STATE OF CONNECTICUT *v.* GERALD A.* (AC 39126)

Alvord, Bright and Lavery, Js.

Syllabus

Convicted of the crimes of sexual assault in the first degree and risk of injury to a child in connection with his alleged sexual abuse of his minor daughter, K, the defendant appealed to this court. The defendant had been charged in separate informations with the sexual abuse of K and her sister, G. The trial court granted the state's motion for joinder, and the cases were tried together. The jury found the defendant not guilty of the charges related to G. *Held*:

1. The evidence was sufficient to support the defendant's conviction of one of the two counts of sexual assault in the first degree of which he had been convicted, as it was reasonable for the jury to conclude, beyond a reasonable doubt, that the defendant had engaged in sexual intercourse with K by digitally penetrating her vagina with his finger; on the basis of certain testimony from K that she flinched and clenched because it hurt when the defendant tried to put his finger inside of her vagina, the jury reasonably could have inferred that the defendant digitally penetrated, at the very least, her labia majora, which constituted sexual intercourse within the meaning of the applicable statute (§ 53a-65 [2]), and the trial court instructed the jury on the legal definition of sexual intercourse and that penetration, however slight, was sufficient to complete vaginal intercourse.
2. The trial court did not abuse its discretion when it admitted certain uncharged misconduct evidence in the form of testimony from K, G and their mother as to the defendant's alleged prior physical violence toward them and whether it could have caused K and G to delay reporting his sexual abuse: that court correctly determined that the testimony was relevant and material to the credibility of K and G, who were key witnesses for the state at trial and on whose credibility the state's case hinged, because it provided an explanation for their delay in disclosing the defendant's sexual abuse, and defense counsel indicated prior to trial that the issue of the delayed disclosures by G and K would be explored at trial; moreover, the trial court properly determined that the probative value of the challenged testimony was not outweighed by its prejudicial effect, as it did not tend to arouse the emotions of the jury or create a distracting side issue, the defendant was not unfairly

* In accordance with our policy of protecting the privacy interests of the victims of the crimes of sexual assault and risk of injury to a child, we decline to identify the victim or others through whom the identity of the victim may be ascertained. See General Statutes § 54-86e.

surprised by the evidence given that the state filed a motion to introduce it three months before the start of trial, the matter did not consume an inordinate amount of time and the defendant had a full opportunity to cross-examine G and K.

3. The defendant could not prevail on his claim that the trial court improperly granted the state's motion for joinder of the two cases against him for trial, that court having properly exercised its discretion in permitting the cases to be tried together: the evidence in each case would have been cross admissible as prior misconduct in the other case and to show that the defendant had a propensity to engage in aberrant and compulsive sexual misconduct, as the incidents alleged by both G and K were not too remote in time from each other and were allegedly committed on similar persons, and the defendant's conduct toward G and K was similar in that his sexual abuse of them began when they were of a young, prepubescent age, it occurred in the family home when he was alone with them or when other family members slept and the abuse involved similar acts committed on each girl, and although G claimed that the defendant engaged in additional types of sexual misconduct with her and began abusing her at a younger age, that did not outweigh the numerous similarities in his abuse of G and K or render his misconduct with respect to G more severe and shocking than his misconduct with respect to K; moreover, the trial court properly determined that the prejudicial effect of the evidence did not outweigh its probative value, and the defendant did not explain how the evidence would have been unduly prejudicial by showing that it demonstrated more than his propensity to sexually assault G and K.

4. The trial court did not abuse its discretion when it denied the defendant's motion to make an opening statement to the jury; given that much of the material that defense counsel sought to discuss was covered by his cocounsel during jury selection, that defense counsel had requested that the court permit cocounsel to conduct jury selection, that defense counsel robustly addressed the jury during introductions of counsel, and the court's statement that the items that counsel wanted to discuss in the opening statement could be addressed during, and were more appropriate for, closing argument, the defendant was unable to show that the court's ruling was harmful and was not deprived, in a meaningful way, from addressing the jury prior to the receipt of evidence.

Argued January 3—officially released July 3, 2018

Procedural History

Two substitute informations charging the defendant in each case with two counts of the crime of sexual assault in the first degree and three counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the

court, *Colin*, *J.*, granted the state's motion for joinder and denied the defendant's motion for severance; thereafter, the court denied the defendant's motion to make an opening statement; subsequently, the matter was tried to the jury; thereafter, the court granted the state's motion to introduce certain evidence; verdicts and judgment of guilty of two counts of sexual assault in the first degree and three counts of risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, senior assistant public defender, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, *Jr.*, state's attorney, and *Maureen V. Ornousky*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Gerald A., appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that: (1) there was insufficient evidence presented at trial to convict him of one count of sexual assault in the first degree; (2) the trial court improperly admitted evidence of his prior misconduct; (3) the trial court improperly granted the state's motion for joinder of two separate cases against him; and (4) the trial court improperly denied his motion to make an opening statement to the jury. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The defendant and A (mother) were married in 1980 in

Port-au-Prince, Haiti. The couple had two daughters who were born in Haiti, G in 1991 and K in 1993. When the children were young, the defendant moved to the United States. The mother and the children remained in Haiti until 1998, when they moved to Connecticut to join the defendant.[1] The family first lived on Hope Street in Stamford.

In May, 1999, the mother gave birth to the couple's third daughter, R. Before R's birth, while the mother was pregnant, the family moved to a two bedroom apartment on Adams Avenue. In 2001, the family moved to a bigger apartment on Roosevelt Avenue in Stamford. At about that time, the mother began working two jobs. At most times during the marriage, the mother worked and the defendant was unemployed. Because he did not work outside of the home, the defendant cared for the children while the mother was at work.

While the family lived on Roosevelt Avenue, the defendant began sexually abusing K, who was six or seven years old.[2] The first incident that K remembers occurred on a weekend day, when the mother was not home. K was preparing to shower, and when she entered the bathroom, the defendant was there, sitting on the edge of the bathtub, and talking on the phone. When K removed her towel and attempted to get into the bathtub, the defendant stopped her. The defendant laid K on his lap and touched her vagina.

Another incident, also while the family lived on Roosevelt Avenue, occurred when the family was preparing

[1] The defendant's son from a previous relationship also moved to the United States at this time.

[2] Although K testified that the defendant began abusing her when she was five or six years old, both she and the mother testified that she was born in 1993. Since the family moved to Roosevelt Avenue in 2001, K must have been at least six or seven years old when the abuse began. We note this discrepancy, but conclude that it is immaterial to our disposition of the defendant's claims on appeal.

to go to a wedding. When K went "to see what was taking him so long" to get ready, the defendant took her into his bedroom. The defendant laid K on the bed, removed her underwear, and began touching her vagina. The defendant "tried to put his finger inside" K's vagina, but she "flinched 'cause it hurt," and he stopped. The defendant put K's underwear back on, and she left his bedroom.

Between 2003 and 2004, the family moved to Myano Lane. On Saturdays, K, who was nine or ten years old at the time, was responsible for cleaning the bathroom. One Saturday, the family was preparing to visit with a relative who was visiting from Pennsylvania. Because K cleaned the bathroom, she showered last. When K finished showering, she went into the bedroom that she shared with her sisters, wearing only a towel. The defendant was in her room. The defendant laid K down on the bed and began sucking on her breasts. The defendant then performed oral sex on K. Afterward, K "felt so nasty," that she showered again.

On another occasion while the family lived on Myano Lane, K was preparing to attend church on a Sunday morning. Wearing only a towel, K went to the bathroom to shower, but the door was closed. She knocked on the door, and the defendant opened the door and pulled her into the bathroom, shutting the door behind them. The defendant then laid K on his lap and touched her vagina. Afterward, K showered.

On a fifth occasion, K, who was ten years old at the time, was reading in her room with the door open on a Saturday. The defendant walked by and then came into the room. He asked K what book she was reading, and then put his hands down her shorts and began touching her vagina. When the defendant stopped touching K's vagina and left the room, K thought that he was finished, but the defendant returned with Vaseline on his hand and began touching her vagina again. Afterward, K washed herself with soap and water.

In May, 2005, the mother purchased a home for the family in Stratford. The defendant left the family home in October, 2007. The mother subsequently filed for divorce.

In 2012, while she was attending college in California, K disclosed the sexual abuse to G, who recently had given a voluntary statement to the Stamford Police Department in which she alleged that the defendant had sexually abused her during her childhood, beginning at age three. In connection with G's allegations, under docket number CR-12-0177252-T, the defendant was charged with two counts of sexual assault in the first degree and three counts of risk of injury to a child. K returned to Connecticut in May, 2012. When she returned, she went to the Stamford Police Department and gave a voluntary statement regarding the defendant's sexual abuse of her. In connection with K's allegations, under docket number CR-12-0177635-T, the defendant was charged with two counts of sexual assault in the first degree and three counts of risk of injury to a child. The state filed a motion for joinder, which the court granted.

At the time of trial, the state filed a consolidated ten count long form information charging the defendant with four counts of sexual assault in the first degree and six counts of risk of injury to a child. Counts one through five of the information related to G's allegations, and counts six through ten related to K's allegations. The jury found the defendant guilty of counts six and eight, which charged him with sexual assault in the first degree, and counts seven, nine and ten, which charged him with risk of injury to a child. The jury found the defendant not guilty of counts one through five. The court sentenced the defendant to a total effective term of twenty years incarceration, four of which were a mandatory minimum, followed by twenty years

of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the evidence presented at trial was insufficient to convict him of one count of sexual assault in the first degree. Specifically, the defendant argues that the state failed to prove that he engaged in sexual intercourse with K, within the meaning of § 53a-70 (a) (2), because K did not testify that he digitally penetrated her vagina. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. The state charged the defendant, in count six of the information, with sexual assault in the first degree in connection with an act of abuse he committed against K while the family was living on Roosevelt Avenue.[3] At trial, K testified that the family was preparing to go to a wedding and that the girls had not yet put on their dresses. The defendant was still getting dressed, so K went to the bathroom "to see what was taking him so long." The defendant took K into his bedroom, laid her on the bed, removed her underwear, and began touching her vagina. The defendant "tried to put his finger inside" K's vagina, but she "flinched 'cause it hurt . . . ." The defendant put K's underwear back on, and she left his bedroom.

On cross-examination, the following colloquy occurred:

"[Defense Counsel]: And during any of these incidents, did he penetrate you?

"[K]: Are we talking about [this] one incident?

[3] Count six of the information charged that "at . . . Roosevelt Ave, Stamford, CT between the years of 2000 to 2004, [the defendant] engaged in sexual intercourse with a child under the age of 13 years, specifically [K], and the accused was more than two years older [than] said child . . . ."

"[Defense Counsel]: An[y] of . . .

"[K]: Yes, he did when I was living in . . . Roosevelt.

"[Defense Counsel]: Oh.

"[K]: That was the day that, the wedding, he tried to.

"[Defense Counsel]: Well, there's a difference between try and penetrate; right?

"[K]: Well, I was six, so.

"[Defense Counsel]: So, you don't know whether he penetrated you or not at that incident?

"[K]: He tried to when I was at . . . Roosevelt, but he couldn't. . . .

"[Defense Counsel]: There's a difference between tried to penetrate and penetrate. Would you agree with me; right? Try to penetrate and penetrate are two different things; are they not?

"[K]: Well, it depends on what you're talking about.

"[Defense Counsel]: Well, if I attempt to do something, it's different from me doing something; right?

"[K]: Yes.

"[Defense Counsel]: Okay. If I try to do something, it's different from doing it; right?

"[K]: No, it's not different.

"[Defense Counsel]: It's not different?

"[K]: He tried to do something. . . .

"[Defense Counsel]: In any of these occasions did he penetrate you? . . .

"[K]: I was six years old. He tried to, but I clenched. It hurt. Like, he didn't go inside. . . .

"[Defense Counsel]: So, on none of these occasions did he penetrate you with any part of his body; correct?

"[K]: I just said that he tried to in—Roosevelt.

"[Defense Counsel]: I understand that tried part. But on one of these occasions was he successful, how is that, in penetrating you?

"[K]: None of the occasions was he successful.

"[Defense Counsel]: So, he never fully penetrated you; correct?

"[K]: Successfully."

On redirect examination, K testified that the defendant touched her vagina and tried sticking his finger inside of her vagina. She testified that it hurt "[t]he minute he tried to—like the second he tried to." The prosecutor asked, "[p]ast your vagina?" and K responded,"[y]es."

We begin with the applicable standard of review and principles of law that guide our analysis. "The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the 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. . . .

"Finally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Elmer G.*, 176 Conn. App. 343, 349–50, 170 A.3d 749, cert. granted on other grounds, 327 Conn. 971, 173 A.3d 952 (2017).

"The jury is entitled to draw reasonable and logical inferences from the evidence. [T]he jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . [I]n considering the evidence introduced in a case, [j]uries are not required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." (Internal quotation marks omitted.) *State* v. *Prosper*, 160 Conn. App. 61, 71, 125 A.3d 219 (2015).

The jury found the defendant guilty of one count of sexual assault in the first degree in connection with the wedding day incident. "A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and

such other person is under thirteen years of age and the actor is more than two years older than such person . . . .'' General Statutes § 53a-70 (a). The defendant's sole challenge to his conviction under § 53a-70 (a) (2) is that the state failed to prove beyond a reasonable doubt that he engaged in sexual intercourse with K. General Statutes § 53a-65 (2) defines sexual intercourse as ''vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. . . . Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen . . . .'' ''[D]igital penetration, however slight, of the genital opening, is sufficient to constitute vaginal intercourse.'' (Internal quotation marks omitted.) *State* v. *Anthony L.*, 179 Conn. App. 512, 519, 179 A.3d 1278, cert. denied, 328 Conn. 918, 181 A.3d 91 (2018).

Our Supreme Court's decision in *State* v. *Albert*, 252 Conn. 795, 750 A.2d 1037 (2000), informs our analysis of the defendant's sufficiency claim on appeal. In *Albert*, our Supreme Court looked to the language and legislative history of § 53a-65 (2) and held that the genital opening includes the labia majora,[4] and therefore, ''digital penetration, however slight, of the *labia majora* is sufficient penetration to constitute vaginal intercourse under § 53a-65 (2).'' (Emphasis in original.) Id., 809. The defendant in *Albert* was convicted, inter alia, of sexual assault in the first degree, in connection with an incident in which he put his hand in the three year old victim's bathing suit and touched her ''inside'' her ''crotch.'' (Internal quotation marks omitted.) Id., 797. When the victim's pediatrician examined her shortly thereafter, she observed two scrapes on the inside fold of the victim's labia majora. Id., 798.

[4] The court in *Albert* defined the labia majora as ''the outer fatty folds bounding the vulva.'' (Internal quotation marks omitted.) *State* v. *Albert*, supra, 252 Conn. 798 n.5.

On appeal, our Supreme Court rejected arguments by the defendant that § 53a-65 (2) required penetration beyond the labia majora to at least the labia minora, and that a "mere touching of the surface of the labia majora is not sufficient to constitute penetration . . . ." Id., 813. The court opined: "As we previously indicated, we disagree with the defendant's suggestion that a defendant must put his finger or fingers 'beyond the labia majora' for his conduct to fall within the definition of sexual intercourse in § 53a-65 (2)."[5] Id. The court noted that the "evidence presented in this case from which a reasonable jury could have concluded that the defendant put his finger beyond the victim's labia majora" included the victim's testimony that the defendant touched her " '[i]nside' " her "crotch," the scrapes on the victim's labia majora, and, most relevant to our present analysis, the victim's indication that "the touching hurt her . . . ." Id.

In light of the evidence presented in this case, it was reasonable for the jury to conclude that the defendant engaged in sexual intercourse with K by digitally penetrating her vagina. K testified that the defendant "tried to put his finger inside" of her vagina, but she "flinched 'cause it hurt . . . ." On cross-examination, defense counsel repeatedly asked her whether the defendant "penetrated" her vagina, or merely "tried to." Although K testified that the defendant never "[s]uccessfully" penetrated her vagina, she also testified that the defendant "tried to, but I clenched. It hurt. Like, he didn't go inside." On the basis of K's testimony that she flinched when the defendant tried to put his finger inside of her vagina because it hurt, she clenched and

[5] In *State* v. *Scott*, 256 Conn. 517, 534, 779 A.2d 702 (2001), our Supreme Court again noted its conclusion in *Albert* that "a touching of the labium majora satisfies the penetration requirement . . . because penetration of the labia majora constitutes penetration of the body . . . ." (Internal quotation marks omitted.)

it hurt, the jury was free to draw the reasonable inference that the defendant at least digitally penetrated K's labia majora. See *State* v. *Edward B.*, 72 Conn. App. 282, 296, 806 A.2d 64 ("[s]ignificantly, [the victim] testified that the defendant hurt her when he placed his hands under her clothes below her waist and moved his hands"), cert. denied, 262 Conn. 910, 810 A.2d 276 (2002).

As we previously have noted, "[t]he jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . [I]n considering the evidence introduced in a case, [j]uries are not required to leave common sense at the courtroom door . . . ." (Internal quotation marks omitted.) *State* v. *Prosper*, supra, 160 Conn. App. 71. The court instructed the jury as to the legal definition of "sexual intercourse," and informed it that "[p]enetration, however slight, is sufficient to complete vaginal intercourse . . . ." The jury was free to infer, on the basis of this record and its common sense, that if K "flinched" and "clenched" because "[i]t hurt" when the defendant "tried to put his finger inside" of her vagina, that the defendant digitally penetrated, at the very least, K's labia majora.

