opportunity to observe the child in the presence of the nanny and driver and described that interaction in very positive terms. . . .

"The court finds that it is in the best interests of this child for *his parent to accompany him on air travel, whenever possible, unless emergency circumstances arise* that would cause the child to miss entirely his alternate weekend parenting time with the plaintiff. Since the parties generally reside so far from each other, it is important to this very young child for the [plaintiff's] parenting time to be regular and consistent. Thus, if work, family or health related circumstances arise such that the [plaintiff] is unable to accompany the child at all times via air travel, then the nanny and driver who testified in court are reasonable substitutes to step in, *on an emergency and limited basis only*, to accompany the child to/from Florida. *The court expects that these circumstances would be infrequent.*

"It cannot be reasonably disputed that flexibility and trust is an important part of cooperative coparenting, and that principle is particularly important in this case when the parents live far apart from each other. The [plaintiff's] choice of the individuals who can handle the air travel appears to be quite reasonable and the [defendant] should trust his ability to make that decision during his parenting time in the *limited circumstances* contemplated by this decision (health, work or other family related *emergency* or commitment)." (Emphasis added.)

The court then issued the following orders: "(1) The current orders shall remain in effect until the child is age three. (2) Upon the child attaining age three, in the event that the [plaintiff] is unable to travel by air with the child for his weekend or holiday parenting time due to a health/work/other family emergency or commitment, then he shall immediately so notify the [defendant] in writing and by phone of the circumstances and who will be traveling with the child except that the choices shall be limited to the nanny and driver who testified in court. As previously noted, this should not be a regular and consistent occurrence since the plaintiff generally spends his weekend parenting time in the northeast and travel to/from Florida with the child does not appear to be a regular occurrence. *It seems unlikely that these types of emergencies or commitments will frequently arise. To be clear, the first choice to travel by air with the child is a parent*—the [defendant's] position in this regard is well founded. In the event that the [plaintiff] is not able to be with the child during the air travel, then he shall instruct the nanny and/or driver (one of whom must accompany the child during air travel in the [plaintiff's] absence) to keep the [defendant] reasonably informed of the child's whereabouts at all times, including keeping her informed of any delays, diversions and upon arrival. It should be noted that the

[defendant] is certainly free to accompany the child during air travel if she so desires." (Emphasis added.)

On June 8, 2018, the defendant filed a postjudgment motion for contempt claiming that the plaintiff had violated the 2018 order. On June 12, 2019, the defendant amended her motion for contempt, and claimed, inter alia, that the plaintiff had violated the 2018 order on five separate occasions over the course of one year, three of which occurred over a period of three months. Specifically, the defendant claimed that the plaintiff failed to accompany the child on airline travel on May 28, 2018 (Memorial Day weekend), on June 17, 2018 (Father's Day weekend), on August 4, 2018, and on January 27 and March 31, 2019. The court, *Truglia*, *J.*, held an evidentiary hearing on the defendant's amended motion for contempt on June 28 and July 5, 2019.

After the hearing, on July 5, 2019, the court entered an order denying the defendant's motion for contempt (2019 order), which is the subject of this appeal. The order provides: "After an evidentiary hearing, the court does not find that the defendant has carried her burden of proof by clear and convincing evidence that the plaintiff has wilfully violated a clear order of the court.

"*The defendant has carried her burden of proof by clear and convincing evidence that the plaintiff has violated clear orders of this court regarding visitation.* The court's [2018 order] states unambiguously that the [the plaintiff] will accompany the child on airline flights, not the nanny or driver, unless he is unable 'due to a health/work/other family emergency.' There was no emergency and therefore no exception over the 2018 Memorial Day weekend, or the 2018 Father's Day weekend. Similarly, there was no emergency for the August 3 [through] August 10, 2018 parenting time or for the regularly scheduled January 25 [through January] 27, 2019 parenting time. The defendant correctly points out

that the court's order clearly contemplates that the child flying without a parent should be a rare occurrence in emergency situations only. It is also clear that the plaintiff's time with the child is generally scheduled well in advance.

"The court cannot find, however, the plaintiff intentionally and wilfully violated the court's orders. The plaintiff appears to have acted on advice of his own counsel and the court-appointed guardian ad litem. The court cannot find, therefore, that the plaintiff intentionally violate[d] a clear court order without sufficient justification or excuse.

"The motion is denied.

"The court does not find the plaintiff in contempt.

"The plaintiff is ordered, however, to abide strictly with the court's orders henceforth requiring him to be the person who travels by air with the child except in the case of emergency, *not his convenience*." (Emphasis added.)

The plaintiff then filed a postjudgment motion to reargue, claiming that the 2019 order effectively modified the 2018 order. The defendant objected to the plaintiff's motion to reargue. The court held a hearing on the motion on September 23, 2019, and denied the motion on the same day. This appeal followed.

On appeal, the plaintiff claims that the court's 2019 order, in which it denied the defendant's motion for contempt but ordered the plaintiff to be the person travelling with the child by air except "in cases of emergency, and not his convenience," constituted an improper modification, and not a clarification, of the 2018 order. Specifically, the plaintiff argues that the 2018 order permitted the child's nanny or driver to accompany the child on air travel in the plaintiff's stead not only in emergencies, but also whenever the plaintiff

had a health, work, or other family commitment. The plaintiff further contends that the 2019 order constitutes a modification because it requires him to accompany his minor child on any airline travel, except in the case of emergency, eliminating the exception he was provided in the 2018 order for health, work, or other family commitments. We disagree.[2]

We begin our analysis by setting forth the relevant standard of review and applicable legal principles. "[T]he standard of review in family matters is well settled. An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review." (Internal quotation marks omitted.) *Clark* v. *Clark*, 150 Conn. App. 551, 568, 91 A.3d 944 (2014). We are mindful, however, that the construction of an order or judgment of the court is a question of law over which our review is plenary. See *Perry* v. *Perry*, 130 Conn. App. 720, 724, 24 A.3d 1269 (2011) ("[b]ecause [t]he construction of [an order or] judgment is a question of law for the court . . . our review . . . is plenary" (internal quotation marks omitted)). "As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is

[2] Because we conclude that the 2019 order did not constitute an improper modification of the 2018 order, we do not address the plaintiff's additional claims.

the intention of the court as gathered from all parts of the [order or] judgment. . . . *The interpretation of* [*an order or a*] *judgment may involve the circumstances surrounding* [*its*] *making* . . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Emphasis added; internal quotation marks omitted.) Id.

To resolve the plaintiff's claim, we must determine, as an initial matter, whether the 2019 order constituted a modification or a clarification of the 2018 order. General Statutes § 46b-56 governs the modification of child custody orders. Subsection (b) of § 46b-56 provides in relevant part: "In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child . . . ." This court has recognized that, "[a]fter the final decree, [our Supreme] [C]ourt has limited the broad discretion given the trial court to modify custody orders under . . . § 46b-56 by requiring that modification of a custody award be based upon either a material change of circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child." (Citations omitted.) *Hall* v. *Hall*, 186 Conn. 118, 122, 439 A.2d 447 (1982).

To determine if the court's 2019 order was a clarification of the 2018 order, rather than an alteration or modification, we begin by "examining the definitions of both alteration and clarification. An alteration is defined as [a] change of a thing from one form or state to another; making a thing different from what it was without destroying its identity. . . . An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon or erased from the

instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. . . . Similarly, a modification is defined as [a] change; an alteration or amendment which introduces new elements into the details or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . *Conversely, to clarify something means to free it from confusion. . . . Thus, the purpose of a clarification is to take a prior statement, decision or order and make it easier to understand.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Perry* v. *Perry*, supra, 130 Conn. App. 725–26. On the basis of our thorough review of the record and the language and context of the orders, we conclude that the court clarified, rather than modified, the 2018 order.

First, we examine the terms of the 2018 order, which provides in relevant part: "Upon the child attaining age three, in the event that the [plaintiff] is unable to travel by air with the child for his weekend or holiday parenting time due to a health/work/other family emergency or commitment, then he shall immediately so notify the [defendant] in writing and by phone of the circumstances and who will be traveling with the child except that the choices shall be limited to the nanny and driver who testified in court. As previously noted, this should not be a regular and consistent occurrence since the plaintiff generally spends his weekend parenting time in the northeast and travel to/from Florida with the child does not appear to be a regular occurrence. It seems unlikely that these types of emergencies or commitments will frequently arise." On appeal, the plaintiff claims that this language provided an exception not only for emergencies, but also for any health, work, or family commitments. We do not agree.

We acknowledge that, viewed in isolation, the terms in the 2018 order are ambiguous, specifically with

respect to the meaning of the term "commitment" relative to the "health, work or other family emergency" language that precedes it. Our precedent nonetheless instructs that, when ambiguity exists in a postdissolution order, clarification is appropriate so long as there is no substantive change to the original order.[3] See *Almeida* v. *Almeida*, 190 Conn. App. 760, 767, 213 A.3d 28 (2019) ("[m]otions for clarification . . . may be appropriate where there is an ambiguous term in a judgment or decision . . . but, not where the movant's request would cause a substantive change in the existing decision" (internal quotation marks omitted)). As this court has explained, "[i]n order to determine whether the trial court properly clarified ambiguity in the judgment or impermissibly modified or altered the substantive terms of the judgment, we must first construe the trial court's judgment. . . . In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from *all parts of the judgment*. . . . *The interpretation of a judgment may involve the circumstances surrounding the making of the judgment*. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Emphasis added; internal quotation marks omitted.) Id., 766.

Accordingly, this court is obligated to consider the intention of the court, as gathered from all parts of the 2018 order as well as the circumstances surrounding

[3] Indeed, we note that, although the court did not find that the plaintiff wilfully violated this order, it nevertheless found that the plaintiff did, in fact, violate the terms of the 2018 order. The plaintiff has not challenged the propriety of that determination on appeal. Moreover, the determination that the plaintiff violated the terms of the 2018 order was made following a full evidentiary hearing that required, in addition to evidence of the plaintiff's conduct, a determination of the proper meaning of the terms of the 2018 order by the court, which, in turn, required the court to clarify the parameters of the visitation order in question.

its enactment. Such review convinces us that the trial court intended to provide a very limited exception to the general rule that a parent was to accompany the minor child on any airline travel. In the 2018 order, the court repeatedly emphasized that the exception was available only on a limited basis in emergency circumstances. To construe the isolated language in question from the 2018 order to grant the plaintiff an exception for *any* work, health, or family commitment, as the plaintiff urges, simply cannot be reconciled with the plain language of the 2018 order as a whole, which expressly provides that the exception was available "on an emergency and limited basis only" and that such circumstances "would be infrequent." An exception that expanded the range of work, health, or family commitments to include those that are not emergency in nature would not be a "limited" exception; rather it would subsume the general requirement set forth in the 2018 order of parent supervised child air travel. As the court observed at the hearing on the plaintiff's motion to reargue, the plaintiff "always has a commitment. . . . [H]e's a busy guy. . . . [The plaintiff's construction of the language in question] makes the language of Judge Colin's order completely meaningless." We therefore conclude that the 2018 order did not provide a broad exception for any work, health, or family commitment, but rather one for emergencies that may occur in limited circumstances.

Next, we turn to the terms of the 2019 order to determine what effect it had on the court's 2018 order. The plaintiff claims that the 2019 order constituted a modification of the 2018 order because it eliminated the exception for "situations involving a health, work, or other family commitment" by requiring the plaintiff to be "the person who travels by air with the child except in the case of emergency, not his convenience." We disagree.

Having construed the 2018 order as providing the plaintiff with a very limited exception for emergency situations, we conclude that the 2019 order was not a modification. In the 2019 order, the intention of the court was to clarify the scope of the exception created in the 2018 order. This is especially evident given the testimony and exhibits presented at the 2019 hearing that led the court to iterate that the plaintiff must not act based on his "convenience" but must adhere strictly to the terms of the order. For example, the plaintiff testified, concerning airline travel on Memorial Day weekend of 2018, that "I did not want to fly back and forth on the same day and then have a meeting in the—I think it was in the morning on the Tuesday." When questioned about the airline travel on August 4, 2018, the plaintiff did not answer in detail and stated, "I'm sure I complied with the order. I'm sure I had a business meeting or a family issue, and I'm sure I notified [the defendant] of that . . . ." He responded similarly with regard to the January 27, 2019 airline travel, stating, "I'm sure on Monday I had work a work commitment or multiple work commitments." Further, with respect to the March 31, 2019 airline travel, the following colloquy took place:

"[The Defendant's Counsel]: With respect to spring break 2019, do you recall when you selected that spring break vacation?

"[The Plaintiff]: No.

"[The Defendant's Counsel]: Was it months in advance?

"[The Plaintiff]: Yes.

"[The Defendant's Counsel]: And [your child] was scheduled to return on a Sunday, wasn't he?

"[The Plaintiff]: It sounds right.

"[The Defendant's Counsel]: But you had a work commitment on Monday.

"[The Plaintiff]: Okay.

"[The Defendant's Counsel]: That's not Sunday. The transition day and the work commitment are two different dates. Do you agree with that?

"[The Plaintiff]: The transition and the work day are two different dates, yes.

"[The Defendant's Counsel]: Yes. They don't fall on the same day. They don't conflict."

The transcript of the 2019 hearing demonstrates that, despite the clear mandate of the court's 2018 order, the plaintiff did not understand the limited nature of the visitation order contained therein. It therefore was incumbent upon the court to provide him with a clarification of the terms of that order and explain that the terms of the 2018 order did not permit the plaintiff to act based on mere "convenience," particularly given the context of a contempt proceeding in which the court had found a violation of the 2018 order.

Accordingly, we conclude that the 2019 order was not a modification because it did not alter the meaning or substantive terms of the 2018 order. See *Almeida* v. *Almeida*, supra, 190 Conn. App. 766. Both orders, when construed in their entirety and considering all relevant circumstances surrounding their making, contemplate that the exception to parent supervised child air travel would apply only in the limited case of an emergency. The 2019 order made clear that the exception contained in the 2018 order was available to the plaintiff only "in the case of emergency, not his convenience" and did not broadly apply to all types of health, work, or other family commitments. In light of the foregoing, we reject the plaintiff's contention that the 2019 order constituted an improper modification of the 2018 visitation order.

The judgment is affirmed.

In this opinion ELGO, J., concurred.

DEVLIN, J., dissenting. The appeal in this case arises from the trial court's denial of the motion for contempt filed by the defendant, Stacey Tannenbaum. In her motion for contempt, the defendant asserted that, on five occasions over a period of approximately one year, the plaintiff, Leonard Tannenbaum, did not personally accompany the parties' minor child on air travel between Connecticut and Florida due to work commitments. At the time that the contempt motion was filed, the operative parenting time order was the January 29, 2018 order entered by the court, *Colin*, *J.* On July 5, 2019, the court, *Truglia*, *J.*, denied the defendant's motion for contempt after finding that, although the plaintiff had violated Judge Colin's order, such violation was not wilful. The order further provided: "The plaintiff is ordered, however, to abide strictly with the court's orders henceforth requiring him to be the person who travels by air with the child except in the case of emergency, not his convenience." It is from this order that the plaintiff appeals.

The majority aptly summarizes the procedural history of the parenting time orders issued by Judges Colin and Truglia, as well as the details of Judge Colin's January 29, 2018 order. I agree that the construction of the two orders are questions of law for the court and that our standard of review is plenary. I also agree that in determining whether Judge Truglia's 2019 order constituted a modification or a clarification of Judge Colin's 2018 order, it is appropriate to examine the practical effect of one order on the other. In that regard, I also agree that "[t]he determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Internal quotation marks

omitted.) *Lawrence* v. *Cords*, 165 Conn. App. 473, 485, 139 A.3d 778, cert. denied, 322 Conn. 907, 140 A.3d 221 (2016).

In his 2018 order, Judge Colin found that it was "in the best interests of this child for his parent to accompany him on air travel, whenever possible, unless emergency circumstances arise that would cause the child to miss entirely his alternate weekend parenting time with the plaintiff." The majority accurately emphasizes the "emergency circumstances" language in the finding. Likewise, the majority emphasizes that portion of Judge Colin's order finding that the "nanny or driver who testified in court are reasonable substitutes to step in, on an emergency and limited basis only, to accompany the child to/from Florida."

On the basis of these findings, the majority concludes that the exception allowing the nanny or the driver to accompany the child applied only in emergency circumstances and that Judge Truglia's 2019 order simply made that clear. Considering Judge Colin's 2018 order as a whole, however, I see it as allowing accompaniment by the nanny or the driver in circumstances beyond emergencies. There is a thread through Judge Colin's findings and his ultimate order demonstrating the court's intention to foster the development of a father/son relationship between the plaintiff and his child. The court observed that the original order[1] resulted in the plaintiff missing some parenting time. The court further noted the importance to the young child of regular and consistent parenting time with his father. At the conclusion of its findings, the court emphasized the importance of flexibility and trust in a coparenting relationship and encouraged the defendant to trust the

[1] That order provides in relevant part that, "[u]nless the parties otherwise agree in writing, a parent shall accompany the minor child on any airline travel."

plaintiff to make the decision to have the nanny or the driver substitute for him during his parenting time "in the limited circumstances contemplated by this decision (health, work or other family related emergency or commitment)." Likewise, the actual order entered by the court provides: "[I]n the event that the [plaintiff] is unable to travel by air with the child for his weekend or holiday parenting time due to a health/work/other family emergency *or commitment*, then he shall immediately so notify the [defendant] in writing and by phone of the circumstances and who will be traveling with the child . . . . It seems unlikely that these types of emergencies *or commitments* will frequently arise." (Emphasis added.)

The majority construes Judge Truglia's 2019 order as a clarification of Judge Colin's 2018 order, concluding: "[T]he 2018 order did not provide a broad exception for any work, health or family commitment, but rather one for emergencies which may occur in limited circumstances." This construction seems to me to be at odds with the actual language of Judge Colin's order, the parties' understanding of that order, and, most importantly, the best interest of the minor child. Accordingly, I respectfully dissent.

In examining Judge Colin's 2018 order, a reasonable first step is to look at the meaning of the words that he used in his order, namely, "emergency" and "commitment." "Emergency" is defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action"; Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 407; while "commitment" is defined as "an agreement or pledge to do something in the future." Id., p. 250. Therefore, emergencies are unforeseen and require immediate action whereas commitments are promises of future conduct. The terms describe entirely different types of situations, and Judge Colin provided for both in his order.

In his motion to modify, the plaintiff sought unfettered ability to have the child's nanny or his driver accompany the child on air travel. Judge Colin's order did not go that far, but, as written, it was not limited only to emergencies. As previously discussed, the order clearly contemplated an exception, albeit to be invoked infrequently, for commitments as well. Judge Truglia conflated these two separate exceptions in his order, in which he states: "[Judge Colin's order] states unambiguously that the [plaintiff] will accompany the child on airline flights, not the nanny or driver, unless he is unable to 'due to a health/work/other family emergency.' There was no emergency and therefore no exception over [the dates listed in the contempt motion]." By limiting the exception to emergencies only, Judge Truglia failed to consider the alternative exception for designated commitments that is plainly part of the order. Based on the defendant's motion for contempt, it is evident that the parties understood Judge Colin's order as applying to nonemergency situations. The defendant's motion repeatedly makes reference to various instances in which the plaintiff asserted a "work conflict" or "work commitment" as a reason not to accompany the child on air travel. The defendant's assertion, and basis for the motion for contempt, was not that these instances did not qualify as emergencies but, rather, that these work conflicts were either (1) not on Sunday travel days, or (2) related to parenting time scheduled months in advance. This interpretation was in accord with the language of the order that provided for a commitment exception, as previously discussed. Moreover, this interpretation was shared by both the plaintiff's lawyer and the court-appointed guardian ad litem who, as noted by Judge Truglia, advised the plaintiff that his conduct was in compliance with Judge Colin's order.