Construing the evidence in the light most favorable to sustaining the jury's verdict, we conclude that there was sufficient evidence before the jury from which it could find beyond a reasonable doubt that the defendant was guilty of sexual assault in the first degree.[6]

[6] The defendant cites two cases to support his assertion that the evidence before the jury was insufficient to convict him of sexual assault in the first degree. First, he cites *State* v. *Albert*, supra, 252 Conn. 798. The defendant points to physical evidence in that case, specifically, scrapes on the inside fold of the victim's labia majora that easily bled when touched, and argues that "[t]he quantum of evidence in this case does not match that in *Albert*; there is only [K's] testimony that her recollection was that the defendant 'tried to' but was not successful in any type of digital penetration." The defendant also cites *State* v. *Merriam*, 264 Conn. 617, 621–22, 835 A.2d 895 (2003), in which our Supreme Court affirmed the judgment of conviction of sexual assault in the first degree, sexual assault in the second degree,

II

The defendant next claims that the trial court improperly admitted evidence of uncharged misconduct in the form of testimony of the mother, G, and K that the defendant was physically abusive to them.[7] Specifically,

and risk of injury to a child. The defendant again points to the physical evidence in that case, specifically, that an examination by the victim's pediatrician revealed redness of the victim's labia majora. Id., 628.

In essence, the defendant argues that because there was physical evidence to support the verdicts in those cases, and here, there only was the testimony of K, the evidence was insufficient to support his conviction of sexual assault in the first degree. We reject this argument. Physical evidence is not required to convict a defendant of sexual assault in the first degree. See, e.g., *State* v. *Pedro S.*, 87 Conn. App. 183, 201, 865 A.2d 1177 (concluding that there was sufficient evidence presented at trial to support defendant's conviction and noting that "[t]he defendant's claim is based solely on the flawed premise that the state bore the burden of proving its case with physical evidence"), cert. denied, 273 Conn. 924, 871 A.2d 1033 (2005). Indeed, K's testimony alone, if credited by the jury, is sufficient to sustain the conviction. See *State* v. *Madore*, 96 Conn. App. 271, 283 n.12, 900 A.2d 64, cert. denied, 280 Conn. 907, 907 A.2d 93 (2006); see also *State* v. *Gene C.*, 140 Conn. App. 241, 247, 57 A.3d 885 ("[o]ur Supreme Court has recognized that a jury reasonably can find a defendant guilty of sexual assault on the basis of the victim's testimony alone"), cert. denied, 308 Conn. 928, 64 A.3d 120 (2013).

[7] For the first time, on appeal, the defendant also claims that the trial court erred in admitting, through the testimony of G and K, evidence of uncharged sexual misconduct. Although the defendant argues that "[t]rial counsel's motions, arguments and the court's rulings have preserved this claim for review," our review of the record reveals that defense counsel never objected to the admission of this evidence. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning 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.) *State* v. *Jose G.*, 102 Conn. App. 748, 755–56, 929 A.2d 324 (2007), aff'd, 290 Conn. 331, 963 A.2d 42 (2009). The defendant's claim as to the uncharged sexual misconduct evidence, therefore, is unpreserved for appeal, and the defendant has not requested 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), or requested reversal pursuant to the plain error doctrine.

he argues that this evidence had "no or minimal relevance," was "clearly prejudicial," and its admission "denied the defendant of his due process rights to a fair trial." We are not persuaded.

The following procedural history is relevant to our resolution of this claim. On December 8, 2014, the state filed a motion in limine in which it sought, in relevant part, to present "evidence of domestic violence, which was ongoing within the family home." The state argued that this evidence would not be "necessarily other misconduct evidence," but bore on G and K's "ability and/or willingness to disclose the abuse to authorities." Alternatively, the state argued that if the court found this evidence to be other misconduct evidence, it was admissible pursuant to § 4-5 (c) of the Connecticut Code of Evidence[8] to "corroborate crucial prosecution testimony of the witnesses" and was "necessary to lay a foundation for expert testimony." The state claimed that the proposed evidence was offered for the acceptable purposes of explaining the behavior of G and K, and laying a foundation for expert testimony that would explain why they did not disclose the alleged sexual abuse until adulthood, and that the probative value of this evidence on these issues outweighed its prejudicial effect.

On January 12, 2015, the defendant filed a memorandum of law in opposition to the state's motion in limine, in which he argued that the state was "merely speculating that any alleged domestic abuse in the household may have delayed or impacted the witnesses' ability to disclose the alleged abuse to authorities." The defendant argued that any evidence of physical abuse was

See Practice Book § 60-5; see also *State* v. *Jose G.*, supra, 756 ("[w]here a defendant fails to seek review of an unpreserved claim under either *Golding* or the plain error doctrine, this court will not examine such a claim" [internal quotation marks omitted.]). Accordingly, we decline to review this claim.

[8] Although, in its motion, the state cited to § 4-5 (b) of the Connecticut Code of Evidence, § 4-5 (c) contains the exception to which the state was referring.

irrelevant to the current charges and was more prejudicial than probative. The defendant noted that the claims of physical abuse were unsubstantiated by corroborating evidence.

The court held a hearing on January 15, 2015.[9] On January 20, the court issued a memorandum of decision, in which it deferred ruling on the motion until the time of trial. At trial, outside the presence of the jury, the state proffered that the mother, G, and K would testify that during the time they lived with the defendant, "there was frequent domestic violence in the home." Specifically, the state anticipated that the mother would testify about domestic violence that began while the family was living in Haiti and increased when the family

[9] At the January 15 hearing, the state represented that G and K would testify that they observed the defendant be physically violent toward their mother on a regular basis, and that they were fearful of what the defendant would do to them and their mother. The state further represented that the mother would testify that the defendant was physically abusive throughout their marriage and that she sought medical treatment at least once, but the defendant intimidated her into not saying "what actually happened to her." The state explained that this evidence was needed to help the jury understand the atmosphere in the home, the intimidation that was going on in the home, the power and control that the defendant had over the family, the fear that the children would feel about reporting the sexual abuse, and why G and K would not go to the mother for protection, because she "was not even able to protect herself." The state argued that delayed disclosure was an important issue in this case, that this evidence would help the jury understand G and K's delayed disclosures, and that this evidence would corroborate crucial prosecution testimony about the witnesses' reasons for their late disclosures. The state acknowledged that if the court permitted this testimony, it could also give a limiting instruction to the jury that would minimize any prejudicial effect.

In response, the defendant argued that this evidence was prejudicial and uncorroborated, and that, if the jury was permitted to hear this evidence, it would "assume this guy is a wife beater" and consequently think that "he probably is guilty of these sexual assaults as well." The defense further argued that the delayed reporting was unrelated to the alleged domestic abuse because it was too far removed in time from the 2012 reporting dates. Defense counsel did concede, however, that she intended to cross-examine G and K on the issue of delayed disclosure, but maintained that it should not "be brought up that they [reported] it later because they saw their father beating on their mother," and that she did not think "that has anything to do with this delayed disclosure."

moved to the United States. The state represented that the mother also would testify that she observed the defendant discipline the children by striking them with a belt when they were naked and that the defendant would throw things at her. The state further represented that the mother would testify about two specific incidents: one in which the police were called to the house, but the mother did not want the defendant arrested, and a second one in which the defendant injured her and she went to a hospital, but did not report that the defendant had assaulted her.

The state also represented that G and K would testify about the "discipline tactics" of the defendant, that they often heard screaming and yelling between the defendant and their mother, and that they observed their mother injured after some of these screaming and yelling incidents. The state also proffered evidence about G and K's half brother, who reported to the Department of Children and Families (department) that he had been assaulted by the defendant. The state represented that there would be testimony that the defendant, and possibly the mother, instructed G and K not to cooperate with the department's investigation, and that their half brother was sent back to Haiti as punishment. The state represented that it did not intend to "go into too much detail" regarding the physical abuse, and argued that because the alleged physical abuse was happening contemporaneously with the sexual abuse, this evidence was necessary to "complete the story of what was happening in the home at the time."

Defense counsel argued that the alleged physical violence could not be admitted as bearing on G and K's late disclosures, because the defendant left the family home in 2007 and the disclosures were not made until 2012. Defense counsel noted that the defendant was not living in Connecticut in 2012, and argued that due to the defendant's absence from the state at the time

that G and K disclosed, they were not "under an imminent fear of him at that point," and were "not in imminent danger at that point." The defendant further argued that because this was a case alleging sexual assault, physical violence was irrelevant to the crimes charged and had no probative value. As to the proffered testimony regarding the department's investigation, defense counsel argued that because he believed that the half brother still resided in Haiti, he would be unable to call him as a witness to refute that testimony. Defense counsel argued that the proffered evidence was prejudicial, had no probative value, constituted "bad character evidence," and that despite any limiting instruction the court might give, the jury would use the evidence to conclude that the defendant was "a bad guy."

Defense counsel conceded that he planned to cross-examine the witnesses on the issue of their late disclosures. When the court asked whether such questioning on cross-examination would open the door to this evidence, defense counsel responded that in light of the fact that G and K disclosed the sexual abuse five years after the defendant moved out of the family home, he hoped that it would not.[10]

The court ruled orally on the state's motion. First, on the issue of whether the evidence properly was characterized as uncharged misconduct evidence, the court

[10] Defense counsel responded: "Well, I hope it doesn't—open the door to that type of evidence, Your Honor, because, as I said, it—it very well could be that had they come forward a year later, a year after he left the house, and they were still at a tender age of eight, nine, ten, eleven years old, we're talking about grown women now. They're no longer in fear of him. This mother has moved on. He got remarried. He lives in Boston. They haven't seen him for five years. So, the idea that they're still in fear of him and that's why the late disclosure, well, that would be fine if the late disclosure was a year after he left—left the house. But five years, five years after he's led the—left the house and they've had no contact with him, they're claiming that they're still in imminent fear of him and what he would do to their mother and use that to describe why this late disclosure occurred as it did? That dog don't hunt."

observed that it was "not so sure it is uncharged misconduct evidence, as opposed to evidence being offered to explain the reasons why the complainants waited for years to report the alleged assaults. Rather, it's related to their credibility." The court relied on two cases, *State* v. *Cruz*, 56 Conn. App. 763, 746 A.2d 196 (2000), aff'd, 260 Conn. 1, 792 A.2d 823 (2002),[11] and *State* v. *Daniels*, 42 Conn. App. 445, 681 A.2d 337, cert. denied, 239 Conn. 928, 683 A.2d 397 (1996),[12] and ruled that "as a basis to aid the jury, perhaps, if it believes the testimony, in assessing the credibility of the two alleged victims in this case, under *State* v. *Cruz* [supra, 763] and *State* v. *Daniels* [supra, 445], that evidence is admissible."

The court further ruled that even if this evidence were categorized as uncharged misconduct evidence, it would be admissible under § 4-5 (c) of the Connecticut Code of Evidence to corroborate crucial prosecution testimony, specifically, testimony about why G and K waited to report the alleged sexual abuse. The court

[11] In *State* v. *Cruz*, supra, 56 Conn. App. 764, a jury found the defendant guilty of five counts of sexual assault in the first degree and two counts of risk of injury to a child. On appeal, the defendant claimed that the trial court erred in allowing the victim to testify that she did not report the sexual abuse for more than two years because she feared the defendant because she believed him to be a gang member. Id., 771. This court concluded that "[t]his evidence was relevant to aid the trier to determine why [the victim] had waited two years before reporting the crimes, an issue directly involving [the victim's] credibility," and affirmed the judgments of conviction. Id., 771–72.

[12] In *State* v. *Daniels*, supra, 42 Conn. App. 446–47, a jury found the defendant guilty of one count each of sexual assault in the first degree, assault in the third degree, and unlawful restraint in the first degree. On appeal, the defendant claimed that the trial court erred in allowing the victim to testify about past incidents of sexual abuse. Id., 449–50. Specifically, the victim testified that she was twice sexually assaulted in the past by other men, and that on both occasions, nothing was done after she reported those incidents. Id., 450. Because of this, she was reluctant to report the sexual assault by the defendant and delayed in reporting. Id. This court concluded that "the proffered testimony clearly had a tendency to aid the jury in its determination as to why she delayed before reporting the incident to the police"; id., 451; and affirmed the judgment of conviction. Id., 460.

noted that defense counsel was free to explore on cross-examination the period of delay between when the defendant left the home and when G and K reported the sexual abuse, as "that argument goes to the weight of the proposed testimony, not its admissibility." The court further noted that defense counsel twice indicated that he would explore the issue of the delayed disclosure on cross-examination.

The court concluded that the probative value of the evidence outweighed its prejudicial effect, but noted its intent to give the jury a limiting instruction explaining that the evidence was to be used only for the purpose of assessing the credibility of G and K as to why they delayed in reporting. The court cautioned counsel that it did not want "a collateral trial on the details of the claims= they're going to make about what happened to them." The court also ruled that evidence about G and K's half brother was inadmissible, and limited the physical violence evidence to testimony from the mother, G, and K about any incidents of alleged violence that they personally witnessed or that were inflicted on them.

During the state's case-in-chief, G testified that while she lived with the defendant, there were incidents when he hit her. She testified that, more than once, a "couple times a year," the defendant would hit her with a belt. She described one incident that occurred while the family was living on Hope Street: "I was going to school, and we—when we go to school, he drives us, and we have to like, give him a kiss on the cheek. And for some reason, that day I didn't want to. So, when I got home later on, he took off my underwear and my pants, and he hit me with the belt because I didn't kiss him on the cheek when he dropped me off at school." Immediately following this testimony, the court gave a limiting

instruction to the jury.[13] G further testified that she did not disclose this to a teacher because she was scared that the defendant would kill her mother, and that on one occasion, after he had sexually abused G, he told her to keep her "mouth shut" about the sexual abuse and that if she told anyone about the sexual abuse, "bad things were going to happen." Although G never witnessed the defendant hit her mother, she testified that she heard arguments between her mother and the defendant and, after these arguments, observed swelling on her mother's face. Immediately following this testimony, the court gave a limiting instruction.[14] G also testified that she observed the defendant hit K with a belt as a form of discipline. She also testified that her mother never protected her and K from being hit. Following this testimony, the court again gave a limiting instruction.[15]

[13] The court instructed: "So, ladies and gentlemen, it's my job now to give you another instruction. You just heard the witness testify about being struck, allegedly, by the defendant. I must instruct you that this evidence may be used by you, if you decide to use it at all, for one purpose and one purpose only; that is, to assess the credibility of the alleged victim's testimony on the issue of the alleged sexual assaults only. It can be used for no other purpose, including as substantive evidence that the defendant is guilty of the crimes charged. Rather, it may only be used to assess the credibility of the alleged victim's testimony. But you cannot use that evidence that the defendant allegedly struck this witness in determining that the defendant is guilty of the crimes charged. Again, it's only related to the credibility of the witness."

[14] The court instructed: "I'm going to interrupt one moment and give one more instruction on this last piece about the witness' alleged observations of swelling on her mother's face and her allegedly hearing the arguments between her mother and father. Just like I just mentioned a few moments ago, this evidence is being offered to explain the alleged failure to report in a timely manner. And I must instruct you that this evidence may be used, again, if you decide to use it at all, for one purpose and one purpose only, namely, to assess the credibility of the alleged victim's testimony. It can be used for no other purpose, including as substantive evidence that the defendant is guilty of the crimes charged in the information. Rather, it may only be used to assess the credibility of the alleged victim's testimony."

[15] The court instructed: "Ladies and gentlemen of the jury, the instruction I gave you before about the use of the alleged domestic violence type evidence is solely for the purpose of credibility, also applies to the testimony you just heard from the witness about allegedly observing her sister being

K testified that the defendant was physically abusive toward her. She recalled a specific incident that occurred on Roosevelt Avenue: "On one day I was living in . . . Roosevelt and I was eating cereal and I didn't want to finish eating the cereal or something or I didn't like the cereal. And he said that I had to finish eating it. And so I just sat there. He turned off all the lights in the kitchen and I just sat there in the dark and I was crying. And then, he came back into the kitchen and took the bowl of cereal away. And then, when I got up to go, he smacked me across my face so hard that I slid from the kitchen table all the way against the cabinets in the kitchen. And the kitchen was pretty big, too." She further testified that the defendant disciplined her and G by hitting them, smacking them across the face, hitting them on the hands, and sometimes, making them strip naked and hitting them with a belt or the back of his hand. At the conclusion of K's testimony, the court gave a limiting instruction to the jury.[16]

struck by her father. Same type of instruction; that evidence is solely to assess the credibility of the alleged victim's testimony, particularly on the issue of when it was reported, the sexual assaults were reported. And it can't be used for any other purpose, including as substantive evidence that the defendant is guilty of the crimes charged in the information. It's only to be used to assess the credibility of the alleged victim's testimony on the issue of when she reported these alleged sexual assaults."

[16] The court instructed: "All right. Before we proceed with the cross-examination, I'm going to tell the jury one other cautionary instruction. You just heard the testimony from this witness about alleged—her being allegedly physically struck by the defendant, as well as the testimony regarding her older sister's allegedly being physically struck by the defendant. I must instruct you, as I think I did earlier during the testimony of the first witness, that this evidence of the defendant's alleged behavior as just described may be used by you, if at—if you decide to use it at all—for one purpose and one purpose only, namely, to assess [the] credibility of the testimony from this witness. It can be used for no other purpose, including as substantive evidence that the defendant is guilty of the crimes charged.

"The defendant is not charged with any of the physical abuse type evidence you just heard. And the testimony from this witness may be used only to assess the credibility of this witness' testimony and not as substantive evidence that the defendant is guilty of the crimes charged in the information."

The mother testified that while she was married to the defendant, she observed him hitting the children. She also testified that during their marriage, she and the defendant would argue. She described one incident in which an argument turned violent and she sustained an injury to her face. Immediately following this testimony, the court gave a limiting instruction to the jury.[17] The mother then testified that when the defendant disciplined G and K, he would do so with a belt. Immediately following this testimony, the court informed the jury: "In the instruction I just gave you on the last piece of testimony goes for this testimony as well." See footnote 16 of this opinion.