Our Supreme Court has observed that "a modification is defined as [a] change; an alteration or amendment

which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . Conversely, to clarify something means to free it from confusion. . . . Thus, the purpose of a clarification is to take a prior statement, decision or order and make it easier to understand. Motions for clarification, therefore, may be appropriate where there is an ambiguous term in a judgment or decision . . . but, not where the movant's request would cause a substantive change in the existing decision." (Citations omitted; internal quotation marks omitted.) *In re Haley B.*, 262 Conn. 406, 413, 815 A.2d 113 (2003).

By restricting the exception to emergencies only, Judge Truglia cancelled the commitment aspect of the order. This was a substantive change and a modification of Judge Colin's order. It was not a clarification. As the majority emphasizes, clarification is appropriate when there is an ambiguous term in a judgment or decision. See id. Indeed, the case cited by the majority, *Perry* v. *Perry*, 130 Conn. App. 720, 24 A.3d 1269 (2011), is just such a case. In *Perry*, the parties had agreed that the father would have visitation with the minor children every other weekend, but, due to a scrivener's error, the judgment provided that the father would have visitation every weekend. Id., 722. When the error was brought to the attention of the trial court, the judgment was clarified to reflect every other weekend visitation. Id., 723. On appeal, this court noted the ambiguities in the judgment and rejected the father's claim that the clarification was, in fact, an improper modification. Id., 726–27. Likewise, in *Bauer* v. *Bauer*, 308 Conn. 124, 126, 60 A.3d 950 (2013), the parties had agreed to split equally the defendant's pension. In its memorandum of decision, however, the trial court did not enter any orders regarding the pension. Id., 127. Our Supreme Court ruled that a subsequent order requiring the defendant to split

his pension with the plaintiff constituted a clarification of the judgment, as opposed to a modification. Id., 129.

On the other hand, where a subsequent order causes a substantive change in an earlier order, such subsequent order modifies rather than clarifies the earlier order. See *Perry* v. *Perry*, supra, 130 Conn. App. 726; see also *In re Haley B.*, supra, 262 Conn. 414 (holding that trial court's ruling decreasing visitation from once per week to once per month constituted modification of original decision); *Almeida* v. *Almeida*, 190 Conn. App. 760, 768, 213 A.3d 28 (2019) (holding that trial court's order expanding defendant's obligation regarding property transfer from quitclaiming his interest to taking steps to ensure that plaintiff acquired 100 percent interest in property amounted to improper modification of marital dissolution judgment).

Judge Colin's 2018 order provided the plaintiff with the ability, under certain nonemergency conditions, to have the child's nanny or his driver accompany the minor child on air travel. Judge Truglia's order took that away, and, in so doing, Judge Truglia modified Judge Colin's order.[2] Construed as a modification, Judge Truglia's order was improper because it contained no findings as to the best interests of the minor child. It is well established that in ruling on a motion to modify visitation, "the trial court shall be guided by the best interests of the child . . . ." (Internal quotation marks omitted.) *Balaska* v. *Balaska*, 130 Conn. App. 510, 515–16, 25 A.3d 680 (2011); see *Stahl* v. *Bayliss*, 98 Conn. App. 63, 68, 907 A.2d 139 ("[i]t is statutorily incumbent

[2] I agree that the plaintiff pushed the limits of Judge Colin's 2018 order—possibly beyond its intended scope. Nevertheless, if, following the hearing on the defendant's contempt motion, Judge Truglia had ordered that only commitments on travel days counted as an exception, that would have constituted a clarification. Judge Truglia's ruling, however, went much further and eliminated the commitment exception entirely. This, in my view, constitutes a modification.

upon a court entering orders concerning . . . visitation or a modification of such order to be guided by the best interests of the child" (internal quotation marks omitted)), cert. denied, 280 Conn. 945, 912 A.2d 477 (2006); see also *Kelly* v. *Kelly*, 54 Conn. App. 50, 57, 732 A.2d 808 (1999) (holding that trial court improperly granted motion to modify visitation without hearing and evidence concerning children's best interests).

In the present case, the trial court made no findings regarding the best interests of the child, nor did it receive any evidence from the guardian ad litem. This is significant because the more restrictive order entered by Judge Truglia may or may not be in the child's best interests. The majority notes the comment by Judge Truglia that, given the plaintiff's responsibilities, to construe Judge Colin's order as including commitments would render his order completely meaningless. In my view, to address his concern regarding the "commitment" language in the order, Judge Truglia should have advised the parties that he was considering modifying the order and conducted a hearing at which the parties and guardian ad litem could testify, and, after which, the court could make findings as to what was in the best interests of the child. It is not inconceivable that, following such a hearing, the judge might be persuaded that the "commitment" exception did not render Judge Colin's order meaningless, but, rather, represented the judge's effort to foster a meaningful and nurturing relationship between this young boy and his busy father who lives 1300 miles away.

Because such a hearing did not take place, I respectfully dissent.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* ABU HASHEM MALICK ET AL. (AC 43262)

Moll, Alexander and Bishop, Js.

Syllabus

Pursuant to the rule of practice (§ 23-18 (a)), in any action to foreclose a mortgage, "where no defense as to the amount of the mortgage debt is interposed," the amount of the debt may be proved by the submission of an affidavit of debt.

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. The plaintiff filed an affidavit of debt attesting to the amount of the mortgage debt. The defendant filed an objection to the plaintiff's affidavit, in which he claimed that, inter alia, the plaintiff had overstated his municipal taxes and that it had miscalculated his interest. Following a hearing, the trial court granted the defendant additional time to obtain and submit verified documentation to support his contention as to those two amounts. The court thereafter held another hearing to consider, inter alia, the defendant's offer of proof as to his objection, which the defendant did not attend. The court, relying on the plaintiff's affidavit of debt and other submissions, rendered a judgment of strict foreclosure, and the defendant appealed to this court. *Held* that the trial court erred as a matter of law when it accepted the plaintiff's affidavit of debt and relied on it to establish the amount of the defendant's indebtedness: under our Supreme Court's decision in *Burritt Mutual Savings Bank of New Britain* v. *Tucker* (183 Conn. 369), once the defendant raised objections concerning the amount of the mortgage debt set forth in the plaintiff's affidavit, the hearsay exception provided in Practice Book § 23-18 (a) no longer applied, and the plaintiff was required to provide evidence of the amount of the debt.

Argued April 15—officially released September 28, 2021

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Shujaat Malick was defaulted for failure to appear; thereafter, the court, *Bruno*, *J.*, granted the plaintiff's motion for summary judgment as to liability; subsequently, the matter was

tried to the court, *Bruno*, *J.*; judgment of strict foreclosure, from which the named defendant appealed to this court. *Reversed*; *further proceedings*.

Roy W. Moss, for the appellant (named defendant).

Brian D. Rich, with whom, on the brief, was *Anthony E. Loney*, for the appellee (plaintiff).

Opinion

ALEXANDER, J. The defendant Abu Hashem Malick[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, JPMorgan Chase Bank, National Association. On appeal, Malick claims that the court erred as a matter of law when, despite his objections to some of the calculations set forth in the plaintiff's affidavit of debt, it accepted the affidavit and relied on it to establish the amount of the defendant's indebtedness. Because we are bound by our Supreme Court's decision in *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, 183 Conn. 369, 374–75, 439 A.2d 396 (1981), we reverse the judgment of the trial court.

The following facts inform our review. The defendant is the owner of real property in Fairfield (property). In a complaint dated January 9, 2018, the plaintiff alleged that the defendant had executed and delivered to Washington Mutual Bank, N.A., its predecessor in interest,[2] a note in the principal amount of $417,000, of which the plaintiff became the holder, secured by a mortgage on the property. The plaintiff further alleged that the defendant was in default on the note and that it had elected to accelerate the debt. The plaintiff sought a

[1] The defendant also is known as Abu Hashem W.Q. Malick. Also named as defendants in the trial court were Shujaat Malick and HOP Energy, LLC, neither of whom is a party to this appeal.

[2] The plaintiff alleged that it acquired Washington Mutual Bank, N.A., on or about September 25, 2008.

judgment of foreclosure. The defendant filed an answer in which he alleged in part that he had "no monetary obligations" to the plaintiff.

On January 24, 2019, the plaintiff filed a motion for summary judgment as to liability, which was granted by the court on April 4, 2019. The defendant, on April 12, 2019, filed a motion requesting that the court reconsider and vacate its summary judgment as to liability, which the court denied on May 14, 2019. On May 28, 2019, the defendant filed two identical motions in which he again requested that the court reconsider and vacate its summary judgment as to liability.

On June 20, 2019, the plaintiff filed an affidavit of debt, signed by Nicole L. Smiley, an "[a]uthorized [s]igner" of the plaintiff, attesting that the defendant owed the plaintiff $749,420.60 as of June 13, 2019. On June 21, 2019, the plaintiff filed a motion seeking a judgment of strict foreclosure. On July 3, 2019, the plaintiff updated its affidavit of debt to include the interest that had accumulated since its June 20, 2019 affidavit.

Thereafter, on July 5, 2019, the defendant filed a "brief" in support of (1) his April 12, 2019 motion to reconsider and vacate, which motion the court already had denied on May 14, 2019, and (2) his May 28, 2019 motions to reconsider and vacate the summary judgment as to liability. The defendant also filed an objection to the plaintiff's affidavit of debt on the grounds that it contained hearsay and inaccurate calculations as to the defendant's municipal tax liability and the interest owed on his loan. On July 8, 2019, the court held a hearing on the plaintiff's motion for judgment of strict foreclosure, and the court issued an order granting the defendant additional time, specifically, until a hearing on July 15, 2019, to obtain and submit verified documentation to support his contention that the plaintiff had miscalculated the outstanding interest

due, as well as the defendant's municipal tax liability.[3] The defendant thereafter filed another objection to the plaintiff's affidavit in which he claimed that according to "town records," the plaintiff had overstated his municipal taxes by $4208.83, and that it had miscalculated his interest by "tens of thousands of dollars." The defendant also claimed an offset for damages in the amount of $5,810,000.