The state also presented the testimony of Dr. Larry Rosenberg, a clinical psychologist and an expert in child psychology, who testified that the majority of children who are sexually abused in childhood do not disclose the abuse until adulthood. He opined that this is usually caused by fear, "but there are different types of fears." Dr. Rosenberg explained that a victim may fear physical threat, even where those threats have not been made explicitly by the abuser, as a result of domestic violence or physical abuse that has occurred in the home. He also opined that children may fear "a threat to the nonoffending parent with regard to the offending parent."

After the close of evidence, the court charged the jury with respect to this evidence as follows: "You will

[17] The court instructed: "I'm just going to tell the jury; I know you might be getting tired of me, hearing this, but what you just heard about this alleged injury that this witness suffered, as I said before, you can use that for one purpose and one purpose only. And that's only to assess the credibility of the alleged victims on the issue of why they delayed to report the incident.

"You can't use it for any other purpose. So, for example, you can't, if you believe this testimony, you can't say, well, I believe that this witness was injured, and, therefore, the defendant must be guilty of the crimes charged in the information. That you can't do. But you can use this to assess the credibility of the alleged victims as to the issue of why they delayed in their report."

recall on occasion I have ruled that some testimony and evidence have been allowed for a limited purpose. Any testimony or evidence which I identified as being limited to a purpose, you will consider it only as it relates to the limits for which it was allowed, and you shall not consider such testimony and evidence in finding any other facts as to any other issue.

* * *

"Other alleged misconduct of the defendant, limited use instruction. The state has offered evidence of other acts of misconduct of the defendant. Specifically, the state offered evidence of the defendant's allegedly being physically abusive toward one or more of his children and their mother. This evidence was admitted for a limited purpose only. The evidence is not being admitted to prove any bad character, propensity or criminal tendencies of the defendant. Such evidence, if you believe it, is being admitted solely to explain why the alleged victims delayed in their reporting of the sexual—alleged sexual abuse. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate any criminal propensity.

"You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issues for which it was offered by the state, but only as it may bear on the issue of the alleged victims delayed reporting of their claimed abuse. This evidence cannot be used by you for any other purpose.

"On the other hand, if you do not believe such evidence or, even if you do, if you find that it does not logically, rationally and conclusively support the issue for which it was offered by the state, namely, to explain the delayed reporting by the alleged victims, then you may not consider that testimony for any purpose. You may not consider evidence of other misconduct of the

defendant for any purpose other than the ones I've just told you because it may predispose your mind uncritically to believe that the defendant may be guilty of the offense here charged merely because of the alleged other misconduct. For this reason, you may consider this evidence only on the limited issue I described and for no other purpose."

We begin with the applicable standard of review and principles of law that guide our analysis. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Estrella J.C.*, 169 Conn. App. 56, 93, 148 A.3d 594 (2016).

"As a general rule, evidence of prior misconduct is inadmissible to prove that a defendant is guilty of the crime of which he is accused. . . . Nor can such evidence be used to suggest that the defendant has a bad character or a propensity for criminal behavior." (Internal quotation marks omitted.) *State* v. *Martin V.*, 102 Conn. App. 381, 385, 926 A.2d 49, cert. denied, 284 Conn. 911, 931 A.2d 933 (2007); see also Conn. Code Evid. § 4-5 (a). "In order to determine whether such evidence is admissible, we use a two part test. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of [the prior misconduct] evidence must outweigh [its] prejudicial effect . . . . The primary responsibility for making these determinations rests with the trial court. 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. . . .

"Under the first prong of the test, the evidence must be relevant[18] for a purpose other than showing the

[18] "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. Conn. Code Evid. § 4-1.

defendant's bad character or criminal tendencies. . . . Recognized exceptions to this rule have permitted the introduction of prior misconduct evidence to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. Conn. Code Evid. § 4-5 [(c)]." (Citations omitted; internal quotation marks omitted; footnote in original.) *State* v. *Martin V.*, supra, 102 Conn. App. 385–86.

"The official commentary to § 4-5 (c) states in relevant part: Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered, and that its probative value outweighs its prejudicial effect. . . . *The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive.* Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors. . . . Conn. Code Evid. § 4-5 (c), commentary." (Emphasis in original; internal quotation marks omitted.) *State* v. *Estrella J.C.*, supra, 169 Conn. App. 96.

Here, the court determined that the challenged uncharged misconduct evidence showing that the defendant was physically abusive to his wife and children was relevant to the issue of the credibility of G and K, particularly as to why they delayed in reporting

the sexual abuse. The challenged testimony was material to this issue, as G and K were the state's key witnesses at trial, and the state's case hinged on their credibility. As the court noted, defense counsel indicated both during argument and in a pretrial filing that she would explore the issue of G and K's delayed disclosures. The credibility of both G and K, and their behavior, therefore, would be called into question by the defense. We note the well recognized principle that "[i]ssues of credibility typically are determinative in child sexual abuse prosecutions. This is so because in sex crime cases generally, and in child molestation cases in particular, the offense often is committed surreptitiously, in the absence of any neutral witnesses." (Internal quotation marks omitted.) Id., 98. We conclude that this uncharged misconduct evidence provided an explanation for why G and K delayed in disclosing the sexual abuse and, therefore, the court was correct in its determination that it was relevant because it bore on the important issue of their credibility as witnesses.[19]

We now turn to the trial court's determination that the probative value of this evidence outweighed its prejudicial effect. "Section 4-3 of the Connecticut Code of Evidence . . . provides that [r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of

[19] The defendant also argues that evidence of his violence toward the mother and children was irrelevant to the issue of delayed disclosure. Specifically, he argues that, in light of the facts that he moved out of the family home in 2007 and subsequently moved to another state, eventually divorced from the mother, and maintained very little contact with G and K, "[t]here was no evidence that they were in [a] situation or [in] circumstances that the defendant could harm them or their mother since 2007." We conclude that the trial court was correct in its determination that such an argument goes to the weight of the evidence, not its admissibility. Furthermore, having suffered through the years of abuse that they alleged occurred at the hands of the defendant, it was not unreasonable that G and K would fear for their safety and the safety of their mother years after the abuse had ceased.

undue delay, waste of time or needless presentation of cumulative evidence. [T]he determination of whether the prejudicial impact of evidence outweighs its probative value is left to the sound discretion of the trial court judge and is subject to reversal only where an abuse of discretion is manifest or injustice appears to have been done. . . . [Our Supreme Court] has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be excluded as unduly prejudicial: (1) where it may unnecessarily arouse the jury's emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) Id., 98–99.

We conclude that the court properly determined that the probative value of the challenged testimony was not outweighed by its prejudicial effect. This uncharged misconduct evidence did not tend to arouse the emotions of the jury, especially in light of the nature of the crimes with which the defendant had been charged, crimes that alleged his sexual abuse of his daughters. See id., 99; see also *State* v. *Vega*, 259 Conn. 374, 398, 788 A.2d 1221 ("evidence of dissimilar acts is less likely to be prejudicial than evidence of similar or identical acts" [internal quotation marks omitted]), cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002). This lack of prejudice is especially true in light of the fact that the jury found the defendant guilty of only five counts of a ten count information, suggesting that the evidence did not "most certainly . . . arouse the emotions and passions of the jury," to the extent that the defendant suggests. The evidence also did not create a distracting side issue, as it "pertained to the credibility of the state's key witness[es], which was the essence

of the state's case." *State* v. *Estrella J.C.*, supra, 169 Conn. App. 99–100. The evidence and counterproof of it did not consume an inordinate amount of time, as it occurred at the beginning of trial. Furthermore, the defendant cannot claim that he was unfairly surprised by this evidence. The state filed a motion in limine three months prior to the start of trial, in which it notified the defendant of its intention to elicit this testimony; see id., 100; and, at argument on January 15, 2015, represented to the court and defense counsel the anticipated substance of this testimony. See footnote 8 of this opinion. Finally, the defendant had a full opportunity to cross-examine G and K on whether the physical violence years before could have actually caused them to delay reporting.

The court did not abuse its discretion in admitting the uncharged misconduct evidence.

III

The defendant next claims that the court improperly granted the state's motion for joinder of the two separate cases against him for trial. Specifically, the defendant argues that he was substantially prejudiced by the joinder of two informations, one charging the defendant in connection with allegations of abuse made by G and one charging the defendant in connection with allegations of abuse made by K, because both cases "depended solely on the credibility of the witnesses," and "the fact that there were two accusers increased their credibility." The defendant further argues that "none of the extreme prejudicial effect caused by the joinder of the cases had been mitigated because the trial court failed to give any cautionary instructions." We disagree.

The following procedural history is relevant to our resolution of this claim. The state initially charged the defendant in two separate informations, one containing

the counts related to G's allegations of abuse, and one containing the counts related to K's allegations of abuse. On December 8, 2014, pursuant to Practice Book §§ 41-3 and 41-19, the state filed a motion for joinder of the cases for trial. In its motion, the state argued that the defendant would not be substantially prejudiced by joinder because the evidence satisfied the factors enunciated by our Supreme Court in *State* v. *Boscarino*, 204 Conn. 714, 529 A.2d 1260 (1987), or alternatively, because the evidence was cross admissible pursuant to this court's decision in *State* v. *Webb*, 128 Conn. App. 846, 19 A.3d 678, cert. denied, 303 Conn. 907, 32 A.3d 961 (2011). The state acknowledged that the court could "give a jury instruction at the time of the proposed testimony and at the conclusion of trial so that the evidence will be used for its proper purpose."

On January 12, 2015, the defendant filed a motion in which he requested that the court "sever the two above docket numbers and deny the state's motion for joinder." The defendant also filed a memorandum of law in opposition to, in relevant part, the state's motion for joinder, in which he argued that "by joining these cases for trial there would be extreme prejudice to the defendant in that there would be [a] strong likelihood of the introduction of overlapping evidence, which could improperly lead an otherwise fair and impartial jury to convict the defendant based on cumulative evidence introduced that has no relevance or bearing to an offense of misconduct charged in each information."

The court heard argument on the motion for joinder on January 15, 2015. In a memorandum of decision, the court granted the state's motion for joinder, overruled the defendant's objection to the motion for joinder, and denied the defendant's motion to sever. The court first concluded that the state had met its burden of proving that the defendant would not be substantially prejudiced by the joinder because the evidence would be

cross admissible at separate trials pursuant to § 4-5 (b) of the Connecticut Code of Evidence and our Supreme Court's decision in *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008). The court then considered the *Boscarino* factors. The court concluded that the defendant would not be unfairly prejudiced by the joinder, and ordered jury selection to begin on February 4, 2015.

On February 4, the state filed a ten count long form information, which charged five counts as to G's allegations of abuse and five counts as to K's allegations of abuse. Before evidence began, the court instructed the jury that "[e]ach charge against the defendant is set forth in the information as a separate count, and you must consider each count separately in deciding this case."

The state called G to testify first. She testified that the defendant began sexually abusing her in Haiti. She testified that, beginning when she was three years old, when the defendant returned to Haiti to visit the family, while the rest of the family was asleep, he would place her on his lap, on top of his shorts, and push her against his penis.

She also testified about five specific incidents of abuse. First, she testified that while the family was living on Adams Avenue, the defendant would come into her room early in the morning while everyone was asleep, remove her underwear, rub his penis on her vagina until he ejaculated, and then clean her with a wet cloth. Second, she described an incident on Roosevelt Avenue that occurred when she was approximately twelve years old. She testified that the defendant came into the room that G was in with her sisters, brought her into his bedroom, locked the door, removed her shorts and underwear, held her down, and engaged in penile-vaginal intercourse with her. Third, G testified about a time on Roosevelt Avenue when the defendant

took her into his bedroom, locked the door, laid her down, took off her pants and underwear, and performed oral sex on her. Fourth, she testified about an incident on Roosevelt Avenue when the defendant French-kissed her and touched her breasts. Finally, she testified that when the family was living on Myano Lane, the defendant came into her room, locked the door, lay down next to her on the bed, and performed oral sex on her.

While the family lived on Myano Lane, G began menstruating. She was thirteen years old. G testified that once she began menstruating, "the molestation decreased drastically, and it was just mostly touching, fondling; there was no penis to vagina touching anymore after I started menstruating."

In addition to K's testimony about the five charged incidents of abuse, as set forth in the facts and part I of this opinion, K also testified that when the family lived in the Stratford home, the defendant would touch her vagina with his hand, suck on her breasts, and perform oral sex on her. She testified that this continued until she began menstruating when she was eleven years old.

Prior to the conclusion of the state's case-in-chief, the court instructed the jury as follows: "[J]ust to remind you—and you'll hear this instruction again later on in the case, at the end of the case, that you are going to be required to independently evaluate each and every [count] of the information; so, there's ten. You're going to have to evaluate each one independently and separately and make an independent determination of your verdict on each count independently from the others. So, I want to remind you of that." In its final instructions, the court instructed the jury that it must make a "separate and independent determination" of guilt as to each of the ten counts, it must deliberate on each count

separately, the total number of counts charged did not add to the strength of the state's case, and that "[e]ach count is a separate entity."[20] After deliberation, the jury returned a verdict of not guilty on counts one through five of the information, all counts related to the allegations of abuse alleged by G, and returned a verdict of guilty on counts six through ten of the information, all counts related to the allegations of abuse made by K.

We begin with the applicable standard of review and principles of law that guide our analysis. "The principles that govern our review of a trial court's ruling on a motion for joinder or a motion for severance are well established. Practice Book § 41-19 provides that, [t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together. . . . In deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb. . . . The defendant bears a heavy burden of showing that [joinder] resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of

[20] The entirety of the court's instruction was as follows: "Multiple charges and/or informations. The defendant is charged with ten counts. To the extent that there have been any changes regarding the content of the information, it is of no concern to your deliberations. You are to consider only the specific charges submitted to you and not concern yourself with how the information may have read when it was read to you at the start of trial.

"The defendant is entitled to and must be given by you a separate and independent determination of whether he is guilty or not guilty as to each of the counts. Each of the counts charged is a separate crime. The state is required to prove each element in each count beyond a reasonable doubt. Each count must be deliberated upon separately. The total number of counts charged does not add to the strength of the state's case. You may find that some evidence applies to more than one count of the information. The evidence, however, must be considered separately as to each element in each count. Each count is a separate entity. You must consider each count separately and return a separate verdict for each count. This means that you may reach opposite verdicts on different counts. A decision on one count does not bind your decision on another count."

the court's instructions." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 543–44, 34 A.3d 370 (2012).

"A long line of cases establishes that the paramount concern is whether the defendant's right to a fair trial will be impaired. Therefore, in considering whether joinder is proper, this court has recognized that, where evidence of one incident would be admissible at the trial of the other incident, separate trials would provide the defendant no significant benefit. . . . Under such circumstances, the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial. . . . Accordingly, we have found joinder to be proper where the evidence of other crimes or uncharged misconduct [was] cross admissible at separate trials. . . . Where evidence is cross admissible, therefore, our inquiry ends.

"Substantial prejudice does not necessarily result from [joinder] even [if the] evidence of one offense would not have been admissible at a separate trial involving the second offense. . . . Consolidation under such circumstances, however, may expose the defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, the jury may consider that a person charged with doing so many things is a bad [person] who must have done something, and may cumulate evidence against him . . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any of the charges might not [persuade the

jury] of the accused's guilt, the sum of it will convince them as to all. . . .

"[Accordingly, the] court's discretion regarding joinder . . . is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, [in *State* v. *Boscarino*, supra, 204 Conn. 722–24] we have identified several factors that a trial court should consider in deciding whether a severance or [denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 155–56, 51 A.3d 1048 (2012).

We begin our analysis by determining whether the evidence in the cases concerning G and K was cross admissible, such that evidence in each case would have been admissible as prior misconduct in the other case. "[A]s a general rule, prior misconduct evidence is inadmissible to prove the defendant's bad character or criminal tendencies. See Conn. Code Evid. § 4-5 (a) . . . . In *State* v. *DeJesus*, supra, 288 Conn. 470, however, our Supreme Court recognized a *limited* exception to the prohibition on the admission of uncharged misconduct evidence in *sex crime* cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior. . . . This exception to the admission of propensity evidence was subsequently codified in § 4-5 (b) of the Connecticut Code of Evidence.

"Under § 4-5 (b) of the Connecticut Code of Evidence and *DeJesus*, evidence of uncharged sexual misconduct is admissible if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant and compulsive criminal sexual behavior with which he or she is charged." (Emphasis in original; internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 88–89, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018). Such evidence is admissible if: "(1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect." Conn. Code Evid. § 4-5 (b).

"In assessing the relevancy of such evidence, and in balancing its probative value against its prejudicial effect, the trial court should be guided by this court's prior precedent construing the scope and contours of the liberal standard pursuant to which evidence of uncharged misconduct previously was admitted under the common scheme or plan exception. Lastly, prior to admitting evidence of uncharged sexual misconduct under the propensity exception . . . the trial court must provide the jury with an appropriate cautionary instruction . . . .

"Recognizing the difficulties of balancing the probative value of the evidence against its prejudicial effect, we have held that the trial court's decision will be reversed only whe[n] abuse of [its] discretion is manifest or whe[n] an injustice appears to have been done. . . . On review by this court, therefore, every reasonable presumption should be given in favor of the trial

court's ruling." (Citations omitted; internal quotation marks omitted.) *State* v. *Devon D.*, 321 Conn. 656, 666, 138 A.3d 849 (2016).

Applying these standards in the present case, we conclude that the trial court properly exercised its discretion in permitting the cases to be tried together because the evidence in both cases was cross admissible. On appeal, the defendant does not challenge the trial court's finding that the cases involved aberrant and compulsive sexual misconduct, so we turn first to the question of relevancy. It is undisputed that the incidents alleged by both G and K were not too remote in time from each other, and were allegedly committed upon similar persons (i.e., the defendant's prepubescent daughters). See, e.g., id., 667 ("[a]ll three victims are prepubescent children of similar age who are the defendant's biological children"). The gravamen of the defendant's argument on appeal is that his conduct with respect to G and K was not sufficiently similar in nature and circumstances. Specifically, he argues that G's claims were more severe and "of a slightly different nature" than K's claims. We disagree.