On July 15, 2019, the court held another hearing on the plaintiff's motion for strict foreclosure and to consider the defendant's offer of proof as to his objection to the amount of the mortgage debt set forth in the plaintiff's affidavit of debt. The defendant did not attend the July 15, 2019 hearing, which had been rescheduled for the purpose of allowing him the opportunity to obtain verified documentation to support his allegations that the plaintiff's affidavit contained erroneous calculations. Relying on the plaintiff's affidavit of debt and other submissions, the court rendered a judgment of strict foreclosure, setting a law day of September 17, 2019. The present appeal followed.

The defendant claims that the court improperly rendered a judgment of strict foreclosure after he had articulated specific objections to the amount of the mortgage debt set forth in the plaintiff's affidavit of debt. He argues that "[t]his appeal ultimately concerns the applicability of the hearsay exception provided in Practice Book § 23-18 . . . ." We conclude, on the basis of *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, supra, 183 Conn. 374–75, that, once the defendant raised objections "concerning the amount of the mortgage debt"; id., 375; set forth in the plaintiff's updated affidavit of debt, the hearsay exception provided by § 23-18 (a) no longer applied, and the plaintiff

[3] The court also denied the defendant's May 28, 2019 motion to vacate the court's denial of his motion to reconsider and vacate the court's summary judgment as to liability.

was required to provide evidence of the amount of the debt. Accordingly, the court erred as a matter of law.

"[T]he scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . [T]he proper characterization of the trial court's ruling is clarified by examining the nature of an affidavit of debt and the function of Practice Book § 23-18 (a) in foreclosures. Without question, an affidavit of debt is hearsay evidence because it is an out-of-court statement, by an absent witness, that is offered to prove the truth of the amount of the debt averred in the affidavit. . . . As is relevant here, the purpose of § 23-18 (a) is to serve as an exception to the general prohibition of hearsay evidence when appropriate circumstances arise, namely, that the amount of the debt is not in dispute. . . . Therefore, the defendant's claim that the trial court erred in determining that § 23-18 (a) applies is most properly characterized as challenging the trial court's determination that an exception to the general prohibition of hearsay applies to the affidavit of debt.

"A trial court's decision to admit evidence, *if premised on a correct view of the law* . . . calls for the abuse of discretion standard of review. . . . In other words, only after a trial court has made the *legal determination* that a particular statement . . . is subject to a hearsay exception, is it [then] vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought. . . . Therefore, a trial court's legal determination of whether Practice Book § 23-18 (a) applies is a question of law over which our review is plenary." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 483–84, 166 A.3d 670 (2017).

"Practice Book § 23-18 (a) provides that in any foreclosure action 'where no defense as to the amount of the mortgage debt is interposed,' the amount of the debt may be proved by submission of an affidavit executed by an affiant familiar with the details of the debt." Id., 486. "In a mortgage foreclosure action, a defense to the amount of the debt must be based on some articulated legal reason or fact. . . . The case law is clear that a defense challenging the amount of the debt must be actively made in order to prevent the application of § 23-18 (a)." (Citation omitted; internal quotation marks omitted.) Id.

In *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, supra, 183 Conn. 374, the defendant had raised an objection to the plaintiff's affidavit of debt, specifically disputing "the amounts shown thereon for principal, interest, taxes, and late charges." Our Supreme Court explained that once "a defense concerning the amount of the mortgage debt" set forth in the plaintiff's updated affidavit of debt was raised, "[t]he rule [Practice Book § 527, now § 23-18] . . . was inapplicable and the general prohibition against hearsay evidence precluded the use of the affidavit." Id., 375; see also *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 798–99, 888 A.2d 95 (when defendant sets forth articulated challenge to amount of mortgage debt set forth in plaintiff's affidavit of debt, "the use of Practice Book § 23-18 to introduce the affidavit is prohibited, and the hearsay rules apply" (internal quotation marks omitted)), cert. denied, 277 Conn. 925, 895 A.2d 799 (2006).

In the present case, the defendant objected to the plaintiff's affidavit of debt, raising "a defense concerning the amount of the mortgage debt" set forth therein. *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, supra, 183 Conn. 375. Specifically, he objected in relevant part on the ground that the taxes shown in the

municipal tax records differed from those set forth in the plaintiff's affidavit by the amount of $4208.83 and that the plaintiff's calculations did not contain the property tax abatement that he had received from the municipality. He also objected on the ground that he had a variable interest rate on his loan and that the plaintiff's interest rate calculation was incorrect.

Although the defendant's answer alleging that he had "no monetary obligations" to the plaintiff would be insufficient to result in the preclusion of Practice Book § 23-18 (a) to establish the amount of the debt; see *U.S. Bank National Assn.* v. *Bennett*, 195 Conn. App. 96, 111, 223 A.3d 381 (2019) ("[a] defense or a counterclaim does not affect the applicability of Practice Book § 23-18 (a) unless it actually challenges in some manner *the amount of the debt* alleged by the plaintiff" (emphasis added; internal quotation marks omitted)); *Connecticut National Bank* v. *N. E. Owen II, Inc.*, 22 Conn. App. 468, 471–75, 578 A.2d 655 (1990) (defendant's claim that he had no knowledge as to correctness of amount of debt is insufficient to raise challenge that requires evidentiary hearing); the defendant's objections "concerning the amount of the mortgage debt"; *Burritt Mutual Savings Bank of New Britain* v. *Tucker*, supra, 183 Conn. 375; set forth in the plaintiff's affidavit render improper the application of § 23-18 (a) in establishing the amount of the debt.[4] See id., 374–75; *Bank of America, N.A.* v. *Chainani*, supra, 174 Conn. App. 486; *National City Mortgage Co.* v. *Stoecker*, supra, 92 Conn. App. 798–99. Accordingly, the court erred as a matter of law.

The judgment is reversed and the case is remanded for further proceedings.

In this opinion the other judges concurred.

[4] We offer no comment on the merits of the defendant's defenses or objections. In this case, the court committed legal error by accepting the affidavit of debt.

STATE OF CONNECTICUT *v.* JASMIN I. LUNA
(AC 43097)

Cradle, Alexander and Lavine, Js.

Syllabus

Convicted of the crimes of misconduct with a motor vehicle and assault in the third degree, the defendant appealed to this court, claiming, inter alia, that the trial court improperly precluded her from introducing into evidence certain medical records of T, who died after the motorcycle he was operating collided with the defendant's vehicle. The defendant had initiated a left turn into a parking lot, without signaling and while speaking on a cell phone, when she turned her vehicle into the path of the oncoming motorcycle before running over the motorcycle and both T and his passenger, who suffered serious injuries. The defendant gave a sworn statement to the police at the accident scene that she had not been on her cell phone at the time of the crash and later mailed to them a second sworn statement, written with the assistance of her counsel, in which she stated, inter alia, that no cars were in the other lane of travel when she turned into the parking lot and that she neither made nor received any phone calls within twenty minutes before the collision. *Held*:

1. The defendant could not prevail on her claim that the evidence was insufficient for the jury to determine that she acted with criminal negligence, as required for a conviction of both misconduct with a motor vehicle and assault in the third degree; there was sufficient evidence pursuant to which the jury could have found, beyond a reasonable doubt, that the defendant exhibited a failure to perceive a substantial and unjustifiable risk that the manner in which she drove her vehicle would cause T's death when, in a gross deviation from the standard of care a reasonable person would observe in her situation, she did not wait for the motorcycle to pass but, believing that it was not traveling that fast, turned left into its path and drove over the motorcycle and its passengers.
2. The trial court did not abuse its discretion or violate the defendant's constitutional right to present a defense when it precluded her from introducing into evidence a toxicology report that showed that T had five substances in his system twelve hours after the collision:

   a. The defendant's unpreserved evidentiary claim that the report was admissible as a business record was not reviewable: nothing in the record indicated that the defendant ever alerted the trial court that she was making such a claim, and, even if her claim had been preserved for appellate review, it failed, as the court precluded the report on the ground that the defendant did not establish its relevance, the defendant did not provide any testimony concerning the effects the substances may have had on T's ability to operate the motorcycle, which was not a matter of

common knowledge of the jurors, the report merely listed the substances without an explanation as to the notation of abnormal for those with a positive value, and there was no way to know from the report the amount of any substance in T's body, when he ingested it or whether it was part of his medical treatment; moreover, admission of the report into evidence would have been prejudicial and likely confused the jury, which would have had to speculate regarding the substances and their effects, if any, on T's ability to operate the motorcycle, and the string of inferences the defendant sought to establish by admission of the report was too tenuous. b. Because the trial court did not abuse its discretion in determining that the toxicology report was not relevant and, thus, not admissible, the defendant's unpreserved constitutional claim that the court's evidentiary ruling deprived her of her right to present a defense was unavailing.

3. The defendant could not prevail on her unpreserved claim that the admission into evidence of T's death certificate violated her sixth amendment right to confrontation because the death certificate contained testimonial hearsay; defense counsel waived any objection on confrontation clause grounds by stating that he had no objection when the document was marked for identification and objecting when it was offered as a full exhibit only on the ground that it was more prejudicial than probative.

4. The defendant's unpreserved claim that the trial court violated her constitutional right to conflict free representation was unavailing: the record was inadequate to review the defendant's assertion that the court failed to inquire, sua sponte, into a conflict of interest that defense counsel created when he provided the prosecutor with the defendant's second statement to the police, which made counsel into a potential witness who was unable to object to the admission of the statement into evidence or to argue that he was responsible for it without admitting to his mistake; moreover, there was nothing in the record to indicate that the court reasonably should have known of a conflict, as the statement contained nothing signaling a conflict of interest but, rather, simply provided a description of the incident at issue, and there was never a mention of any purported conflict of interest by any party involved; furthermore, as it was not clear from the record that any conflict of interest existed, the court was correct to rely on defense counsel's lack of an objection and silence as to any conflict of interest in determining that there was no need to inquire.

Argued April 6—officially released September 28, 2021

Procedural History

Information, in the first case, charging the defendant with the violations of operating a motor vehicle on a highway with a hand-held telephone or mobile electronic device and operating a motor vehicle without minimum insurance, and with the infraction of making

an improper turn, and substitute information, in the second case, charging the defendant with the crimes of misconduct with a motor vehicle and assault in the third degree, brought to the Superior Court in the judicial district of New Haven at Meriden, geographical area number seventeen, where the defendant was presented to the court, *K. Murphy, J.*, in the first case, on a plea of guilty to operating a motor vehicle without minimum insurance; thereafter, the second case was tried to the jury; verdict of guilty; subsequently, the charges of operating a motor vehicle on a highway with a hand-held telephone or mobile electronic device and making an improper turn were tried to the court; judgments of guilty in accordance with the plea, verdict and finding, from which the defendant appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Roger Dobris*, former senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Jasmin I. Luna, appeals from the judgment of conviction, rendered after a jury trial, of misconduct with a motor vehicle in violation of General Statutes § 53a-57 and assault in the third degree in violation of General Statutes § 53a-61 (a) (3) in connection with a motor vehicle accident in which the defendant's vehicle collided with a motorcycle.[1] On

[1] We note that the defendant, in two, signed statements in the record, spelled her first name "Jazmin." We use the spelling that is consistent with the operative information.

The defendant also was found guilty by the trial court of the motor vehicle violation of operating a motor vehicle with a hand-held telephone or mobile electronic device in violation of General Statutes (Rev. to 2017) § 14-296aa (b) (1), and of committing the infraction of improper turn in violation of General Statutes § 14-242. Additionally, the defendant pleaded guilty to hav-

appeal, the defendant claims that (1) the evidence adduced at trial was insufficient to support her conviction, (2) the trial court abused its discretion and violated her sixth amendment right to present a defense by improperly precluding her from introducing into evidence portions of the medical records of the operator of the motorcycle, Kevin Tardiff, (3) the court erred in admitting into evidence Tardiff's death certificate and, in doing so, violated her sixth amendment right to confrontation because the document contained testimonial hearsay, and (4) the court violated her sixth amendment right to conflict free representation when it failed to inquire into the actual conflict of interest created by defense counsel when he provided the state with evidence harmful to the defendant. We are unpersuaded by each of the defendant's claims and affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On May 20, 2017, at approximately 4:30 p.m., the defendant was driving her vehicle in a southbound direction on Old Colony Road in Meriden to attend a baby shower at the Meriden Turner Society (hall). As the defendant was approaching the parking lot of the hall, she noticed her mother waving for her to turn into the parking lot. At the same time, the defendant noticed a motorcycle driven by Tardiff traveling in a northbound direction on Old Colony Road. The motorcycle was traveling in the center of the lane at the speed limit, neither veering nor swerving. The defendant was holding a cell phone in her right hand and speaking into it. The defendant admitted to one of the police officers at the scene that she was using her cell phone for its global positioning system (GPS) function. She looked to the hall on her left, moved her left hand as if to wave to her

ing committed the infraction of operating a motor vehicle without minimum insurance in violation of General Statutes § 14-213b. The defendant has not challenged her conviction of the foregoing violation or infractions on appeal.

mother, and initiated a left turn of the vehicle without signaling. The motorcycle, traveling in the opposite direction, skidded for thirty-seven feet before Tardiff "laid the bike down," deliberately dropping the motorcycle to the ground, where it bounced and scraped along the pavement for thirty more feet before striking the defendant's vehicle. The defendant's vehicle drove over the motorcycle, Tardiff and his passenger, Kathryn Caponigro, before coming to a stop "almost all the way into" the parking lot.

Emergency personnel soon arrived to treat the motorcycle operator and his passenger. Tardiff and Caponigro were transported to MidState Medical Center in Meriden and later taken via Life Star helicopter to Hartford Hospital. Tardiff died of his injuries approximately two weeks later. Caponigro remained in the hospital for three months, and her injuries seriously affected her walking, speech, and vision.

At the scene of the accident, the defendant gave a statement to Garrett Ficara, an officer with the Meriden Police Department, in which she stated that she had not been on her cell phone at the time of the crash. She also told Lieutenant Thomas J. Cossette, Sr., of the Meriden Police Department that she had been using the GPS capability of her cell phone while driving. An eyewitness who was driving a vehicle directly behind the defendant prior to the crash, Elizabeth Gonzalez-Asik, saw the defendant holding her cell phone, in her right hand, up to her ear and talking into the phone.

Additionally, at the scene, the defendant told Lieutenant Cossette that she saw the motorcycle but did not think that it was coming "that fast." In her written statement, taken by Officer Ficara at the accident scene, the defendant stated that she saw the motorcycle, traveling northbound on Old Colony Road, come over the

hillcrest. From behind the defendant's car, Gonzalez-Asik saw the motorcycle coming and thought to herself that the defendant was going to hit the motorcycle because she "knew [that the defendant] didn't see them."

Following a jury trial, the defendant was convicted of misconduct with a motor vehicle and assault in the third degree. She was sentenced to a total effective term of six years of incarceration, execution suspended after three years, followed by three years of probation. This appeal followed.

I

The defendant first claims that the state presented insufficient evidence to support her conviction of misconduct with a motor vehicle and assault in the third degree. Specifically, she argues that the state did not present sufficient evidence regarding the element of criminal negligence as to both offenses. We disagree.

We first set forth our standard of review. "It is well known that a defendant who asserts an insufficiency of the evidence claim bears an arduous burden. . . . When reviewing a claim of insufficient evidence, an appellate court applies a two part test. . . . We first review the evidence presented at trial, construing it in the light most favorable to sustaining the verdict. . . . [Second, we] . . . determine whether the jury could have reasonably concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt. . . . In this process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . The issue is whether the cumulative effect of the evidence was sufficient to justify the verdict of guilty beyond a reasonable doubt. . . .

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . . An appellate court defers to the jury's assessment of the credibility of witnesses on the basis of [its] firsthand observation of their conduct." (Citations omitted; internal quotation marks omitted.) *State* v. *Thorne*, 204 Conn. App. 249, 256–57, 253 A.3d 1021, cert. denied, 336 Conn. 953, 251 A.3d 993 (2021).

Misconduct with a motor vehicle and assault in the third degree both contain the element of criminal negligence. Section 53a-57 (a) provides: "A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person." Similarly, "[a] person is guilty of assault in the third degree when . . . (3) with criminal negligence, he causes physical injury to another person by means of a . . . dangerous instrument . . . ." General Statutes § 53a-61 (a).

General Statutes § 53a-3 (14) defines criminal negligence as the failure "to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . ." Accordingly, "[u]nder § 53a-57, the state was required to prove that the defendant was operating a motor vehicle,

that [s]he caused the death of another person, and that [s]he failed to perceive a substantial and unjustifiable risk that the manner in which [s]he operated [her] vehicle would cause that death. The failure to perceive that risk must constitute a gross deviation from the standard of care that a reasonable person would observe in the situation." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Daniels*, 191 Conn. App. 33, 50, 213 A.3d 517, cert. dismissed, 333 Conn. 918, 217 A.3d 635 (2019), and cert. granted, 333 Conn. 918, 216 A.3d 651 (2019).

The defendant argues that the evidence was insufficient for a reasonable jury to determine that she acted with criminal negligence, as required for a conviction of both offenses. She contends that "[t]he events of this case occur every day. Everyone who drives knows the feeling of being slightly distracted by problems, conversations with passengers, and trying to get to a destination. . . . [The defendant] suffered a momentary lapse in judgment when she was trying to make a left turn into a place she was not familiar with. She was not criminally negligent . . . ." (Citation omitted.)

In the present case, the evidence was sufficient to support the jury's conclusion that the defendant failed to perceive a substantial and unjustifiable risk while operating a motor vehicle. The defendant, as an operator of a motor vehicle, was "under a duty to exercise reasonable care . . . and to keep a reasonable lookout for persons or traffic that . . . she [was] likely to encounter." (Citation omitted.) *State* v. *Carter*, 64 Conn. App. 631, 642, 781 A.2d 376, cert. denied, 258 Conn. 914, 782 A.2d 1247 (2001). In a gross deviation from the standard of care that a reasonable person would observe in the situation, the defendant, while using her cell phone to attempt to locate her destination, and perhaps while talking on the phone, saw a motorcycle traveling in the opposite direction but did not believe

that it was traveling "that fast" and did not wait for it to pass. Rather, without using her turn signal, she turned left into the path of the motorcycle. Despite Tardiff's placing his motorcycle on the ground, where it continued to slide, the defendant *continued to drive* over the motorcycle and its passengers before stopping in the parking lot of the hall. The defendant's lack of attention while attempting to locate and enter the parking lot exemplifies a failure to "perceive a substantial and unjustifiable risk that the manner in which [s]he operated [her] vehicle would cause that death." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Daniels*, supra, 191 Conn. App. 50.

Similarly, in *State* v. *Carter*, supra, 64 Conn. App. 633, the defendant was convicted of misconduct with a motor vehicle for losing visual focus on the road, veering out of his travel lane and killing a motorist standing by a disabled vehicle. On appeal, the defendant claimed that the evidence was insufficient to establish criminal negligence. Id., 636. This court determined that "[w]hether the defendant had been working on something under the dash or had fallen asleep is of little consequence to our analysis. The [trial] court had before it circumstantial evidence as to what caused the defendant to operate his vehicle while bent over and in an erratic manner. The court was free to draw whatever inferences from the evidence or facts established by the evidence it [deemed] to be reasonable and logical." (Internal quotation marks omitted.) Id., 640.