With respect to the similarity of conduct, our Supreme Court repeatedly has recognized that it "need not be so unusual and distinctive as to be like a signature . . . [but] [r]ather, the question is whether the evidence is sufficiently similar to demonstrate a propensity to engage in the type of aberrant and compulsive criminal sexual behavior with which he . . . [was] charged." (Citation omitted; internal quotation marks omitted.) Id., 668. We find our Supreme Court's decision in *State* v. *Devon D.*, supra, 321 Conn. 656, instructive on this issue. There, the defendant was charged with crimes in connection with the sexual abuse of his three children, one girl and two boys. Id., 658–59. On appeal, the defendant argued that the trial court erred in denying his motion to sever the three cases against him. Id.,

662. Our Supreme Court rejected that argument and held that pursuant to *DeJesus*, the evidence concerning all three of the defendant's children was cross admissible. Id., 666.

The court in *Devon D.* concluded that the defendant's conduct as to each victim was "sufficiently similar to demonstrate that he had a propensity toward aberrant sexual behavior." Id., 667. The daughter claimed that the defendant placed his penis on her stomach; touched her vagina with his fingers; poured lotion on her body; ejaculated on her body; inserted his finger into her vagina while bathing her and using a rag, causing her to bleed; forced her to watch a pornographic movie with her siblings; warned her not to tell anyone about the abuse; penetrated her vaginally with his penis; attempted to penetrate her anally with his penis; forced her to perform fellatio on him, causing her to vomit; put vinegar, or a substance that stung, on her vagina and in her ear; and tried to put his penis in her ear, causing it to bleed. Id., 659–60. One of the sons claimed that the defendant: inserted a rag-covered finger into his anus; rubbed his penis; forced him to watch a pornographic movie with his siblings; and warned him not to tell anyone about the abuse. Id., 660. The other son claimed that the defendant inserted his finger into his anus, and that he had been using a rag but the rag " 'slipped' "; squeezed his penis; pulled back his foreskin; made him shower with his brother; forced him to watch a pornographic movie with his siblings; and warned him not to tell his mother about the bathing. Id. The abuse occurred during the defendant's unsupervised visitation with the children at his home or his mother's home. Id., 667.

As to the similarity of the conduct with respect to each of the victims, the court noted the following similarities: (1) the abuse occurred when the defendant had time alone with each of the victims; (2) the defendant

had forced all of the victims to watch a pornographic movie; (3) the defendant abused each victim in the shower under the guise of bathing them with a rag; (4) the purported bathing of the victims resulted in digital vaginal or anal penetration; (5) the defendant touched each of the victims inappropriately when he was not using the rag; and (6) the defendant warned each of the victims not to tell anyone about his conduct. Id., 667–68. As to the fact that his abuse of his daughter varied from the abuse of his sons, the court concluded: "As we discussed previously in this opinion, the defendant engaged in multiple types of similar conduct with all three victims. The fact that the defendant was unclothed during his abuse of [his daughter] and engaged in additional types of sexual misconduct with her does not outweigh these numerous similarities or erode the probative value of that evidence.

"In addition, the fact that the defendant engaged in additional types of sexual misconduct with [his daughter] does not render his conduct with her so much more severe and shocking than his conduct with [his sons] that severance is required. As the trial court correctly noted, the allegations in all three cases were shocking, and the defendant's inappropriate touching and digital penetration of all three victims can only be characterized as severe. The fact that the defendant engaged in additional types of sexual misconduct with [his daughter] does not render the defendant's conduct toward [his sons] any less severe. Even if the conduct toward [the daughter] was significantly more egregious than his conduct toward [the sons], however, this court previously has upheld the admission of uncharged sexual misconduct when it differed in degree from the charged conduct." Id., 669.

Here, there were numerous similarities between the allegations of G and K, including: (1) the abuse began at a young, prepubescent age; (2) the abuse occurred

when the defendant was alone with his children, or when other family members slept; (3) all of the abuse occurred in the family home; (4) on some occasions, the defendant would bring both G and K to his bedroom, lay them on the bed, and sexually abuse them; (5) the abuse involved the defendant touching G's and K's vaginas, performing oral sex on each of them, and touching their breasts with either his mouth or his hands; and (7) both G and K claimed that the abuse either drastically decreased or ceased when they began menstruating. As our Supreme Court concluded in *Devon D.*, we similarly conclude here that the fact that G claimed that the defendant began abusing her at a younger age and engaged in additional types of sexual misconduct with her does not outweigh the numerous similarities, nor does it render his misconduct with respect to G more severe and shocking than his misconduct with respect to K. Given the similarities between the conduct toward G and K, and in view of the standard of admissibility governing the use of prior misconduct evidence in sexual assault cases, we conclude that the trial court's conclusion that the alleged conduct of the defendant toward G and K was similar was proper.

Having determined that the evidence was relevant to prove that the defendant had a propensity to engage in aberrant sexual behavior, we turn to whether the probative value of the evidence outweighed its prejudicial effect. The defendant argues that because "both of the joined cases depended solely on the credibility of the witnesses and lacked any physical or other corroborating evidence," it was unduly prejudicial to join the cases because "the danger is great that the jury would have used the evidence cumulatively." We are not persuaded.

"We previously have held that the process of balancing probative value and prejudicial effect is critical to the determination of whether other crime[s] evidence

is admissible. . . . At the same time, however, we . . . do not . . . requir[e] a trial court to use some talismanic phraseology in order to satisfy this balancing process. Rather . . . in order for this test to be satisfied, a reviewing court must be able to infer from the entire record that the trial court considered the prejudicial effect of the evidence against its probative nature before making a ruling. . . . In conducting this balancing test, the question before the trial court is not whether [the evidence] is damaging to the defendant but whether [the evidence] will improperly arouse the emotions of the jur[ors].'' (Citation omitted; internal quotation marks omitted.) *State* v. *Devon D.*, supra, 321 Conn. 673.

We are satisfied that the trial court weighed the prejudicial effect of the evidence against its probative value before ruling on the cross admissibility of this evidence. After hearing argument from both parties, the court acknowledged in its memorandum of decision that evidence of child sex abuse was harmful to the defendant, but also noted that prior acts of similar sexual abuse of children are highly probative. ''Although evidence of child sex abuse is undoubtedly harmful to the defendant, that is not the test of whether evidence is unduly prejudicial. Rather, evidence is excluded as unduly prejudicial when it tends to have some adverse effect upon a defendant *beyond* tending to prove the fact or issue that justified its admission into evidence.'' (Emphasis in original; internal quotation marks omitted.) *State* v. *Daniel W.*, supra, 180 Conn. App. 94–95. On appeal, the defendant does not explain how this evidence, if admitted as uncharged sexual misconduct at separate trials, would have been unduly prejudicial by showing more than his propensity to sexually assault his daughters. We note that ''propensity is the precise purpose for which our legislature and courts have allowed such evidence to be admitted and considered.'' Id., 95. We

conclude that the court correctly found that the prejudicial effect of the evidence did not outweigh its probative value, and that the evidence was cross admissible. Therefore, we need not consider whether the trial court properly applied the *Boscarino* factors.[21] See *State* v. *Devon D.*, supra, 321 Conn. 666 n.6.

In sum, we conclude that the trial court properly exercised its discretion in permitting the two cases

[21] We also note that, even if we were to assume arguendo that the joinder of the informations resulted in prejudice to the defendant, we would conclude that the court's repeated and detailed jury instructions cured any prejudice. First, after the jury was impaneled and sworn in, the court instructed the jury that the charges set forth in the information were to be considered as separate counts. Second, during trial, the court again emphasized that the jury was required to "independently evaluate each and every [count] of the information," and make independent determinations of guilt or innocence on each count. Third, the court reiterated these instructions during its final charge. "It is well established that [t]he jury [is] presumed to follow the court's directions in the absence of a clear indication to the contrary." (Internal quotation marks omitted.) *State* v. *Davis*, 98 Conn. App. 608, 624, 911 A.2d 753 (2006), aff'd, 286 Conn. 17, 942 A.2d 373 (2008), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 549, 34 A.3d 370 (2012).

Nonetheless, the defendant argues that "[a]lthough the defendant was acquitted of the allegations brought by [G], that doesn't necessarily resolve whether the defendant was prejudiced by the joinder," and cites our Supreme Court's decision in *Boscarino* for the proposition that "[a]cquittal of some charges doesn't necessarily guarantee that the jury considered the evidence in each case separately." We are not persuaded.

In *Davis*, the defendant was charged with crimes relating to three separate incidents in three informations. *State* v. *Davis*, supra, 98 Conn. App. 611. Those informations were joined for trial. Id. The jury returned verdicts of guilty on all charges related to two of those incidents, but a verdict of not guilty on all charges related to the third incident. Id., 624–25. This court affirmed the judgments of conviction, and on appeal, our Supreme Court noted that "by acquitting the defendant of all of the offenses charged in [one] case, the jury evidently was able to keep the three cases separate and did not blindly condemn the defendant on the basis of the evidence adduced in the [other] case." *State* v. *Davis*, 286 Conn. 17, 37, 942 A.2d 373 (2008), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 549, 34 A.3d 370 (2012). Here, the jury returned verdicts of not guilty on all charges related to the allegations made by G, and of guilty on all charges related to the allegations made by K. We conclude that acquittal of the charges related to G's allegations demonstrates that the jury properly considered each information separately. See also *State* v. *Rodriguez*, 91 Conn. App. 112, 120–21, 881 A.2d 371 (acquittal of one of eight counts charged

against the defendant to be tried jointly. The defendant cannot demonstrate that he was substantially prejudiced by the joinder because the evidence in both cases would have been cross admissible to show that he had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct.

IV

The defendant finally claims that the trial court improperly denied his motion to allow him to make an opening statement to the jury. Although he acknowledges that Connecticut law does not guarantee counsel the right to make an opening statement, the defendant argues that "[d]enying the defendant's request prevented the defendant a fair opportunity to present his case." We are not persuaded.

The following procedural history is relevant to our resolution of this claim. On February 26, 2015, defense counsel Richard P. Silverstein filed a written motion requesting that the court permit him to give an opening statement. On the first day of trial, prior to the commencement of evidence, the court heard argument on this motion. The court stated its intention to allow counsel to introduce themselves to the jury, but "not get into any of the facts of the case." Defense counsel responded: "Well, I was hoping you'd let me go a little further than that. What I would like to do, if there's no objection, was to indicate what I would do, you know, I didn't pick this jury, but in voir dire I cover a number of areas and that maybe cocounsel wouldn't have gone into. What I would like to be able to say to this jury is that the allegations themselves are poison, that the only thing worse than being a child molester is being accused of being a child molester, that I understand in cases such as this it is very difficult to afford the defendant

demonstrated that jury was able to consider each count separately), cert. denied, 276 Conn. 909, 886 A.2d 423 (2005).

the presumption of innocence. I know this. And it's also very hard to hold them to their burden of proof.

"And I want to explain to them that the burden of proof in a sexual assault case is the same burden of proof in [a] disorderly conduct case. I want to explain to them that probability is here and beyond a reasonable doubt is up here, and it's the—that what keeps criminal defense attorneys up at night is, we worry that the closer they come to reaching their burden, the harder it is for the jury to return a not guilty verdict, should they fall just short in reaching that burden, that they may be in the unenviable position of thinking my client is probably guilty, but are mandated by law, should they have a doubt based upon a reason found in the evidence or a lack of evidence, to acquit my client, and that they have taken an oath to do so; something like that."

The state responded that defense counsel's proposed opening statement was more akin to closing argument. The state also noted that many of the areas that defense counsel wanted to address in his opening statement already had been covered by his cocounsel, Attorney Samantha Kretzmer, during jury selection.

In an oral ruling, the court denied the defendant's motion to give an opening statement. The court noted that it planned to "give preliminary instructions to the jury before the evidence starts that touch upon certain of the items just referenced by counsel for the defendant," and that "much of the items just referenced by Mr. Silverstein were adequately covered by Attorney Kretzmer's more than thorough jury selection process," and that Attorney Silverstein had previously requested that the court permit him to conduct the evidentiary portion of the trial and Attorney Kretzmer the jury selection. The court stated that it would allow defense counsel and the state to introduce themselves to the jury, and that "all of the other items referenced by counsel can be addressed during closing argument."

After the jury entered the courtroom, the court informed it: "Before I go over some preliminary instructions, before the evidence starts, it's been a few weeks since you were all here, I'm going to have each attorney just briefly introduce themselves, so you know who the players are, again, and then I'll give you my brief instructions." After the state briefly addressed the jury, defense counsel addressed it as follows: "Good morning. I don't know any of you people. As you are aware, I've been called down to try the case. My trial schedule prevented me from doing the voir dire, [as] I was on trial in New Haven. I usually like to get to know the people that are gonna sit on the case. In this case, it was impossible; however, I do appreciate you all showing up today, even though jurors were cancelled from what I understand.

"I'm from New Haven, Connecticut. I try cases all over the state. And I've been doing this for thirty years. It's all I do, is criminal defense work. I understand this is—this particular case is going to be difficult. You're gonna hear a lot of difficult testimony. It's the type of case that elicits an emotional response for most people. I would only ask you to maintain your objectivity, be dispassionate and objective when (indiscernible) the facts of this case. And I would just ask you to be fair and abide by your oath as a juror, which indicates that you will decide this case fairly and impartially, based solely on the facts that you find in this courtroom and the law the judge gives you. Toward that end, I look forward to working with you. Thank you."

In its preliminary instructions, the court instructed the jury, inter alia, as to the presumption of innocence, the state's burden of proof, and the jury's role in deciding the facts of the case and applying the law as provided by the court. Following these preliminary instructions, the evidentiary portion of the trial commenced.

We begin with the applicable standard of review and the principles of law that guide our analysis. In Connecticut, "the right to make an opening statement to the jury by a defendant in a criminal case is not guaranteed by law or rule. Whether to allow an opening statement is a decision to be left to the sound discretion of the trial court, taking into consideration the number and nature of the charges, the complexity of the issues, the number of defendants and their interrelationship, and similar factors which, when put into proper perspective by an opening statement, would serve to clarify the issues and focus the attention of the jury upon the matters it must decide." *State* v. *Ridley*, 7 Conn. App. 503, 506, 509 A.2d 546, cert. denied, 201 Conn. 803, 513 A.2d 698 (1986).

Under this standard, the court did not abuse its discretion when it denied the defendant's motion to make an opening statement. Defense counsel sought to address the jury, because he did not have the opportunity to do so during voir dire, about the nature of the allegations against the defendant, the difficulty in affording the presumption of innocence in "cases such as this," and the state's burden of proof. The court observed that cocounsel, Attorney Kretzmer, covered much of this material during jury selection, and further noted that Attorney Silverstein himself had requested that the court permit Attorney Kretzmer to conduct jury selection and Attorney Silverstein to conduct the evidentiary portion of the trial. Furthermore, the court's statement that "all of the other items referenced by counsel" could be addressed during closing argument indicated its belief that defense counsel intended to offer argument more appropriate for closing arguments. It is well within the trial court's discretion to prohibit defense counsel from making legal argument in an opening statement. See *State* v. *Book*, 155 Conn. App. 560, 577, 109 A.3d 1027 (concluding that trial court acted well

within discretion in limiting defense counsel's opening remarks because it anticipated that defense counsel would present jury with legal argument), cert. denied, 318 Conn. 901, 122 A.3d 632 (2015), cert. denied, U.S. , 136 S. Ct. 2029, 195 L. Ed. 2d 219 (2016).

Furthermore, the defendant is unable to show that he was harmed by any claimed error. Although the court permitted counsel to introduce themselves to the jury, defense counsel in fact went beyond mere introduction and robustly addressed the jury regarding: (1) his inability to conduct voir dire in this case; (2) the nature of his practice; (3) the "difficult" testimony that the jury would hear during this case; and (4) the jury's duty to be objective and "decide this case fairly and impartially, based solely on the facts that you find in this courtroom and the law the judge gives you." In light of this statement, the court's observation that many of the topics that Attorney Silverstein wished to address were covered by cocounsel during voir dire, and the court's preliminary instructions to the jury, we conclude that the defendant was not deprived, in any meaningful way, from addressing the jury prior to the receipt of evidence. The court did not abuse its discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

JENZACK PARTNERS, LLC *v.* STONERIDGE ASSOCIATES, LLC, ET AL.
(AC 39880)

DiPentima, C. J., and Lavine and Eveleigh, Js.