Like the motorist in *Carter* who lost focus on the road, the defendant in the present case was too distracted to perceive the risk created by the manner in which she was operating her vehicle. See id., 636. On the basis of the evidence presented at trial, the jury reasonably could have concluded that the defendant's actions in utilizing her cell phone, turning in front of the motorcycle, and, ultimately, running over the motor-

cycle and both its operator and passenger, exhibited a failure to "perceive a substantial and unjustifiable risk that the manner in which [s]he operated [her] vehicle would cause that death." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Daniels*, supra, 191 Conn. App. 50. Consequently, on the basis of our review of the record, we conclude that there was sufficient evidence pursuant to which the jury reasonably could have found beyond a reasonable doubt that the defendant, acting with criminal negligence, caused both the death of one person and physical injury to another by means of a dangerous instrument.[2]

II

The defendant next claims that the trial court improperly precluded her from introducing into evidence portions of Tardiff's medical records. Specifically, on the first day of evidence she sought to introduce, inter alia, portions of a toxicology report (report) showing that Tardiff "had five illicit substances in his system" at the time of the accident. According to the report, a sample of Tardiff's urine was taken on May 21, 2017, at 4:46 a.m., and was screened for a number of substances.[3]

[2] As noted, both offenses of which the defendant was found guilty required the jury to find that she acted with criminal negligence. See General Statutes §§ 53a-57 (a) and 53a-61 (a). The jury reasonably could have found that the defendant caused physical injury to Caponigro by driving her vehicle, a dangerous instrument, in a manner that was criminally negligent. See General Statutes §§ 53a-3 (7) and (8), and 53a-61 (a).

[3] In her appellate brief and at oral argument before this court, the defendant disputed the precise time that the urine sample was collected for testing. She based her claim on the fact that the report contains a comment under the Oxycodone screening result that reads: "[P]erformed at MidState Medical Center . . . ." Relying on that comment, the defendant claims that the report shows that the urine was collected prior to Tardiff's being transported to Hartford Hospital; however, there are no facts in the record to support a finding that the times presented in the report from Hartford Hospital are incorrect. This contention serves only to further solidify the trial court's comments regarding the need for testimony to illuminate the relevancy of the report.

The report does not list any amounts of the substances but merely provides a list of substances with either a positive or a negative value. The substances with a positive value have a notation of "abnormal." The report shows that Tardiff's urine tested positive for Oxycodone, amphetamine, benzodiazepine, cannabinoid, and opiate. The defendant has raised both an evidentiary claim and a constitutional claim regarding the trial court's exclusion of Tardiff's medical records. We address each in turn.

A

The defendant first claims that the court abused its discretion in declining to admit into evidence Tardiff's medical records. Specifically, she claims that the records were admissible as business records. The defendant acknowledges that she did not say the words "business record exception" at trial but, nevertheless, alleges that her claim regarding the business record exception to the hearsay rule; see Conn. Code Evid. § 8-4; was functionally preserved because "she did subpoena the medical records, along with someone who could attest to the business record exception requirements." The state claims that the medical records contain hearsay and that the defendant raised her claim regarding the business record exception to the hearsay rule for the first time on appeal. Moreover, the state claims that, even if the defendant did preserve this claim, the preclusion of the medical records was proper because she failed to provide an adequate foundation for their admission under the business record exception and because she failed to establish their relevance to any disputed issues at trial. We agree with the state.

The following additional facts are relevant to our resolution of this claim. Defense counsel sought to admit Tardiff's medical records on the ground that Lieutenant Cossette had "testified about brain response.

. . . [H]e received the medical reports and reviewed them; they are part of the investigation. . . . [H]is report says there were no drugs involved. And yet, he had a toxicology report from the hospital that said that there were five illegal substances." The court inquired whether defense counsel would introduce evidence that there were illicit substances in Tardiff's system "at the time of . . . the accident?" Defense counsel answered affirmatively, and the court stated: "I am not guaranteeing that [the investigating officer] can authenticate those documents. . . . You should be prepared to call a witness who can authenticate those documents."

The following day, defense counsel informed the court that he had subpoenaed the custodian of the medical records at Hartford Hospital to appear with the pertinent medical records. The following colloquy took place between the court and defense counsel:

"The Court: . . . Are you intending to call someone to interpret any of the documents that [you] subpoenaed?

"[Defense Counsel]: No. Just to show . . . the toxicology report—

"The Court: Well, how is someone going to be able to—how is the jury going to be able to interpret that?

"[Defense Counsel]: Well—

"The Court: I don't know what's in the toxicology report. I'm just asking you how—how are you going to be able to interpret whatever substances, if any, are in—in . . . Tardiff's system? . . . [I]f you are going to introduce evidence of some type of substances in someone's system, how is the jury going to know what the impact, if any, of those substances are on that person?

"[Defense Counsel]: Well, under these circumstances, they would know the substances were there. They can apply common sense—

"The Court: But, again, how would they know what the impact is? Suppose he had nicotine in his system; what is the impact of that? Suppose he had aspirin in his system; what is the impact of that? Suppose he had cocaine in his system; what is the impact of that?

"It doesn't—I don't know how those—the introduction of the toxicology report is going to be relevant to the jury's consideration all by itself.

"[Defense Counsel]: Well, I'm not going to ask someone who only delivers the paperwork, and authenticates it, to interpret it.

"The Court: Well, then how would it be relevant to this case?

"[Defense Counsel]: Well, I think—

"The Court: If the jury doesn't know anything about the impact of—any of those substances—I've given a list of three—but, any substances are found, how is the jury going to be able to interpret how that impacts on the human body, on the length that it stays in the system. How are [the jurors] going to be able to interpret that?

"[Defense Counsel]: Well, I'm certain that the state will argue that.

"The Court: No. That's not a question of the state. It's a question of relevancy."

The court further stated to defense counsel: "Counsel, you're going to have to make an indication of whatever is about to be introduced tomorrow, if that when we continue the case to, is relevant in this case. You have not made that—you have not shown that yet. There is an objection by the state.

"Essentially, right now, you're asking for a continuance in order to allow for those documents to be provided. I guess what I'm saying is, just introducing the documents, alone, is not sufficient to make them relevant in this case. It may be they are relevant. I don't know. But you haven't made a case yet that they are relevant. . . . As far as any other substances, I don't know what the other substances are. I also don't know when they were administered [or] [w]hether they were the result of medical intervention. I don't know any of that. So, again, you haven't shown that those—the introduction is relevant."

The court also asked defense counsel whether the records indicate "the date of extraction, or the date that the sample was taken." Defense counsel replied that the records indicate that the sample was taken within eighteen hours of Tardiff being admitted to the hospital. The court then asked that the medical records be marked as a court exhibit "so that [it could] examine [the records] in order to rule on the motion regarding [their] admissibility . . . [and] [s]o that [it could] understand . . . how, if at all, [the records were] relevant here."

The next day, when defense counsel did not call any witnesses to testify regarding the medical records, the court stated: "Alright. Well, based on what you've provided to me today . . . I can't—you haven't identified any witnesses. You haven't provided any additional information. . . .

"In regard to the urine screens . . . there are a number of problems with introducing the urine screens the way they are, without any further explanation. One, based on my knowledge, and it's a limited knowledge, urine does not test—is not as specific as blood, to test what is in a person's system at the time of the test. And I don't know that one can extrapolate backward, the

date of the test, in this case, that you're seeking to introduce, is [May 21] . . . at 4:46 a.m., which is approximately twelve hours after . . . the accident. And . . . it's not clear what those substances, in his urine, how they impacted . . . whether they were affecting him, at all? What the nature of the effect was? . . . I have no idea what the impact of those substances [was] at the time of the accident.

"I don't know what the impact of medical intervention was. Whether some, or all, of these substances might have been provided in the course of medical intervention. There [were] twelve hours that had passed—ten to twelve hours—from the time that medical intervention began. There are a number of different types of drugs. I don't know . . . the impact of those different types of drugs. Even assuming that you could show that they would have been in his system, in his blood system, going through his brain, and his heart, and his body, at the time, even if you could show that they were somehow in his system, at the time, I don't know . . . the impact of those [substances]." The court, thus, sustained the state's objection to the admission of the medical records.

In light of our review of the transcripts of the proceedings concerning the court's decision declining to admit Tardiff's medical records, the defendant's claim that the medical records were admissible as business records is problematic for a couple of reasons. First, there is nothing in the transcripts indicating that defense counsel ever alerted the trial court that he was making such a claim. "To admit evidence under the business record exception to the hearsay rule, a trial court judge must first find that the record satisfies each of the three conditions set forth in [General Statutes] § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was the regular course of

such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter. . . . To qualify a document as a business record, the party offering the evidence must present a witness who testifies that these three requirements have been met." (Internal quotation marks omitted.) *HSBC Bank USA, National Assn.* v. *Gilbert*, 200 Conn. App. 335, 349, 238 A.3d 784 (2020).

Although defense counsel did subpoena the custodian of the medical records at Hartford Hospital to appear with the pertinent medical records, he never presented a witness to testify regarding the medical records to establish a foundation for the documents to be admissible as business records. On the basis of the record, we conclude that the defendant did not preserve her evidentiary claim that Tardiff's medical records were admissible as business records. Accordingly, the claim is not reviewable. See *State* v. *Fernando V.*, 331 Conn. 201, 212, 202 A.3d 350 (2019) ("[a]ssigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush" (internal quotation marks omitted)).

Second, even if we assume that the defendant's evidentiary claim regarding the court's preclusion of the medical records was preserved, the defendant's claim, nevertheless, fails. "Once [the criteria of § 52-180] have been met by the party seeking to introduce the record . . . it does not necessarily follow that the record itself is generally admissible, nor does it mean that everything in it is required to be admitted into evidence. . . . For example, the information contained in the record must be relevant to the issues being tried." (Internal quotation marks omitted.) *State* v. *William C.*, 267 Conn. 686, 704, 841 A.2d 1144 (2004); see also *Edward M.* v. *Commissioner of Correction*, 186 Conn. App. 754, 762, 201 A.3d 492 (2018) ("[i]t is axiomatic that, in order to

be admissible, evidence must be relevant to an issue in the case in which it is offered" (internal quotation marks omitted)). In the present case, the trial court excluded the proffered medical records on the ground that the defendant had failed to establish their relevance, and we agree with that conclusion.

"It is well established that [t]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue." (Citations omitted; internal quotation marks omitted.) *State* v. *Barrett*, 43 Conn. App. 667, 671, 685 A.2d 677 (1996), cert. denied, 240 Conn. 923, 692 A.2d 819 (1997). "As a basic principle, evidence must be relevant to the defendant's theory of the case to be admitted. . . . The proffering party bears the burden of establishing the relevance of offered evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Clifford P.*, 124 Conn. App. 176, 188–89, 3 A.3d 1052, cert. denied, 299 Conn. 911, 10 A.3d 529 (2010). "[A] defendant, when claiming that a court's ruling on relevance and admissibility was improper, bears the initial burden of demonstrating that that ruling was an abuse of discretion." *State* v. *Hernandez*, 91 Conn. App. 169, 173, 883 A.2d 1, cert. denied, 276 Conn. 912, 886 A.2d 426 (2005).