Syllabus

The plaintiff brought this action seeking to foreclose on a certain mortgage of the defendant J. The named defendant had obtained a construction loan from the original lender, S Co., which assigned the mortgage and note to the plaintiff. The note was secured by various personal guarantees that were executed in favor of S Co., including a nonrecourse

guarantee executed by J that was limited solely to her interest in certain real property in Cromwell. J executed two subsequent reaffirmations of her guarantee in connection with certain modifications of the note, and she executed a mortgage in favor of S Co. on the Cromwell property. After the named defendant defaulted on the underlying note, the plaintiff commenced this action, seeking, inter alia, to foreclose on J's mortgage. At trial, the plaintiff argued that the assignment of the note necessarily carried with it an assignment of all the underlying guarantees, including J's limited guarantee. The plaintiff introduced into evidence, inter alia, an exhibit purporting to demonstrate the current amount due on the note. The trial court rendered a judgment of strict foreclosure in favor of the plaintiff and, subsequently, awarded the plaintiff attorney's fees, and J appealed to this court. *Held*:

1. J could not prevail on her claim that because her limited guarantee was not specifically assigned from S Co. to the plaintiff, the plaintiff lacked standing to foreclose on the mortgage; although the allonge that assigned the note to the plaintiff did not explicitly incorporate or mention J's limited guarantee, an examination of the surrounding circumstances demonstrated that S Co. intended to equitably assign the underlying guarantees as part of its assignment of the underlying note, as J's intent in executing her limited guarantee was to collateralize the named defendant's note with her interest in the Cromwell property, the underlying guarantees, which had no independent value other than to secure the note, were the only documents that gave the note any value, and, thus, it could be reasonably assumed that the intention of S Co. in assigning the note to the plaintiff was to assign its rights under the note and the secondary obligations that gave the note its value.
2. The trial court erred in holding that the plaintiff had established the amount of debt due on the note: at trial, the plaintiff had introduced a certain exhibit, which was admitted under the business record exception to the hearsay rule, that computed the amount due on the note through the testimony of a witness, B, who admitted that his knowledge of the starting balance due on the note, as reflected on the computation in the exhibit, came from data submitted by S Co. when the plaintiff purchased the loan, and although B testified that S Co. had attested to how much was due on the note as of the date of the plaintiff's purchase, B had no personal knowledge concerning the starting balance because he was not involved in the negotiation or acquisition of the note from S Co., and, thus, the starting balance used in the computation of debt in the exhibit was inadmissible hearsay; moreover, although B testified that the computation of debt was made and kept by the plaintiff in the ordinary course of its business, there was no evidence in the record regarding S Co.'s business records or its duty to report an accurate starting balance to the plaintiff, the starting balance was not calculated by the plaintiff and was received, rather than made, in the ordinary course of its business, which failed to satisfy the first requirement for

admissibility under the applicable statute (§ 52-180), and the erroneous evidentiary ruling was necessarily harmful to J because it directly implicated the amount she owed under the note.

3. J could not prevail on her claim that the trial court improperly admitted into evidence, in support of the plaintiff's claim for attorney's fees, certain unauthenticated documents that listed R Co., a nonparty, as the party entitled to fees; on the basis of the language of the guarantee, the trial court properly determined that the plaintiff was entitled to recover attorney's fees and expenses pending an appropriate evidentiary showing, as the bills appended to the plaintiff's exhibit in support of the amount of its attorney's fees identified the plaintiff as the client by its unique client number and each entry listed the bill as pertaining to the present matter, and although those bills also included a reference to R Co., the plaintiff's attorney testified that the reference was included for mailing purposes only because there had been a prior issue with the plaintiff receiving its bills at its listed business address, and the trial judge, as the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony, was free to accept that testimony and did not abuse its discretion by admitting the challenged exhibit into evidence.

Argued February 14—officially released July 3, 2018

Procedural History

Action seeking, inter alia, to foreclose a mortgage on certain real property owned by the defendant Jennifer Tine et al., and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the named defendant et al. were defaulted for failure to appear; thereafter, the action was withdrawn as to the defendant Joseph Tine; subsequently, the matter was tried to the court, *Domnarski*, *J.*; judgment for the plaintiff and of strict foreclosure, from which the defendant Jennifer Tine appealed to this court; thereafter, the court, *Domnarski*, *J.*, granted the plaintiff's motion for attorney's fees, and the defendant Jennifer Tine filed an amended appeal. *Reversed in part; new trial.*

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellant (defendant Jennifer Tine).

Houston P. Lowry, with whom, on the brief, was *Dale M. Clayton*, for the appellee (plaintiff).

Opinion

EVELEIGH, J. The defendant Jennifer Tine[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Jenzack Partners, LLC. On appeal, the defendant claims that the trial court improperly: (1) held that Sovereign Bank had assigned the defendant's guarantee to the plaintiff and the plaintiff had standing to foreclose on the mortgage; (2) determined that the plaintiff had established the amount of debt due on the subject note; and (3) granted attorney's fees and costs to the plaintiff. We agree with the defendant's second claim and, accordingly, we reverse the judgment of the trial court only as to Jennifer Tine.

The following facts and procedural history are relevant to our resolution of the issues on appeal. On July 13, 2006, the named defendant, Stoneridge Associates, LLC (Stoneridge), obtained a construction loan in the amount of $1,650,000 from a nonparty, Sovereign Bank (Sovereign). At that time, Stoneridge executed a promissory note (Stoneridge note) evidencing its promise to repay the loan. The note was secured by various personal guarantees; Premier, Gattinella, Snow and Joseph Tine each executed guarantees in favor of Sovereign guaranteeing repayment of the sums due under the note. See footnote 1 of this opinion. On December 23, 2008, the Stoneridge note was modified via a modification

[1] Stoneridge Associates, LLC (Stoneridge), Premier Building & Development, Inc. (Premier), Ronald Gattinella, Joseph Tine also known as Giuseppe Tine (Joseph Tine), Patrick Snow, and Webster Bank are also named as defendants in this action. With the exception of Jennifer Tine and Joseph Tine, all defendants were defaulted for failure to appear or plead. During the pendency of the foreclosure action, Joseph Tine, the defendant's former husband and a member of Stoneridge, filed a petition in bankruptcy and the claims against him were subsequently discharged. For the purposes of this opinion, any reference to the defendant is to Jennifer Tine only.

agreement. On the same date, the defendant executed a limited guarantee in favor of Sovereign guaranteeing repayment of the sum due under the Stoneridge note as modified. In order to secure their respective guarantees, the defendant and Joseph Tine executed a mortgage (Tine mortgage) in favor of Sovereign on their residential property located at 8 Black Birch Drive in Cromwell.[2] The defendant's nonrecourse guarantee limited her liability solely to her interest in the Cromwell property. On August 27, 2009, and May 6, 2010, the defendant executed reaffirmations of her guarantee in connection with subsequent modifications of the Stoneridge note.

On March 22, 2012, Sovereign assigned its mortgage and interests in the Stoneridge note to the plaintiff.[3] In August, 2012, the plaintiff commenced this action, seeking, inter alia, to foreclose on the Tine mortgage. In the operative revised complaint dated April 2, 2013, the plaintiff alleged that, because Stoneridge had defaulted on the underlying Stoneridge note, the plaintiff was entitled to declare the entire balance of the note due and payable. The plaintiff alleged that Sovereign had assigned all of its interests in the Stoneridge note, including continuing guarantees executed by Premier, Gattinella, Snow and Joseph Tine, the limited guarantee executed by the defendant, and the Tine mortgage.[4] Because the plaintiff was the current holder of the Stoneridge note, the plaintiff claimed it was enti-

[2] The Tine mortgage was recorded in the Cromwell land records on January 7, 2009. When the defendant executed her limited guarantee, she and Joseph Tine were joint owners of the Cromwell property. Joseph Tine subsequently transferred his interest in the property to the defendant in connection with his bankruptcy proceedings. At the time of the foreclosure judgment, the defendant was the sole owner of the Cromwell property.

[3] Specifically, Sovereign and the plaintiff executed an allonge endorsing the Stoneridge note to the plaintiff as the obligee of the note. The Tine mortgage was assigned to the plaintiff though an "Assignment of Open-End Mortgage Deed."

[4] See footnote 1 of this opinion.

tled collect on all underlying guarantees and foreclose on the mortgage.

On April 26, 2013, the defendant filed an answer that denied the substance of the complaint and asserted as special defenses lack of consideration, unclean hands, and equitable estoppel. A bench trial was held on August 16, 2016. At trial, the plaintiff claimed that the assignment of the Stoneridge note necessarily carried with it an assignment of all underlying guarantees, including the defendant's limited guarantee secured by the Tine mortgage. The plaintiff also introduced into evidence exhibit 22, a computation of the current amount due on the note. In response, the defendant claimed that the court lacked subject matter jurisdiction to render a judgment of foreclosure against her because her guarantee was not specifically assigned to the plaintiff in the allonge. The defendant also claimed that the plaintiff failed to establish the amount of debt due on the note because evidence of the computation of debt, which included a starting balance provided to the plaintiff by Sovereign, was inadmissible hearsay. Following the trial, both parties filed posttrial briefs. On December 1, 2016, the trial court issued a memorandum of decision entering an order of strict foreclosure on the Tine mortgage. The court held that the plaintiff had standing to foreclose the mortgage that secured the defendant's guarantee and that the plaintiff had established the amount of debt due on the note through the testimony of William Buland, the plaintiff's authorized representative, and the computation of debt in exhibit 22. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant argues that the trial court improperly (1) held that the plaintiff had standing to foreclose on the Tine mortgage; (2) determined that the plaintiff's exhibit 22 was sufficient to establish the amount due on the subject note; and (3) awarded the

plaintiff attorney's fees and expenses. Although we agree with the defendant's second claim and, accordingly, reverse the trial court's judgment and remand the case for a new trial, we address both the defendant's first claim, which pertains to subject matter jurisdiction, and her third claim as an issue likely to arise on remand.

I

The defendant's first claim is that the court improperly found that the plaintiff had standing to bring an action to foreclose on the Tine mortgage. She argues that the plaintiff lacked standing because her limited guarantee was not specifically assigned from Sovereign to the plaintiff in the allonge. In response, the plaintiff argues that the court properly found that it had standing to foreclose the Tine mortgage because the assignment of the Stoneridge note operated as an assignment of the underlying guarantees securing it. We agree that the plaintiff has standing.

We set forth our standard of review and applicable legal principles. "The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination." (Internal quotation marks omitted.) *D'Amato Investments, LLC* v. *Sutton*, 117 Conn. App. 418, 421, 978 A.2d 1135 (2009). "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Because standing implicates the court's subject matter jurisdiction, the plaintiff ultimately bears the

burden of establishing standing. . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, [the standard of] review is plenary." (Internal quotation marks omitted.) *Valley National Bank* v. *Marcano*, 174 Conn. App. 206, 210–11, 166 A.3d 80 (2017).

"A guarantee, similar to a suretyship, is a contract, in which a party, sometimes referred to as a secondary obligor, contracts to fulfill an obligation upon the default of the principal obligor." (Internal quotation marks omitted.) *One Country, LLC* v. *Johnson*, 137 Conn. App. 810, 816, 49 A.3d 1030 (2012), aff'd, 314 Conn. 288, 101 A.3d 933 (2014). Our Supreme Court has recognized the general principle that "a guarantee agreement is a separate and distinct obligation from that of the note or other obligation." *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 675, 94 A.3d 622 (2014). As our Supreme Court stated, "a guarantor's liability does not arise from the debt or other obligation secured by the mortgage; rather, it flows from the separate and distinct obligation incurred under the guarantee contract. . . . [The] guarantor [is not] liable for the debt secured by the mortgage; rather, the guarantor is liable for what he or she agreed to in the [guarantee]." (Citations omitted; internal quotation marks omitted.) Id., 676.

The defendant argues that the plaintiff lacks standing to enforce her limited guarantee because, although the Stoneridge note was assigned from Sovereign to the plaintiff, her limited guarantee itself never was assigned to the plaintiff. The defendant correctly points out that the allonge did not explicitly incorporate or mention the limited guarantee signed by the defendant. The language of the allonge, however, does not by itself control our resolution of the issue; we also may examine the language of the guarantee. See *D'Amato Investments*,

LLC v. *Sutton*, supra, 117 Conn. App. 422. The defendant's guarantee states the following in relevant part: "Guarantor does hereby fully guarantee that Borrower shall duly and punctually perform all of its other obligations, covenants and conditions contained in the Note and Loan Documents." Because the language of the guarantee itself does not shed light on the effect of a subsequent assignment, our resolution of the issue of standing depends on whether the assignment of the Stoneridge note from Sovereign to the plaintiff also operated as an assignment of the defendant's underlying limited guarantee such that the plaintiff can foreclose on the Tine mortgage securing the guarantee.

Neither party has identified a Connecticut case that is factually on point with the present one, and our courts have considered this issue infrequently. See *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties*, supra, 312 Conn. 675. We therefore turn to the Restatement (Third) of Suretyship and Guaranty § 13 (1996), which is persuasive authority and in accord with related Connecticut case law.[5]

The Restatement (Third) of Suretyship and Guaranty § 13 sets forth the rule that when an obligee assigns its rights under an obligation, that assignment operates as an assignment of any secondary obligations attached to the primary obligation. In discussing the assignment of an obligee's rights, subsection (5) provides: "Except as otherwise agreed or as provided in subsection (1),[6]

[5] Our Supreme Court previously has relied on the Restatement (Third) of Suretyship and Guaranty to fill gaps in and support our common law. See *Lestorti* v. *DeLeo*, 298 Conn. 466, 475 n.8, 4 A.3d 269 (2010).

[6] Subsection (1) of § 13 of the Restatement (Third) of Suretyship and Guaranty provides the exceptions for when the assignment of a secondary obligation is prohibited: "The rights of the obligee against the secondary obligor arising out of the secondary obligation can be assigned unless:

"(a) the substitution of a right of the assignee for the right of the obligee would materially change the duty of the second obligor or materially increase the burden or risk imposed on by its contract; or

"(b) the assignment is forbidden by statute or is otherwise ineffective as a matter of public policy; or

an assignment by the obligee of its rights against the principal obligor arising out of the underlying obligation operates as an assignment of the obligee's rights against the secondary obligor arising out of the secondary obligation." (Footnote added.) Restatement (Third), supra, § 13 (5). Additionally, comment (f), explains: "A secondary obligation, like a security interest, has value only as an adjunct to an underlying obligation. It can usually be assumed that a person assigning an underlying obligation intends to assign along with it any secondary obligation supporting it. Thus, unless there is an agreement to the contrary or assignment is prohibited pursuant to subsection (1), assignment of the underlying obligation also assigns the secondary obligation." Restatement (Third), supra, § 13, comment (f). Under the rule expressed in § 13 (5) of the Restatement, therefore, the assignment of the Stoneridge note operates as an assignment of the secondary obligations underlying it, namely, the defendant's limited guarantee.

The defendant claims, however, that because there was no specific mention of her limited guarantee in the allonge assigning the Stoneridge note to the plaintiff, her guarantee was not assigned to the plaintiff. Our Supreme Court addressed an analogous issue in *Lemmon* v. *Strong*, 59 Conn. 448, 22 A. 293 (1890), namely, whether an assignment of a note to a subsequent holder carried with it a related guarantee where the guarantee was not formally assigned. In concluding that no specific assignment was necessary to enforce the related guarantee, the court focused on the surrounding circumstances and intentions of the parties executing the assignment. "The contract and acts of [the assignor] . . . should be construed with reference to all the surrounding circumstances, the controlling consideration being to discover and give effect to the mutual intention

"(c) the assignment is validly precluded by contract." The defendant does not claim that any of these exceptions are applicable in the present case.

of the parties." Id., 454. In holding that the guarantee had been equitably assigned, the court reasoned, "[s]eparated from the guaranty, the note had little pecuniary value; and apart from the ownership of the note the guaranty had but little meaning or value. They belonged together, on the same paper, and were treated by all concerned as forming one instrument for the recovery of the amount due on the note." Id., 452. Accordingly, we examine the surrounding circumstances and intentions of the plaintiff and Sovereign in assigning the Stoneridge note to determine if Sovereign intended to equitably assign the underlying guarantees as part of its assignment of the Stoneridge note.

The present case presents an unusual set of circumstances. The Stoneridge note was not secured by a mortgage on a piece of property; instead, the various personal guarantees executed by Premier, Gattinella, Snow, Joseph Tine and the defendant provided the collateral for the loan. The defendant executed a limited guarantee in which she personally guaranteed Stoneridge's obligations under the note. That guarantee limited her liability to her interest in the Cromwell property and was secured by the Tine mortgage. The defendant also executed two reaffirmations of her guarantee in 2009 and 2010. It is clear, therefore, that the defendant's intent in executing her limited guarantee was to collateralize the Stoneridge note with her interest in the Cromwell property.

At the time of the execution of the Stoneridge note, the underlying guarantees were the only documents that gave the note any value. Conversely, the defendant's limited guarantee had no independent value other than to secure the Stoneridge note. It can be reasonably assumed, therefore, that the intention of Sovereign in assigning the Stoneridge note to the plaintiff was to assign its rights under the note and the secondary obligations that gave the note its value. An assignment of

the Stoneridge note without the guarantees would be valueless to the plaintiff, and the plaintiff certainly assumed that it was getting all of the rights Sovereign had under the Stoneridge note. If Sovereign intended to limit the operation of the transaction to the assignment of the note only and not the underlying guarantees, it easily could have done so by reserving such rights in the allonge. Read in light of all of the surrounding circumstances and the rule expressed in § 13 of the Restatement (Third) of Suretyship and Guaranty, we conclude that the parties intended the assignment of the defendant's limited guarantee as part of the assignment of the Stoneridge note. Thus, the plaintiff has standing to foreclose on the Tine mortgage.

II

The defendant next claims that the court erred in holding that the plaintiff had established the amount of debt due on the subject note. The defendant argues that the total amount due, as shown on exhibit 22, was based on a starting balance that was improperly admitted into evidence under the business records exception because it was provided by Sovereign at the time the note was acquired by the plaintiff and, therefore, Buland's testimony is inadmissible hearsay.[7] In response, the plaintiff argues that exhibit 22 was properly admitted into evidence under the business records exception to establish the starting balance on the note. We agree with the defendant.

The following additional facts are necessary for our resolution of this claim. At trial, the plaintiff called Buland to establish the amount of debt due on the note. The plaintiff introduced a prepared computation of the

[7] We note that the defendant concedes that the portion of exhibit 22 reflecting interest accrual, payments, or other transactions that occurred after the plaintiff acquired the note were properly admitted under the business records exception.

amount due on the Stoneridge note to establish the current debt on the note. The record indicates that the defendant vigorously contested the admissibility of exhibit 22 on the grounds that it was not properly authenticated and was inadmissible hearsay. In response, the plaintiff argued that the document was admissible under the business records exception to the hearsay rule. The court overruled the defendant's objection and allowed exhibit 22 to be admitted into evidence as a full exhibit.