In the present case, the trial court stated to defense counsel numerous times that a witness would be needed to testify as to the effects, if any, that the substances listed in the toxicology report may have had on Tardiff's system and ability to drive, and that introducing the medical records, alone, was not sufficient to establish their relevance. Specifically, the court explained that it could not discern from the toxicology report, alone, when Tardiff ingested the substances, how long they

were in his system, the levels of the substances in his system and the type of impact, if any, on Tardiff, or whether the substances were in Tardiff's system as a result of any medical intervention when he was taken to the hospital. In fact, the toxicology report from Hartford Hospital contains a notation that states that Tardiff tested "positive for cannabinoid—other substances as well but got meds when admitted to [MidState Medical Center]." The report also merely provides a list of substances found in Tardiff's urine with either a positive or negative value and does not list any amounts of the substances.

In *Deegan* v. *Simmons*, 100 Conn. App. 524, 536–39, 918 A.2d 998, cert. denied, 282 Conn. 923, 925 A.2d 1103 (2007), this court addressed a situation similar to the one in the present case. In *Deegan*, the plaintiffs claimed on appeal that the trial court improperly precluded them from introducing evidence demonstrating that the defendant Ollie J. Simmons allegedly tested positive for marijuana at the hospital after a motor vehicle accident involving the parties. Id., 536. Specifically, "[i]n the course of pretrial discovery, it was learned that on the day of the accident, Simmons was taken by ambulance to [MidState] Medical Center in Meriden where a test for a cannabinoid in his system resulted in a finding of 'abnormal.' " Id., 537. The court granted a motion in limine filed by the defendants to exclude the laboratory report. Id. On appeal, this court affirmed the trial court's decision to exclude the report and concluded: "[T]he court correctly noted that there was no evidence that marijuana had been used prior to the accident and no evidence that Simmons was impaired while driving his vehicle. Without corroborating evidence, the laboratory report itself would not explain: (1) how long a cannabinoid substance stays in a person's system; (2) the amount of cannabinoid in Simmons' system at the time

of the accident; (3) the relationship between cannabinoid and marijuana; (4) what other products might cause a positive result for a cannabinoid substance; (5) whether urine tests could produce a false positive result and, if so, how often; (6) the possibility for contamination of the sample; and (7) the chain of custody of any sample. These are not subject areas within the common knowledge of the jury and yet each of these factors has evidentiary significance. Thus, the court correctly concluded that the laboratory report indicating an 'abnormal result' for a cannabinoid screen was inadmissible absent explanatory expert opinion." Id., 538; see also id. ("[e]xpert testimony is required when the question involved goes beyond the field of the ordinary knowledge and experience of judges or jurors" (internal quotation marks omitted)).

Likewise, in *State* v. *Hargett*, 196 Conn. App. 228, 246–47, 229 A.3d 1047, cert. granted, 335 Conn. 952, 238 A.3d 730 (2020), this court concluded that the trial court properly excluded a toxicology report showing the presence of phencyclidine (PCP) in the victim's body at the time of death, which report the defendant sought to have admitted as a business record.[4] In that case, the defendant "did not disclose an expert to testify or to explain how people behave or act under the influence of PCP or how the victim acted or could have acted under the influence of PCP"; id., 244; nor did he "explain why the presence of PCP in the victim's body was relevant to self-defense and his intent or otherwise lay a foundation for the admission of the toxicology report." Id., 246; see also *Abreu* v. *Commissioner of Correction*, 172 Conn. App. 567, 581 and n.6, 160 A.3d 1077 (court

[4] We note that, in *Hargett*, our Supreme Court granted the defendant's petition for certification to appeal as to the following issue: "Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in excluding as irrelevant evidence that the victim was under the influence of [PCP] at the time of the murder . . . ?" *State* v. *Hargett*, 335 Conn. 952, 953, 238 A.3d 730 (2020).

properly excluded evidence of victim's blood alcohol content from autopsy report to show that victim was initial aggressor where defendant failed to present any evidence showing that alcohol caused victim to be more aggressive or level of victim's intoxication, or establishing connection between alcohol in victim's system and his tendency toward aggression), cert. denied, 326 Conn. 901, 162 A.3d 724 (2017).

Similarly, in *State* v. *Lawson*, 99 Conn. App. 233, 235–36, 913 A.2d 494, cert. denied, 282 Conn. 901, 918 A.2d 888 (2007), the defendant was convicted of various crimes in connection with an incident in which his truck collided with a motorcycle driven by the victim, who died from his injuries. In that case, the defendant sought to introduce evidence from an autopsy report that the victim had a trace amount of methadone in his blood at the time of the accident. Id., 246. The court precluded the evidence on the ground that "the effects of a trace amount of methadone on motor skills or judgment must be shown by testimony from a qualified expert." Id., 247. The defendant never presented any testimony regarding the effect of methadone on the victim's ability to operate the motorcycle. Id., 248–49. On appeal, this court affirmed the judgment of the trial court, concluding that "the effect of a trace amount of methadone on the victim would be relevant only if that trace amount affected the victim's ability to operate a motorcycle," and that, because "the effects of a trace amount of methadone on driving impairment is not a matter of common knowledge, experience and common sense," expert testimony was required. Id., 250.

The circumstances of the present case are similar to those in *Deegan*, *Hargett* and *Lawson*. In the present case, notwithstanding the trial court's repeated statements to defense counsel, the defendant did not provide any testimony, expert or otherwise, concerning what effects, if any, the substances in Tardiff's system may

have had on his ability to operate his motorcycle, which was not a matter of common knowledge of the jurors. The report, as in *Deegan*, merely listed substances with either a positive or negative value, and those with a positive value had a notation of "abnormal," with no explanation. There was no way to know from the report alone the amount of any substance found in Tardiff's system, when he may have ingested the substance, whether it was provided to him as part of medical treatment, or whether there was a causal connection between the substances found in Tardiff's system and his ability to operate his motorcycle and avoid the collision with the plaintiff's vehicle. See *State* v. *Hargett*, supra, 196 Conn. App. 245 (trial court properly excluded toxicology report because there was no "causal relationship between the evidence of PCP in the victim's body and the defendant's having shot him"); *Deegan* v. *Simmons*, supra, 100 Conn. App. 539 (laboratory "report did not indicate that Simmons was under the influence of marijuana at the time of the accident, and there was no other evidence adduced at trial that would support a reasonable belief that Simmons was operating his vehicle while he was under the influence of any drug or controlled substance"). The court, therefore, properly concluded that the defendant failed to establish the relevance of the proffered medical records.

Finally, the defendant's claim that the jury could have determined the effects, if any, of the substances in Tardiff's system is unavailing. As this court explained in *Deegan*, "[t]o permit evidence of a laboratory result indicating an abnormal result for a cannabinoid, without any further explanation of that finding, would be highly prejudicial to the defendants" and "would likely have confused" the jury. Id. Because the medical records involved in the present case do not have any values or amounts of the substances and, instead, indicate either a positive or negative value, with a notation

of "abnormal" for the substances with a positive value, their admission would have been prejudicial and likely would have confused the jury, which would have had to speculate regarding the substances and their effects, if any, on Tardiff's ability to operate his motorcycle. See *State* v. *Hernandez*, supra, 91 Conn. App. 173 ("[o]ur Supreme Court has stated that courts are not required to admit evidence that is merely speculative"). Without the necessary testimony, the string of inferences that the defendant sought to establish by admission of the medical records alone was too tenuous. See *Masse* v. *Perez*, 139 Conn. App. 794, 806, 58 A.3d 273 (2012) ("trial court . . . properly [excluded] evidence where connection between the inference and the fact sought to be established was so tenuous as to require the [trier of fact] to engage in sheer speculation" (internal quotation marks omitted)), cert. denied, 308 Conn. 905, 61 A.3d 1098 (2013).

Accordingly, the trial court's exclusion of Tardiff's medical records was not an abuse of discretion.

B

The defendant next claims, for the first time on appeal, that the court's evidentiary ruling that the medical reports were not relevant violated her right to present a defense. She acknowledges that the claim is unpreserved and seeks review 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).[5] This claim requires little discussion. This court

[5] Pursuant to *Golding*, we may review an unpreserved constitutional claim "only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

previously has stated that a "defendant's constitutional right to present a defense does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . Generally, an accused must comply with established rules of procedure and evidence in exercising his right to present a defense. . . . A defendant, therefore, may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right is not violated." (Internal quotation marks omitted.) *State* v. *Galarza*, 97 Conn. App. 444, 464, 906 A.2d 685, cert. denied, 280 Conn. 936, 909 A.2d 962 (2006); see also *State* v. *Cerreta*, 260 Conn. 251, 261, 796 A.2d 1176 (2002) (same); *State* v. *Hargett*, supra, 196 Conn. App. 246–47 (court properly excluded toxicology report where defendant failed to establish relevance of report, and, because "court did not abuse its discretion with respect to its evidentiary rulings . . . [it] did not violate the defendant's constitutional right to present a defense").

Because the trial court in the present case court did not abuse its discretion in determining that the medical reports were not relevant and, therefore, not admissible, the defendant's constitutional claim fails.

III

The defendant next claims that the court erred in admitting Tardiff's death certificate and, in doing so, violated her sixth amendment right to confrontation because the document contained testimonial hearsay. We disagree.

The defendant concedes that this claim is unpreserved and seeks review pursuant to *Golding*. See footnote 5 of this opinion. With respect to the first two prongs of *Golding*, we conclude that the record, which contains the full transcript of the trial proceedings, is adequate for our review and the claim is of constitutional magnitude because it implicates the defendant's

sixth amendment right to confrontation. See *State* v. *Castro*, 200 Conn. App. 450, 456–57, 238 A.3d 813, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020). Accordingly, the defendant's claim is reviewable, and, therefore, we next address the defendant's claim under the third prong of *Golding*. See id., 457. The state claims that, because the defendant waived any sixth amendment claim concerning the admission of the death certificate, her claim fails under the third prong of *Golding*. We agree with the state.

The following additional facts are relevant to the court's analysis of this claim. When Tardiff's death certificate was marked for identification, defense counsel stated that he had "[n]o objection." Additionally, when the state offered the death certificate as a full exhibit, the court asked whether there was any objection, to which defense counsel responded, "I'm going to object. It's . . . more prejudicial than probative." When asked by the court if he had any other objection to the evidence, defense counsel answered in the negative.

"It is well settled that a criminal defendant may waive rights guaranteed to him under the constitution." (Internal quotation marks omitted.) *State* v. *Castro*, supra, 200 Conn. App. 457. "[T]he definition of a valid waiver of a constitutional right . . . [is] the intentional relinquishment or abandonment of a known right." (Internal quotation marks omitted.) Id., 458. "When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. See, e.g., *State* v. *Holness*, 289 Conn. 535, 544–45, 958 A.2d 754 (2008) (holding that defendant waived [claim under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), that trial court improperly admitted recording of conversation in violation of confrontation clause of federal constitution] when counsel agreed to

limiting instruction regarding hearsay statements introduced by state on cross-examination); *State* v. *Fabricatore*, [281 Conn. 469, 481, 915 A.2d 872 (2007)] (concluding defendant waived claim when he not only failed to object to jury instruction but also expressed satisfaction with it and argued that it was proper)." (Internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 71–72, 967 A.2d 41 (2009). Additionally, it is well settled that defense counsel may waive a defendant's sixth amendment right to confrontation. See *State* v. *Castro*, supra, 457–58 ("[T]he defendant is deemed bound by the acts of his [or her] lawyer-agent . . . . Thus, decisions by counsel are generally given effect as to what arguments to pursue . . . what evidentiary objections to raise . . . and what agreements to conclude regarding the admission of evidence . . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." (Internal quotation marks omitted.)).

In the present case, it is clear from the record that defense counsel waived any objection on confrontation clause grounds. The record indicates that defense counsel had "[n]o objection" to the marking of the death certificate for identification, and when the state offered the document as a full exhibit, defense counsel objected only on the ground that the evidence was more prejudicial than probative. Even when asked by the court whether defense counsel had any other objection to it, he responded, "no." These statements by defense counsel regarding Tardiff's death certificate are similar to the statements of defense counsel in *State* v. *Castro*, supra, 200 Conn. App. 462, in which counsel indicated that he had " 'absolutely no objection' to the admission of the ballistics report, or to [a witness] testifying to the contents of that report . . . ." Thus, defense counsel's statements "constituted a valid, express waiver of the defendant's sixth amendment confrontation clause

claim." Id. "[I]n light of the authority already set forth in our discussion of this claim, the defendant's claim fails under the third prong of . . . *Golding* . . . ." Id.

Because the confrontation clause claim was waived, the third prong of *Golding* is not satisfied. "[A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . . To reach a contrary conclusion would result in an ambush of the trial court by permitting the defendant to raise a claim on appeal that his or her counsel expressly had abandoned in the trial court." (Internal quotation marks omitted.) Id., 457, citing *State* v. *Holness*, supra, 289 Conn. 543.

For the foregoing reasons, we conclude that the defendant cannot prevail on her unpreserved confrontation clause claim.[6]

IV

The defendant's last claim is that the court "violated [her] right to conflict free representation when it failed to inquire into the actual conflict of interest [her] defense attorney created when he provided the state with evidence that harmed [the defendant]." We are not persuaded by this claim.

The defendant did not raise any objection to defense counsel's representation at trial and requests that her unpreserved claim be reviewed under *Golding*. See footnote 5 of this opinion. The following additional facts are relevant to our analysis of this claim.

[6] We note that the defendant is not contesting causation or the fact that Tardiff died of the injuries he sustained in the accident. Therefore, even if we assume the existence of error, the admission of the death certificate as a full exhibit was harmless.

A few days following the accident, the defendant sought legal advice from her attorney, who ultimately represented her during the trial. Following this meeting, the defendant mailed a second statement, sworn to and witnessed by counsel, to Lieutenant Cossette at the Meriden Police Department, and asked that this second statement be added to the official police file. She previously had given a sworn statement to Officer Ficara at the time of the accident. In the second statement, the defendant indicated that, while she was stopped at the red light, she sent a "voice text" to her mother. She also stated that "there were no cars in the other lane" when she turned into the parking lot of the hall. The defendant stated as well that she neither made nor received any phone calls "within [twenty] minutes before [she] got to the hall."

During direct examination of Lieutenant Cossette, the state indicated its intention to introduce the defendant's second statement, which was written with the assistance of her counsel. Outside the presence of the jury, the court asked defense counsel if he had any objection to the second statement coming into evidence, to which defense counsel responded, "[n]o, I don't." The court, defense counsel and the prosecutor engaged in a lengthy discussion regarding the statement, its cover letter from defense counsel, and other statements that were a part of the mailing. During this discussion, the court noted multiple times that it was "going to rely on both parties, for their own strategic reasons, to decide . . . what they're going to have admitted as full exhibits . . . ." Ultimately, defense counsel reiterated that he had "no objection" to the admission of the second statement, and the court admitted it as a full exhibit. The other documents contained in the mailing, the cover letter and a letter regarding the defendant's insurance coverage, were marked for identification only.

The defendant first claims that the following three actual conflicts existed during the trial, which affected

defense counsel's representation of her: (1) "[defense counsel] could not object to the admission of the [second] statement or argue that he was responsible for it without admitting to his mistake"; (2) "[defense counsel's] involvement in the [second] statement made him look bad to the jury"; and (3) "[defense counsel] made himself into a potential witness."[7]

The defendant next argues that the court should have, sua sponte, conducted a hearing, to determine whether a conflict of interest existed. The state counters that the court had no duty independently to inquire and that the defendant failed to prove that an actual conflict of interest had an adverse effect on her attorney's representation. This claim fails under the third prong of *Golding* because no constitutional violation exists that deprived the defendant of a fair trial.

The record is adequate to review this claim regarding the defendant's sixth amendment right to counsel, which is of constitutional magnitude. "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (Internal quotation marks omitted.) *State* v. *Crespo*, 246 Conn. 665, 685, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999).

The following legal principals are relevant in addressing this claim. A "trial court has a duty to explore the possibility of a conflict *when it is alerted* to the fact that the defendant's constitutional right to conflict free counsel is in jeopardy. . . . The purpose of the court's inquiry . . . is to determine whether there is an actual or potential conflict, and, if there is an actual conflict, to inquire whether the defendant chooses to waive the conflict or whether the attorney must withdraw." (Citation omitted; emphasis altered; internal

[7] We note that these appear to be claims that counsel's trial strategy was flawed, not that a typical conflict of interest existed.

quotation marks omitted.) *State* v. *Barjon*, 186 Conn. App. 320, 329, 199 A.3d 1119 (2018). "An actual conflict of interest is more than a theoretical conflict. . . . A conflict is merely a potential conflict of interest if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." (Emphasis omitted; internal quotation marks omitted.) *Tilus* v. *Commissioner of Correction*, 175 Conn. App. 336, 349, 167 A.3d 1136, cert. denied, 327 Conn. 962, 172 A.3d 800 (2017). It is well established that there are two instances in which a trial court has a duty to inquire as to the presence of a conflict of interest, namely, "(1) when there has been a timely conflict objection at trial . . . or (2) when the trial court knows or reasonably should know that a particular conflict exists . . . ."[8] (Internal quotation marks omitted.) *State* v. *Davis*, Conn. , , A.3d (2021).

The defendant contends that when her "[second] statement was admitted [in]to evidence and Cossette read it out loud, it was immediately obvious that the statement was damaging to [the defendant's] case. When Cossette [mentioned] the state's theory that [the defendant] wrote the [second] statement to make herself look better, the trial court should have recognized that [defense counsel] had a conflict of interest. The court should have held a hearing to determine the extent of the conflict . . . ."

There is nothing in the record to indicate that the court reasonably should have known of a potential conflict. A review of the second statement reveals that it contained nothing signaling a conflict of interest; rather, it simply provided a depiction of the incident. Additionally, a review of the record demonstrates that there was never a mention of any purported conflict of interest by any party involved. When evaluating whether a con-

[8] The first instance is inapplicable, as the present case involves an unpreserved claim.

flict of interest exists, "[i]t is firmly established that a trial court is entitled to rely on the silence of the defendant and his [or her] attorney, even in the absence of inquiry . . . ." (Internal quotation marks omitted.) *State* v. *Gaines*, 257 Conn. 695, 708, 778 A.2d 919 (2001).

"A trial judge cannot be expected to be prescient. He or she cannot, upon the record before the court prior to trial, evaluate all possible trial strategies and conclude that the defendant's attorney has a conflict that would preclude him or her from pursuing the 'best' strategy. . . . Many attorneys assist clients in making [statements to police] . . . . This alone, however, does not create an inherent conflict any more than does the fact that an attorney represents two defendants in the same trial. . . . Before the trial court is charged with a duty to inquire, the evidence of a specific conflict must be sufficient to alert a reasonable trial judge that the defendant's sixth amendment right to effective assistance of counsel is in jeopardy. The remote possibility that [defense counsel] could have been called as a witness does not constitute a potential conflict of which the court reasonably should have been aware." (Citations omitted; footnote omitted.) *State* v. *Crespo*, supra, 246 Conn. 697.

It was not clear from the record that any conflict of interest existed, and, thus, the court was correct to rely on defense counsel's lack of an objection and silence as to any conflict of interest in determining that there was no need to inquire. See *State* v. *Gaines*, supra, 257 Conn. 708. We conclude that the defendant has failed to point to anything in the record that would establish that the trial court was under a duty to inquire. Accordingly, the defendant's argument fails under the third prong of *Golding*. See *State* v. *Crespo*, supra, 246 Conn. 699.

The judgment is affirmed.

In this opinion the other judges concurred.