We set forth our standard of review and applicable legal principles on this issue. "When presented with an evidentiary issue . . . our standard of review depends on the specific nature of the claim presented. . . . Thus, [t]o the extent a trial court's admission of evidence is based on an interpretation of [law], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . .

"A trial court's decision to admit evidence, *if premised on a correct view of the law*, however, 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 or is not hearsay, or is subject to a hearsay exception, is it 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." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Midland Funding, LLC* v. *Mitchell-James*, 163 Conn. App. 648, 653, 137 A.3d 1 (2016).

In determining the amount of the defendant's debt on the note, the court relied on the prepared computation of the amount due on the Stoneridge note, admitted

as exhibit 22 under the business records exception to the hearsay rule. Because this claim turns on whether the trial court properly classified exhibit 22 as a business record, our review is plenary. See id., 654.

"[H]earsay is an out-of-court statement offered into evidence to establish the truth of the matters contained therein. . . . In the absence of personal knowledge about the contents of a document, a witness' statements about the document are hearsay." (Citation omitted; internal quotation marks omitted.) *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 757, 680 A.2d 301 (1996).

Buland, the plaintiff's authorized representative, admitted during voir dire that his knowledge of the starting balance due on the note, as reflected on the computation in exhibit 22, came from data submitted by Sovereign when the plaintiff purchased the loan from Sovereign. Buland testified that the bank attested to how much was due on the note as of the date of purchase; however, Buland had no personal knowledge concerning the starting balance because he was not involved in the negotiation or acquisition of the note from Sovereign. Furthermore, at trial, the plaintiff did not tender any explanation for why it did not produce the original computation of the starting balance upon which Buland subsequently relied in computing the amount of debt. Because Buland did not have personal knowledge of the starting balance of debt due on the Stoneridge note, the starting balance used in the computation of debt in exhibit 22 was inadmissible hearsay.

The plaintiff argues that because Buland created the computation on the basis of the starting balance received by the plaintiff in the regular course of business, the starting balance listed in exhibit 22 was admissible under the business records exception to the hearsay rule. "In order to establish that a document

falls within the business records exception to the rule against hearsay, codified at [General Statutes] § 52-180, three requirements must be met. . . . The proponent need not produce as a witness the person who made the record or show that such person is unavailable but must establish that [1] the record was made in the regular course of any business, and [2] that it was the regular course of such business to make such a writing or record [3] at the time of such act, transaction, occurrence or event or within a reasonable time thereafter." (Citation omitted; footnote omitted; internal quotation marks omitted.) *LM Ins. Corp.* v. *Connecticut Dismanteling, LLC*, 172 Conn. App. 622, 628–29, 161 A.3d 562 (2017).

Our Supreme Court has noted, however, that when a document is received, rather than made, in the ordinary course of business, it ordinarily will not satisfy the requirements of § 52-180. In *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 801, 595 A.2d 839 (1991), the court stated, "[the authorized representative] testified that the document would have been *received* in the ordinary course of business, not that it would have been *made* in the ordinary course of business. The presumption that a business record is reliable is based in large part on the entrant having a business duty to report. . . . The mere fact that the [party] received this letter in the ordinary course of business and included the document in its files tells us nothing about the motivation of the maker of record, and therefore would not ordinarily satisfy the requirements of § 52-180." (Citations omitted; emphasis in original.) Id. Additionally, the court stated: "We emphasize . . . that the mere receipt of documents in the ordinary course of business, in the absence of any duty owed by the entrant to the business to prepare the record, would not ordinarily establish such documents as business records." Id., 801 n.14.

In the present case, Buland testified that the computation of debt was made and kept by the plaintiff in the ordinary course of business. There is no evidence in the record, however, regarding Sovereign's business records or its duty to report an accurate starting balance to the plaintiff. The starting balance was not calculated by the plaintiff, and therefore, it was received, rather than made, in the ordinary course of business. Accordingly, because the first requirement of § 52-180 is not satisfied, we conclude that the starting balance as shown on exhibit 22 was not admissible under the business records exception.

The plaintiff does not dispute that, in the absence of either exhibit 22 or Buland's testimony concerning the starting balance, there was insufficient competent evidence from which the trial court properly could determine the amount of debt. The challenged evidentiary ruling was necessarily harmful to the defendant because it directly implicated the amount she owed under the Stoneridge note. Where hearsay is improperly admitted into evidence to establish the amount of debt on a loan, the proper remedy is to reverse the trial court's judgment of strict foreclosure.[8] See *New England Savings Bank* v. *Bedford Realty Corp.*, supra, 238 Conn. 758. Because we determine that the starting balance of the amount due on the Stoneridge note as listed on exhibit 22 was inadmissible hearsay, we reverse the trial court's judgment of strict foreclosure as to the defendant.

[8] The defendant contends that the proper remedy in this case would be a directed judgment instructing the trial court to render judgment in favor of the defendant. Specifically, the defendant argues that, even on remand, the plaintiff would be unable to introduce exhibit 22 into evidence under the business records exception because the plaintiff did not offer any evidence from Sovereign that it could verify the starting balance. We decline the defendant's invitation to speculate that the plaintiff will not be able to produce either any representative from Sovereign or testimony to establish the validity of the starting balance on the note.

III

Although we are reversing the judgment of strict foreclosure against the defendant on the second issue, we briefly discuss, as a matter likely to arise on remand, the defendant's claim that the court improperly awarded attorney's fees to the plaintiff. Specifically, the defendant claims that the court improperly admitted unauthenticated documents in support of the plaintiff's claim for attorney's fees that listed a nonparty, "Rockstone 6 Capital, LLC," as the party entitled to fees. The plaintiff responds that the reference to "Rockstone 6 Capital, LLC" was for mailing purposes only, and that the plaintiff's attorney provided sufficient testimony for the court to award reasonable attorney's fees. We agree with the plaintiff.

The following additional facts are relevant to our resolution of this issue. On December 1, 2016, the court issued its memorandum of decision entering an order of strict foreclosure in favor of the plaintiff. Thereafter, the plaintiff filed a motion for attorney's fees and expenses and, on January 11, 2017, the court held an evidentiary hearing on the issue of attorney's fees. In support of its claim, the plaintiff submitted an affidavit regarding its requests for attorney's fees and contemporaneous billing records as exhibit 25. Houston Putnam Lowry, the plaintiff's attorney, also testified as to his firm's fees and expenses incurred in the course of the litigation. Lowry testified that the billing records identified the plaintiff as the client by its unique client number, and each entry listed the matter as "Jenzack v. Snow—Tine Foreclosure on Stoneridge." Each entry also had an additional notation, "Rockstone 6 Capital, LLC." When the defendant questioned what "Rockstone 6 Capital, LLC" referred to, Lowry testified that the reference was included for mailing purposes only because there had been a prior issue with the plaintiff receiving its bills at its listed business address. On Janu-

ary 12, 2017, the court granted the plaintiff's motion for attorney's fees totaling $121,439.41.

We set forth the standard of review and applicable legal principles on this issue. "Attorney's fees in foreclosure actions may be awarded pursuant to General Statutes § 52-249 (a) or . . . pursuant to contract." *N.E. Leasing, LLC* v. *Paoletta*, 89 Conn. App. 766, 774, 877 A.2d 840, cert. denied, 275 Conn. 921, 883 A.2d 1245 (2005). "Where a contract provides for the payment of attorney's fees by a defaulting party, those fees are recoverable solely as a contract right. . . . Therefore, the language of the note governs the award of fees, and we need not consider General Statutes § 52-249 (allowance of reasonable attorney's fees in a foreclosure action). Such attorney's fees incurred language has been interpreted by our Supreme Court . . . as permitting recovery upon the presentation of an attorney's bill, so long as that bill is not unreasonable upon its face and has not been shown to be unreasonable by countervailing evidence or by the exercise of the trier's own expert judgment." (Citations omitted; internal quotation marks omitted.) Id., 778.

Our standard of review on an award of attorney's fees is well settled. "Whether to allow [attorney's] fees, and if so in what amount, calls for the exercise of judicial discretion by the trial court. . . . An abuse of discretion in granting [attorney's] fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citation omitted; internal quotation marks omitted.) *Hornung* v. *Hornung*, 323 Conn. 144, 170, 146 A.3d 912 (2016). "[T]he trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony and, therefore, is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *LaBossiere* v. *Jones*, 117 Conn. App. 211, 224, 979 A.2d 522 (2009).

In the present case, the defendant's limited guarantee contains an indemnity provision applicable to the issue of attorney's fees, which provides in relevant part: "Indemnification. Guarantor shall . . . fully indemnify, save and hold harmless Lender from all cost and damage which Lender may suffer by reason of any failure by Borrower to perform any of the obligations of Borrower under the Note or Loan Documents and fully reimburse and repay to Lender any and all costs and expenses which Lender may incur arising from any such failure, and from any and all loss, liability, expense, *including legal fees and cost of litigation*, and damage suffered or incurred by Lender in enforcing and procuring the performance of this Guaranty and the obligations of Borrower guaranteed hereby." (Emphasis added.)

On the basis of the language in the guarantee, the court properly concluded that the plaintiff was entitled to recover attorney's fees and expenses pending an appropriate evidentiary showing. The defendant does not challenge the reasonableness of the fees awarded; instead, she challenges only the reference to "Rockstone 6 Capital, LLC" and claims that the billing records identified someone other than the plaintiff as the client entitled to attorney's fees. We are not persuaded. The court was free to weigh the exhibit containing references to "Rockstone 6 Capital, LLC" as well as Lowry's testimony in determining whether the plaintiff had established that it was entitled to the attorney's fees requested in exhibit 25. Accordingly, we conclude that the court did not abuse its discretion regarding the admission of exhibit 25.

The judgment is reversed only as to Jennifer Tine and the case is remanded for a new trial; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

BARBARA MIKUCKA *v.* ST. LUCIAN'S RESIDENCE, INC., ET AL.
(AC 39673)

Alvord, Sheldon and Keller, Js.

Syllabus

The plaintiff appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner determining that she was no longer entitled to temporary total disability benefits. The plaintiff had sustained certain compensable injuries in the course and scope of her employment with the defendant company, S Co., which accepted compensability and paid her temporary total disability benefits. Thereafter, the defendants filed a form 36, seeking to discontinue those benefits on the ground that the plaintiff had achieved maximum medical improvement. At an informal hearing, the commissioner approved the form 36, but the plaintiff objected and requested a formal hearing to address the form 36 and the discontinuation of benefits. The commissioner subsequently held a formal hearing on the form 36 to determine whether the plaintiff had achieved maximum medical improvement. At the hearing, the plaintiff did not provide evidence or argue that she had not reached maximum medical improvement but, instead, raised a vocational total disability claim pursuant to *Osterlund* v. *State* (135 Conn. 498) and sought to present evidence in support of that claim. The commissioner did not permit the plaintiff to present such evidence but repeatedly invited her to return in three weeks for a hearing to present evidence that she was vocationally totally disabled. Following the hearing, the commissioner granted the form 36, determining that the plaintiff had reached maximum medical improvement and that she had a work capacity. The plaintiff thereafter appealed to the board, which affirmed the commissioner's decision. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the commissioner violated her right to due process by not permitting her to present evidence in support of her *Osterlund* claim at the formal hearing: the commissioner's decision did not prejudicially affect the plaintiff's substantive rights, as she inexplicably declined the commissioner's invitation to return in three weeks for a hearing to present evidence that she was vocationally totally disabled, and, thus, she could not demonstrate how she was harmed by the commissioner's decision when she could have returned three weeks later to pursue her *Osterlund* claim; moreover, the commissioner's decision to bifurcate the plaintiff's claim protected the defendants' due process rights, as the plaintiff did not provided the defendants with notice of her claim, and if the commissioner had permitted the plaintiff to present evidence in support thereof, the defendants would

have been subjected to trial by ambuscade, in violation of their cognizable due process right to notice.

2. The plaintiff's claim that the commissioner erred in determining that she was not totally disabled pursuant to *Osterlund* was not ripe for review; the plaintiff opted not to pursue this claim despite the commissioner's invitation to do so, and, as a result, it was not litigated, and for this court to review it on appeal would violate the principles of ripeness by prematurely adjudicating a hypothetical claim.

Argued March 20—officially released July 3, 2018

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Sixth District determining that the plaintiff was no longer entitled to certain disability benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Appeal dismissed in part*; *affirmed.*

Jennifer B. Levine, with whom was *Harvey L. Levine*, for the appellant (plaintiff).

Neil J. Ambrose, for the appellees (defendants).

Opinion

KELLER, J. The plaintiff, Barbara Mikucka, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Sixth District (commissioner) that she was no longer entitled to temporary total disability benefits after reaching maximum medical improvement. The plaintiff claims that (1) the commissioner, by not allowing her to present evidence to prove that she did not have a work capacity, violated her right to due process, and (2) the commissioner erred in determining that she was not totally disabled. We affirm the decision of the board and dismiss the appeal as to the second claim.

The following facts and procedural history are relevant to this appeal. The plaintiff worked for the defendant employer, St. Lucian's Residence, Inc.,[1] as a cook. The plaintiff sustained compensable bilateral shoulder injuries in the course and scope of her employment on May 10, 2011. The defendants accepted compensability for the plaintiff's injuries and paid her temporary total incapacity benefits.

On March 19, 2014, the defendants filed a form 36,[2] seeking to discontinue the plaintiff's temporary total disability benefits on the basis that she had "achieved maximum medical improvement" as of February 27, 2014. The defendants attached the opinion of the plaintiff's treating physician, Dr. Robert J. Carangelo, to the form 36. Carangelo opined that the plaintiff had reached maximum medical improvement and assigned a 17.5 percent permanent partial disability to her right shoulder and a 12.5 percent permanent partial disability to her left shoulder. At an informal hearing, the commissioner approved the form 36. The plaintiff objected and requested a formal hearing. On February 10, 2015, the plaintiff sent all parties notice of a formal hearing to address the "Form 36/Discontinuation of Benefits."

On March 11, 2015, the commissioner held a formal hearing on the form 36 to determine whether the plaintiff had achieved maximum medical improvement. At the hearing, the plaintiff neither provided evidence nor argued that she had not reached maximum medical improvement. Instead, the plaintiff testified about her

[1] The Workers' Compensation Trust, the workers' compensation insurer for St. Lucian's Residence, Inc., is also a defendant in this case.

[2] "A [f]orm 36 is a notice to the compensation commissioner and the claimant of the intention of the employer and its insurer to discontinue compensation payments. The filing of this notice and its approval by the commissioner are required by statute in order properly to discontinue payments. General Statutes §§ 31-296, 31-296a, 31-300." (Internal quotation marks omitted.) *Brinson* v. *Finlay Bros. Printing Co.*, 77 Conn. App. 319, 320 n.1, 823 A.2d 1223 (2003).

background and her injuries. The following exchange between the plaintiff and her occurred:

"[The Plaintiff's Counsel]: What is your native tongue?

"[The Plaintiff]: Polish. . . .

"[The Plaintiff's Counsel]: How well do you speak English? . . .

"[The Plaintiff]: A little bit.

"[The Plaintiff's Counsel]: How old are you?

"[The Plaintiff]: Fifty-four.

"[The Plaintiff's Counsel]: "What country did you grow up in?

"[The Plaintiff]: In Poland.

"[The Plaintiff's Counsel]: What is your level of education?"

The defendants' counsel then objected, but the commissioner overruled the objection, stating: "Hang on. [These are] preliminary questions I think any lawyer would ask of any witness. I think you're afraid [the plaintiff's counsel] is leading into an *Osterlund* [v. *State*, 135 Conn. 498, 66 A.2d 363 (1949)] claim[3] . . . . I understand that. But right now, I would ask any witness what [is] your education level, where did you grow up. These are preliminary questions. I'm certainly going to let [the plaintiff's counsel] ask [them]. Go ahead . . . . Would you repeat the question, please?"

[3] "The essence of an *Osterlund* type argument is that even though the injured worker can do *some theoretical* menial work, the injured worker's physical or mental condition due to his or her injury or illness is such that [she] cannot in the exercise of reasonable diligence find employment and, therefore, is just as much totally disabled as though the injured worker could not work at all." (Emphasis in original.) 3 A. Sevarino, Connecticut Workers' Compensation After Reforms (7th Ed. 2017) § 6.02.5, p. 908.

The plaintiff continued to testify:

"[The Plaintiff's Counsel]: What is your level of education?

"[The Plaintiff]: Elementary school and three years of vocational high school.

"[The Plaintiff's Counsel]: Are you married?

"[The Plaintiff]: Yes.

"[The Plaintiff's Counsel]: Do you have any children?

"[The Plaintiff]: No.

"[The Plaintiff's Counsel]: How long have you been married?

"[The Plaintiff]: Twenty-eight years.

"[The Plaintiff's Counsel]: What country were you married in?

"[The Plaintiff]: In Poland.

"[The Plaintiff's Counsel]: And after your vocational school, what kind of work did you do?

"[The Plaintiff]: I worked on the family farm.

"[The Plaintiff's Counsel]: And when did you come to the United States?

"[The Plaintiff]: 1994.

"[The Plaintiff's Counsel]: Did you come with your husband?

"[The Plaintiff]: Yes.

"[The Plaintiff's Counsel]: And where did you reside once you came to the United States?

"[The Plaintiff]: New Britain.

"[The Plaintiff's Counsel]: Did you start any sort of job after moving to the United States.

"[The Plaintiff]: Yes, I clean[ed] offices [for] four hours a day.

"[The Plaintiff's Counsel]: How long did you do that for?

"[The Plaintiff]: For about two, three years.

"[The Plaintiff's Counsel]: And what did you do after that?

"[The Plaintiff]: Then I [went] to St. Lucian's [Residence, Inc.] to work.

"[The Plaintiff's Counsel]: And how long did you work there for?

"[The Plaintiff]: About fifteen, sixteen years.

"[The Plaintiff's Counsel]: And were you able to communicate with your coworkers at St. Lucian's?

"[The Plaintiff]: Yes, because my . . . immediate boss . . . and all the workers were Polish.

"[The Plaintiff's Counsel]: Can you describe your job at St. Lucian's?

"[The Plaintiff]: I cook there, I serve to residents, clean up. Everything.

"[The Plaintiff's Counsel]: And when did you stop working there.

"[The Plaintiff]: I stopped working September, 2011.

"[The Plaintiff's Counsel]: And why did you stop working there?

"[The Plaintiff]: I had an accident. . . .

"[The Plaintiff's Counsel]: Can you describe how that injury occurred? . . .

"[The Plaintiff]: I think I was . . . [baking] some cakes in the big mixer which was on the level of the chair, maybe a little bit higher. And I put all the ingredients in the mixer. But [when] I tried to turn the mixer on with the special device . . . the mixer switched

[positions] and I [fell] and I started screaming to for people to help. . . .

"[The Plaintiff's Counsel]: And can you explain which body parts you injured as a result of this?

"[The Plaintiff]: Both shoulders.

"[The Plaintiff's Counsel]: And did you ever have any surgeries as a result of this injury?

"[The Plaintiff]: Yes, three operations.

"[The Plaintiff's Counsel]: And can you tell me which arms, how many times per arm you had a surgery?

"[The Plaintiff]: On the right shoulder, I had it twice operated and once on the left.

"[The Plaintiff's Counsel]: And did Dr. Carangelo perform surgery on you?

"[The Plaintiff]: Yes. Two operations [were] done by Dr. Kelley and one operation was done by Dr. Carangelo.

"[The Plaintiff's Counsel]: Which arm was done by Dr. Carangelo?

"[The Plaintiff]: Second time, my right.

"[The Plaintiff's Counsel]: And do you currently treat with Dr. Carangelo?

"[The Plaintiff]: Yes, I visit him.

"[The Plaintiff's Counsel]: For both arms?

"[The Plaintiff]: Yes. . . .

"[The Plaintiff's Counsel]: So, after all the surgeries have been completed, how do you presently feel?

"[The Plaintiff]: I didn't feel good. Every time I move my arms a little bit more than I should, the pain starts to increase, and it feels like a knife getting in my arms.

"[The Plaintiff's Counsel]: Has this feeling been present since after your surgeries? . . .

"[The Plaintiff]: [I]t hurts me all the time. . . .

"[The Plaintiff's Counsel]: How much activity with your arms does it take for your pain to worsen?

"[The Plaintiff]: The moment I start moving my arms, they start getting pain."

At this point, the commissioner interjected and the following colloquy occurred:

"[The Commissioner]: Is there a medical record that says [the plaintiff is] not at maximum medical improvement?

"[The Plaintiff's Counsel]: No, because I'm still arguing that a form 36 is a discontinuance of her [temporary total] benefits.

"[The Commissioner]: So, you don't have a medical record saying she's not at maximum medical improvement?

"[The Plaintiff's Counsel]: No. . . .

"[The Commissioner]: Well, I told you we're going to proceed with the hearing on the form 36, whether or not it was providently or improvidently granted. I understand you're claiming that she has an *Osterlund* claim. That's not on the notice. . . . I cannot, based on the notice that I have, reach a determination whether she's vocationally disabled or not. And quite frankly, I don't think [the defendants' counsel] is prepared to litigate that any way, but it's not on the notice. We're here to determine whether she was . . . at maximum medical improvement on the date the form 36 was granted. I appreciate what you're telling me. . . . Look, you may have a very good *Osterlund* claim, but this right now is not the place to litigate it. I'm not suggesting you

may or may not do well on that, but what we're here to discuss is the form 36. I can certainly put it down for an *Osterlund* claim if you want and [the defendants' counsel] can get [a] vocational expert . . . . I think my hands are [somewhat] tied here in that the notice says that—

"[The Plaintiff's Counsel]: Well, so are mine.

"[The Commissioner]: But the difference is this, I don't see the file until today for a trial. I don't know in advance what it's about. Unfortunately, I didn't handle the prior hearings, so I'm here on what we're here for. You know, [the form 36] was granted a year ago. You could certainly have pursued a vocational claim a year ago. Maybe you didn't have the evidence at that point or not, I don't know, or you could have asked to have that issue advanced. But I think where you and I may be differing is I think you think that you can just claim that she's vocationally disabled as a defense to [the] form 36.

"[The Plaintiff's Counsel]: "That's what I'm saying. . . .

"[The Commissioner]: [T]he question I have is whether or not she's . . . at maximum medical improvement. If you want to pursue [the vocational disability] claim, you're more than welcome to. You may have a very good claim. I'm not suggesting you don't. What I'm suggesting is, we're not going to do that here because the issue is a form 36, and it's a no decision. . . . Just like . . . if we were here for something else, I wouldn't let [the defendants] add something on in a surprise to you. . . . [I]f you want to pursue a vocational disability [claim], I would put this file down for two or three weeks, and you could come and you bring the evidence. . . .

"[The Plaintiff's Counsel]: I will have the *Osterlund* claim that you think is appropriate."

After reiterating that the plaintiff was welcome to introduce evidence to suggest that she was not at maximum medical improvement, the commissioner stated: "What I'm going to do is put this down for a hearing in three weeks . . . . The claim you're going to make at that time is [that the plaintiff is] vocationally disabled."

In his November 10, 2015 decision, the commissioner determined that the plaintiff had reached maximum medical improvement and that she had a work capacity. Accordingly, he granted the form 36, effective as of the date on which the defendants filed it, March 19, 2014.

On November 23, 2015, the plaintiff, without pursuing the vocational total disability claim pursuant to *Osterlund* as the commissioner had recommended, appealed to the board, arguing that "the trial commissioner could not rule on a form 36 establishing her attainment of maximum medical improvement without considering whether she was still temporarily totally disabled."[4]

In its September 14, 2016 decision affirming the commissioner's decision, the board found in relevant part the following: "Essentially, on March 11, 2015, the [defendants] were prepared to proceed with their arguments in favor of granting the form 36 and the [plaintiff] had not offered notice to the trial commissioner nor to the [defendants] that she was pursuing a claim that she was entitled to total disability based on an *Osterlund* theory; nor is it clear she had evidence necessary as of that date to establish a prima facie case on such a claim. Under these circumstances the trial commissioner essentially was obligated to follow the precedent in *Martinez-McCord* v. *State*, No. 5055, CRB-7-06-2 (February 1, 2007) to rule on the issue which was capable of

[4] On November 23, 2015, the plaintiff also filed a motion to add additional evidence to the record, seeking to introduce a vocational capacity evaluation, and a motion to correct. The commissioner denied the motion to correct and did not rule on the motion to introduce evidence.

being addressed at that juncture and bifurcate the issues and address the balance of the issues at a later proceeding. 'Bifurcation of the trial proceedings lies solely with the discretion of the trial court . . . and appellate review is limited to a determination of whether this discretion has been abused.' *Swenson* v. *Sawoska*, [18 Conn. App. 597, 601, 559 A.2d 1153 (1989), aff'd, 215 Conn. 148, 575 A.2d 206 (1990)]. [The commissioner] did not abuse his discretion in this matter.

"Moreover, the [plaintiff's] argument herein appears to contravene our unequivocal precedent in *Ghazal* v. *Cumberland Farms*, No. 5397, CRB-8-08-11 (November 17, 2009). If a new issue or new evidence is considered at a formal hearing, the trial commissioner must offer the opposing party the ability to prepare on the issue and challenge the evidence. [The commissioner] offered the parties this opportunity. The [plaintiff] does not persuade us that this decision was erroneous in any respect. Moreover, we believe that had the commissioner ruled on the [plaintiff's] claim for [General Statutes] § 31-307[5] . . . benefits solely on the record available as of March 11, 2015, the claim may well have failed. The decision of [the commissioner] to bifurcate

[5] General Statutes § 31-307 (a) provides: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of his average weekly earnings as of the date of the injury, calculated pursuant to section 31-310, after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage pursuant to section 31-310; but the compensation shall not be more than the maximum weekly benefit rate set forth in section 31-309 for the year in which the injury occurred. No employee entitled to compensation under this section shall receive less than twenty per cent of the maximum weekly compensation rate, as provided in section 31-309, provided the minimum payment shall not exceed seventy-five per cent of the employee's average weekly wage, as determined under section 31-310, and the compensation shall not continue longer than the period of total incapacity."

the proceedings comported with the due process standards delineated in *Balkus* v. *Terry Steam Turbine Co.*, [167 Conn. 170, 177, 355 A.2d 227 (1973)], and protected the interests of both parties.

"We have long pointed out that the parameters of [General Statutes] § 31-298[6] . . . extend great deference to trial commissioners as to how to manage proceedings before them. *See Reid* v. *Speer*, No. 5818, CRB-2-13-1 (January 28, 2014) and *Valiante* v. *Burns Construction Co.*, No. 5393, CRB-4-08-11 (October 15, 2009). We find no error in how [the commissioner] handled an issue which was raised at the [eleventh] hour by [the plaintiff's] counsel, and which could not have been addressed at that point in time." (Footnotes added and omitted.) This appeal followed.

Before addressing the plaintiff's claims, we set forth the standard of review on appeals from the board. "The

[6] General Statutes §31-298 provides: "Both parties may appear at any hearing, either in person or by attorney or other accredited representative, and no formal pleadings shall be required, beyond any informal notices that the commission approves. In all cases and hearings under the provisions of this chapter, the commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. No fees shall be charged to either party by the commissioner in connection with any hearing or other procedure, but the commissioner shall furnish at cost (1) certified copies of any testimony, award or other matter which may be of record in his office, and (2) duplicates of audio cassette recordings of any formal hearings. Witnesses subpoenaed by the commissioner shall be allowed the fees and traveling expenses that are allowed in civil actions, to be paid by the party in whose interest the witnesses are subpoenaed. When liability or extent of disability is contested by formal hearing before the commissioner, the claimant shall be entitled, if he prevails on final judgment, to payment for oral testimony or deposition testimony rendered on his behalf by a competent physician, surgeon or other medical provider, including the stenographic and videotape recording costs thereof, in connection with the claim, the commissioner to determine the reasonableness of such charges."

conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board." (Internal quotation marks omitted.) *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 205–206, 76 A.3d 168 (2013).

The following principles regarding a claimant's eligibility for temporary total disability payments on the basis of a vocational total disability are relevant to this appeal. "Under the Workers' Compensation Act, General Statutes § 31-275 et seq., [a] worker is entitled to total disability payments pursuant to . . . § 31-307 only when his injury results in a total incapacity to work, which [our Supreme Court has] defined as the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation which he might reasonably follow. . . . Our Supreme Court stated in *Osterlund* . . . that [a] finding that an employee is able to work at some gainful occupation within his reasonable capacities is not in all cases conclusive that he is not totally incapacitated. If, though he can do such work, his physical condition due to his injury is such that he cannot in the exercise of reasonable diligence find an employer who will employ him, he is just as much totally incapacitated as though he could not work at all. . . . If, because of the employee's injury, his labor becomes unmarketable, in spite of his diligent efforts to find work, his earning power is gone and he is totally incapacitated. . . .

"This court previously has stated that [i]n order to receive total incapacity benefits under § 31-307, a plaintiff bears the burden to demonstrate a diminished earning capacity by showing either that she has made

adequate attempts to secure gainful employment *or* that she truly is unemployable. . . . Whether the plaintiff makes this showing of unemployability by demonstrating that she actively sought employment but could not secure any, or by demonstrating through a nonphysician vocational rehabilitation expert or medical testimony that she is unemployable . . . as long as there is sufficient evidence before the commissioner that the plaintiff is unemployable, the plaintiff has met her burden. . . .

"Whether a claimant is realistically employable requires an analysis of the effects of the compensable injury upon the claimant, in combination with his preexisting talents, deficiencies, education and intelligence levels, vocational background, age, and any other factors which might prove relevant. This is of course the analysis that commissioners regularly undertake in total disability claims . . . . A commissioner always must examine the impact of the compensable injury upon the particular claimant before him. . . .

"The import of *Osterlund* . . . is that the commissioner must evaluate not only the physical incapacity of the plaintiff, but the effect that the physical injury has on the plaintiff's employability." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Bode* v. *Connecticut Mason Contractors, The Learning Corridor*, 130 Conn. App. 672, 679–81, 25 A.3d 687, cert. denied, 302 Conn. 942, 29 A.3d 467 (2011).

I

The plaintiff's first claim is that the commissioner, by not allowing her to present evidence to prove that she did not have a work capacity, violated her right to due process. We disagree.

"Whether a party was deprived of his due process rights is a question of law to which appellate courts

grant plenary review." *McFarline* v. *Mickens*, 177 Conn. App. 83, 100, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

"Inquiry into whether particular procedures are constitutionally mandated in a given instance requires adherence to the principle that due process is flexible and calls for such procedural protections as the particular situation demands. . . . There is no per se rule that an evidentiary hearing is required whenever a liberty [or property] interest may be affected. Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances." (Internal quotation marks omitted.) *West Hartford* v. *Murtha Cullina, LLP*, 85 Conn. App. 15, 24–25, 857 A.2d 354, cert. denied, 272 Conn. 907, 863 A.2d 700 (2004).

"The fundamental requisite of due process of law is the opportunity to be heard. . . . The hearing must be at a meaningful time and in a meaningful manner. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (Internal quotation marks omitted.) *Pagan* v. *Carey Wiping Materials Corp.*, 144 Conn. App. 413, 418–19, 73 A.3d 784, cert. denied, 310 Conn. 925, 77 A.3d 142 (2013).

"Matters of procedure in compensation cases which do not affect prejudicially the rights of parties, will not avail upon appeal. Unless such rights be thus affected, the form of procedure before the compensation commissioner is exclusively for his determination. It is only when the rights of parties are prejudicially affected that we will consider on appeal matters of procedure before the commissioner." (Internal quotation marks omitted.) *Gonirenki* v. *American Steel & Wire Co.*, 106 Conn. 1, 8–9, 137 A. 26 (1927).

The plaintiff argues that the commissioner, by not allowing her to present evidence about her vocational total disability claim pursuant to *Osterlund* at the March 11, 2014 hearing, violated her right to due process. The plaintiff's due process claim is meritless because the commissioner's decision to not allow her to present evidence in support of her *Osterlund* claim on that particular day did not prejudicially affect her substantive rights. The commissioner repeatedly invited the plaintiff to return for a hearing in three weeks to present evidence that she was vocationally totally disabled. The plaintiff inexplicably declined the commissioner's invitation to do so. Thus, she cannot demonstrate how she was harmed by the commissioner's decision to not let her present evidence regarding a potential vocational disability at the March 11, 2014 hearing when she could have returned three weeks later to pursue this claim.[7]

The plaintiff, primarily relying on *O'Connor* v. *Med-Center Home Health Care, Inc.*, 140 Conn. App. 542, 59 A.3d 385, cert. denied, 308 Conn. 942, 66 A.3d 884 (2013), argues that she could have rebutted the form 36 notice seeking to terminate her temporary total disability benefits on the basis of her reaching maximum medical improvement by either showing that she was medically or vocationally totally incapacitated. This is the correct interpretation of the law. See id., 554, 556 n.8. The plaintiff, however, fails to acknowledge a key distinction between the present case and *O'Connor*. In *O'Connor*, the plaintiff litigated her vocation based disability claim over a four session hearing. Id., 545. In the present case, the commissioner offered the plaintiff the opportunity to litigate this issue. As previously

[7] The plaintiff argues that the commissioner's decision not to allow her to present evidence could have a preclusive effect in later proceedings. She has failed to support this assertion with any authority. At oral argument before this court, the defendants conceded that the plaintiff can still pursue a vocational total disability claim.

stated, the plaintiff elected not to pursue this claim. The plaintiff cannot, now on appeal, rely on *O'Connor* to argue that the commissioner should have undergone a holistic evaluation of her work capacity when, unlike the plaintiff in *O'Connor*, she never presented this claim despite the commissioner's invitation to do so.

It is also important to note that the commissioner's decision to bifurcate the plaintiff's claim protected the defendants' due process rights. At workers' compensation hearings, "no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue." *Osterlund* v. *State*, 129 Conn. 591, 596, 30 A.2d 393 (1943).

"Administrative hearings, including those held before workers' compensation commissioners, are informal and governed without necessarily adhering to the rules of evidence or procedure. . . . Nonetheless, administrative hearings must be conducted in a fundamentally fair manner so as not to violate the rules of due process. . . . A fundamental principle of due process is that each party has the right to receive notice of a hearing, and the opportunity to be heard at a meaningful time and in a meaningful manner. . . . Due process of law requires not only that there be due notice of the hearing but that at the hearing the parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence. . . . Further, procedural due process mandates that the commissioner cannot consider additional evidence submitted by a party without granting the opponents . . . the opportunity to examine that evidence and offer evidence in explanation or rebuttal." (Citations omitted; internal quotation marks omitted.) *Bryan* v. *Sheraton-Hartford Hotel*, 62 Conn. App. 733, 740, 774 A.2d 1009 (2001).

"One of the fundamental purposes of the commissioner's expansive evidentiary reach is to encourage full disclosure and cooperation among the parties during the pendency of a claim. . . . [A] commissioner must always protect the substantial rights of the parties [which] include the right of the employer . . . independently to examine the claimant, to notice his deposition, and to insist on hearing his personal testimony at a formal hearing. . . . Protecting such substantial rights is part and parcel of ensuring that each party in a compensation proceeding receives a fair hearing." (Citation omitted; internal quotation marks omitted.) *Bidoae* v. *Hartford Golf Club*, 91 Conn. App. 470, 477, 881 A.2d 418, cert. denied, 276 Conn. 921, 888 A.2d 87 (2005), cert. denied, 547 U.S. 1112, 126 S. Ct. 1916, 164 L. Ed. 2d 665 (2006). "The matter rests in the legal discretion of the commissioner, and that requires such notice as is reasonable under the circumstances." *Pallanck* v. *Donovan*, 109 Conn. 469, 472, 147 A. 14 (1929).

In the present case, the plaintiff did not provide the defendants notice of her *Osterlund* claim. In her request for a formal hearing, she only identified "Form 36/Discontinuation of Benefits" as an issue for the formal hearing. The form 36 filed by the defendants stated that "maximum medical improvement" was the basis for the discontinuation of temporary total benefits. As a result, the March 11, 2015 hearing was scheduled to determine whether the plaintiff had reached maximum medical improvement. As the plaintiff conceded at the hearing, she did not have evidence to rebut the defendants' claim that she had reached maximum medical improvement. Instead, she sought to present evidence in support of an *Osterlund* claim, without providing fair notice. If the commissioner had let this occur, the defendants would have been subjected to trial by ambuscade, a violation of their cognizable due process right to notice. Thus, the plaintiff's due process claim is further undermined

because, as a result of plaintiff's trial tactics, the commissioner was left with no choice but to delay the plaintiff from presenting her vocational total disability claim pursuant to *Osterlund* in order to protect the defendants' right to due process.

II

The plaintiff also claims that the commissioner erred in determining that she was not totally disabled. We conclude that this claim, as the plaintiff frames it, is not ripe for review.

"[R]ipeness is a sine qua non of justiciability . . . ." (Internal quotation marks omitted.) *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 624, 822 A.2d 196 (2003). "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . As we have recognized, justiciability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . Finally, because an issue regarding justiciability raises a question of law, our appellate review is plenary. (Citations omitted; footnote omitted; internal quotation marks omitted.) *Office of the Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 568–69, 858 A.2d 709 (2004)

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract

disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Citation omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86–87, 952 A.2d 1 (2008).

The plaintiff argues that because she was vocationally totally disabled pursuant to *Osterlund*, the commissioner improperly found that she has a work capacity. As previously discussed in this opinion, the plaintiff opted not to pursue this claim despite the commissioner's invitation to do so, and, thus, it was not litigated. Now, on appeal, we can only speculate what evidence the plaintiff[8] could have presented in support of this theory and how the defendants could have challenged it. Moreover, the commissioner never made a finding with respect to whether the plaintiff was vocationally totally disabled pursuant to *Osterlund*, and, if the plaintiff's pattern of reluctance to pursue this claim through the offered channels continues, a final decision may never be reached on it. For us to now review this claim, as the plaintiff characterizes it, on appeal, would violate the principles of ripeness by prematurely adjudicating a hypothetical claim. As a result, the plaintiff's decision not to return for a hearing only a few weeks later to present evidence that she was vocationally totally disabled pursuant to *Osterlund* has left this claim unripe for review.

The appeal is dismissed in part; the decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

[8] The record does contain some evidence that the plaintiff presented in support of her *Osterlund* claim. This evidence includes her limited testimony at the March 11, 2015 hearing, her vocational capacity evaluation, and her functional capacity evaluation. We do not know, however, what else she might have testified to, what her neighbor, a purported fact witness, might have testified to, and whether or on what grounds the defendants would rebut this claim.

STATE OF CONNECTICUT *v.* LEE BALDWIN (AC 40283)

DiPentima, C. J., and Alvord and Flynn, Js.

Syllabus

Convicted, on a guilty plea pursuant to the *Alford* doctrine, of the crime of risk of injury to a child and of violation of probation, the defendant appealed to this court, claiming that the trial court improperly denied his motion to modify the terms and conditions of probation. As part of the defendant's plea agreement, he was required to register as a sex offender and to participate in sex offender treatment. Subsequently, the defendant commenced a habeas action, alleging ineffective assistance of trial counsel regarding his *Alford* plea. Thereafter, the defendant filed a motion to modify the conditions of his probation, in which he requested that he not be required to discuss any facts in connection with his conviction or other facts for which he had a right against self-incrimination until after the conclusion of his habeas litigation. He also sought to suspend his sex offender treatment until the resolution of his habeas case. *Held*:

1. The defendant could not prevail on his claim that the trial court's denial of his motion to modify the conditions of his probation violated his fifth amendment privilege against self-incrimination in future proceedings, the defendant having waived his claim by entering an *Alford* plea and expressly agreeing, on the record, to participate in sex offender treatment, including admitting to the conduct that resulted in his *Alford* plea; the court specifically informed the defendant on two occasions during the plea hearing that he would be required to participate in sex offender treatment and that as part of such treatment, he would be required to admit to committing acts that constituted the violation of his probation, the defendant accepted those conditions and garnered the benefits of his plea bargain with the state, and in doing so, he waived the right to challenge the conditions that he participate in sex offender treatment and admit to his conduct.
2. The defendant's claim that the trial court abused its discretion in denying his motion to modify and not allowing him to delay participating in sex offender treatment until after the conclusion of his pending habeas matter was unavailing, the defendant having expressly waived his objection to participating in sex offender treatment, and having failed to demonstrate that the trial court, in concluding that policy and public safety concerns do not warrant the suspension of the sex offender treatment, abused its discretion in denying his motion to modify the conditions of his probation.

Argued April 9—officially released July 3, 2018

Procedural History

Substitute information charging the defendant with the crimes of risk of injury to a child and sexual assault in the fourth degree, and with two counts of violation of probation, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the defendant was presented to the court, *Cradle, J.*, on a plea of guilty to risk of injury to a child and an admission to the violations of probation; judgment in accordance with the plea; thereafter, the court denied the defendant's motion to modify the conditions of his probation, and the defendant appealed to this court. *Affirmed.*

Temmy Ann Miller, assigned counsel, with whom, on the brief, was *Scott Jongebloed*, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Donald S. MacCalmon*, assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Lee Baldwin, appeals challenging the denial of his motion to modify the terms and conditions of his probation filed pursuant to General Statutes § 53a-30 (c). Specifically, he claims that (1) the court's denial violated his fifth amendment privilege against self-incrimination in a future proceeding and (2) the court abused its discretion in denying the motion to modify and not allowing the defendant to delay his sex offender treatment until his pending habeas action had concluded. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our discussion. On July 11, 2014, the defendant

pleaded guilty, pursuant to the *Alford* doctrine,[1] to two counts of violating his probation and one count of risk of injury to a child.[2] During discussions, on the record, just prior to the plea canvass, defense counsel noted that the defendant "realizes during his [sex offender] treatment he has to admit to the underlying conduct." The court immediately asked the defendant if he had discussed this requirement with his counsel, and he responded in the affirmative. The defendant also acknowledged that the court would require him to register as a sex offender.

During the canvass, the court repeated that, due to the nature of the defendant's conduct, he would be required to register as a sex offender. The court also informed the defendant that he would be required to participate in sex offender treatment during his probation. The court then stated: "Now, what is important for you to understand is that during the period of your probation, when you go to sex offender treatment they are going to require you to acknowledge that you've committed the acts that you are charged with today and that you've [pleaded] to. You understand what I

[1] "Under *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless. . . . A defendant often pleads guilty under the *Alford* doctrine to avoid the imposition of a possibly more serious punishment after trial." (Citation omitted; internal quotation marks omitted.) *Robles* v. *Commissioner of Correction*, 169 Conn. App. 751, 752 n.1, 153 A.3d 29 (2016), cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

[2] During this proceeding, the prosecutor indicated that the defendant was on probation following his conviction of the crimes of breach of the peace and possession of narcotics. The conduct underlying the violation of probation and risk of injury to a child charges was a sexual contact complaint. Specifically, the minor victim "disclosed that the defendant had touched his butt and penis underneath his clothes and that it [had] happened more than once."

mean by that?" The defendant responded in the affirmative. The court then cautioned the defendant as follows: "Okay. Because if you don't acknowledge that you committed the act that can be a violation of probation and then you would come back here and the state would be looking for you to serve eight years in jail. Any questions about that?" The defendant responded in the negative.

The court accepted the defendant's plea, finding that it was made knowingly and voluntarily with the assistance of competent counsel. On September 23, 2014, the court sentenced the defendant to ten years incarceration, execution suspended after two years, and five years probation. The court also required the defendant to register as a sex offender and to participate in sex offender treatment. In March, 2016, the defendant commenced a habeas action, alleging ineffective assistance of counsel with respect to his *Alford* plea on July 11, 2014.

On May 31, 2016, the defendant filed a motion to modify the conditions of his probation pursuant to § 53a-30 (c).[3] He requested that "he not be required to discuss any aspect of the facts underlying his conviction or other facts for which he has a [f]ifth [a]mendment privilege against self-incrimination [in sex offender treatment] until after petitioner's habeas litigation has concluded."

At a hearing on July 18, 2016, defense counsel explained that the defendant was seeking to stay his

[3] General Statutes § 53a-30 (c) provides: "At any time during the period of probation or conditional discharge, after hearing and for good cause shown, the court may modify or enlarge the conditions, whether originally imposed by the court under this section or otherwise, and may extend the period, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29. The court shall cause a copy of any such order to be delivered to the defendant and to the probation officer, if any."

sex offender treatment until the resolution of his habeas case. The state filed its written response to the defendant's motion on August 5, 2016. It argued that the defendant had not shown good cause as required by § 53-30 (c) and that the defendant was made fully aware of the terms of his guilty plea, including participating in sex offender treatment and admitting to his criminal actions.

On September 12, 2016, the court, after hearing briefly from the parties, issued its oral decision denying the defendant's motion to modify the terms of his probation. At the outset, it noted that sex offender treatment was part of the defendant's guilty plea pursuant to the *Alford* doctrine. It further determined that the requirement that the defendant participate in sex offender treatment as part of his probation did not affect the merits of his pending habeas action. Additionally, the court concluded that there were policy and public safety concerns that did not warrant the suspension of his sex offender treatment. The court also rejected the defendant's arguments regarding the fifth amendment privilege against self-incrimination. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court's denial of his motion to modify the conditions of his probation violated his fifth amendment privilege against self-incrimination in future proceedings. Specifically, he argues that the court "failed to protect [his] privilege against self-incrimination when it refused to hold in abeyance the requirement that he respond to incriminating questions [in sex offender treatment] that could be used against him in a new prosecution." We conclude that the defendant waived this claim by expressly agreeing, on the record, to participate in sex offender treatment, including admitting to the conduct that resulted in his *Alford* plea.

The following legal principles inform our analysis. "A plea of guilty is, in effect, a conviction, the equivalent of a guilty verdict by a jury. . . . In choosing to plead guilty, the defendant is waiving several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. . . . These considerations demand the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences. . . . The United States Supreme Court has held that for the acceptance of a guilty plea to comport with due process, the plea must be voluntarily and knowingly entered. *Boykin* v. *Alabama*, 395 U.S. 238, 243–44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)." (Citation omitted; internal quotation marks omitted.) *State* v. *Moye*, 119 Conn. App. 143, 163, 986 A.2d 1134, cert. denied, 297 Conn. 907, 995 A.2d 638 (2010).

By entering an *Alford* plea[4] in the present case, the defendant waived, inter alia, his right against self-incrimination. Additionally, the court specifically informed the defendant on two occasions during the plea hearing that he would be required to participate in sex offender treatment. Furthermore, the court apprised the defendant that as part of his treatment, he would be required to admit to committing acts that constituted the violation of his probation.

The defendant accepted these conditions and garnered the benefits of his plea bargain with the state. In doing so, he expressly waived the right to challenge the conditions that he participate in sex offender treatment and admit to his conduct. "Waiver is an intentional relinquishment or abandonment of a known right or

[4] We note that "[t]he entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty." *State* v. *Faraday*, 268 Conn. 174, 205, 842 A.2d 567 (2004).

privilege. . . . It involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim." (Internal quotation marks omitted.) *State* v. *Klinger*, 103 Conn. App. 163, 170–71, 927 A.2d 373 (2007); cf. *State* v. *Obas*, 320 Conn. 426, 444–45, 130 A.3d 252 (2016) (because it was undisputed that defendant did not explicitly waive right to file application for exemption for sex offender registration and plea agreement was ambiguous, court would not infer from defendant's assent to register as sex offender for ten years that he forfeited his statutory right to request exemption).

In *Klinger*, the defendant claimed, inter alia, that the condition of probation requiring him to repay a certain financial institution was improper. *State* v. *Klinge*r, supra, 103 Conn. App. 170. In concluding that the defendant had waived this claim, we noted that he had "acquiesced in the conditions of probation imposed by the court." Id., 171. Furthermore, "[a]fter the state suggested additional conditions of probation, defense counsel was given the opportunity to object and refused to make an objection." Id. We determined that under these facts and circumstances, the defendant had waived any objection to his conditions of probation. Id. See generally *United States* v. *Mezzanatto*, 513 U.S. 196, 201, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995) (criminal defendant may knowingly and voluntarily waive many

of most fundamental protections afforded by United States constitution). In the present case, during his plea canvass, the defendant waived any objection to participating in sex offender treatment and the requirement that he admit to the conduct that led to the violation of his probation. Accordingly, we decline to consider this appellate claim.

II

The defendant also claims that the court abused its discretion in denying the motion to modify and not allowing him to delay participating in sex offender treatment until his pending habeas action had concluded. Specifically, the defendant argues that the court misinterpreted his claim[5] regarding his fifth amendment concerns and gave improper weight to the state's public interest argument. We are not persuaded by these arguments.

"Probation is the product of statute. . . . Statutes authorizing probation, while setting parameters for doing so, have been very often construed to give the court broad discretion in imposing conditions." (Citation omitted; internal quotation marks omitted.) *State* v. *Crouch*, 105 Conn. App. 693, 696–97, 939 A.2d 632, 635 (2008). Section 53a-30 (c) authorizes a court to modify the terms of probation for "good cause." *State* v. *Obas*, 147 Conn. App. 465, 482, 83 A.3d 674 (2014), aff'd, 320 Conn. 426, 130 A.3d 252 (2016). "It is well settled that the denial of a motion to modify probation will be upheld so long as the trial court did not abuse its discretion. . . . On appeal, a defendant bears a

[5] Specifically, the defendant argued in his brief that the court "failed to appreciate that the defendant sought to preserve his right not [to] have statements he made during sex offender treatment used against [him] in a reprosecution of the charges he had been convicted of and which he was challenging via a habeas petition. The lower court mistakenly understood his claim to be that he had the right to assert his privilege against self-incrimination during the habeas trial."

heavy burden because every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . The mere fact that the denial of a motion to modify probation leaves a defendant facing a lengthy probationary period with strict conditions is not an abuse of discretion. Rather, [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Citations omitted; internal quotation marks omitted.) *State* v. *Denya*, 149 Conn. App. 714, 718, 89 A.3d 455 (2014).

In part I of this opinion, we concluded that the defendant expressly waived his objection to participating in sex offender treatment and to admitting to his conduct that underlies his fifth amendment claim. Additionally we conclude that the defendant has failed to demonstrate that the trial court, in concluding that the "policy and public safety concerns . . . do not warrant the suspension of [the sex offender treatment,]" abused its discretion in denying his motion to modify the conditions of his probation. This claim, therefore, must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

HSBC BANK USA, N.A., TRUSTEE
v. MARK A. HALLUMS
(AC 39955)

Lavine, Bright and Bishop, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. After the trial court rendered a judgment of strict foreclosure, the defendant appealed to this court, claiming, inter alia, that the trial court improperly rendered a judgment when the plaintiff lacked standing. *Held*:

1. The defendant's claim that the plaintiff lacked standing was unavailing; the trial court found that the plaintiff was the holder of the note, endorsed in blank, and that it had been assigned the mortgage, those findings

were supported by the record evidence, and the defendant submitted no proof that someone else was the owner of the note and mortgage.

2. The defendant could not prevail on his claim that the trial court lacked jurisdiction to render a judgment of strict foreclosure after the defendant's debt was discharged in bankruptcy; the defendant failed to provide any authority to support his claim that, because he had listed his debt to the plaintiff as unsecured in his bankruptcy filings, the debt and note automatically became unsecured, despite the valid mortgage lien, as the law is clear that liens that survive discharge in bankruptcy include the in rem liability of mortgages, and a creditor's right to foreclose a mortgage survives or passes through bankruptcy proceedings, and the defendant could not avoid that conclusion by unilaterally describing his obligation as "unsecured" in his bankruptcy filings despite a valid mortgage lien.

3. The defendant's claims that the trial court improperly refused to apply the best evidence rule and the clean hands doctrine were unavailing, there having been no merit to those claims.

Argued April 18—officially released July 3, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Scholl*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; thereafter, the court, *Dubay*, *J.*, rendered a judgment of strict foreclosure; subsequently, the court, *Dubay*, *J.*, denied the defendant's motion for reconsideration, and the defendant appealed to this court. *Affirmed.*

Mark A. Hallums, self-represented, the appellant (defendant).

Christa A. Menge, with whom, on the brief, was *Jonathan A. Adamec*, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendant, Mark A. Hallums, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, HSBC Bank USA, N.A., as Trustee for the Registered Holders

of Nomura Home Equity Loan, Inc. On appeal, the defendant claims that the court improperly: (1) rendered a judgment when the plaintiff lacked standing in the case; (2) rendered a judgment in the absence of jurisdiction because there was no state law right to pursue a foreclosure action in light of the defendant's discharge of the debt in bankruptcy; and (3) refused to apply the best evidence rule and the clean hands doctrine. We affirm the judgment of the trial court.

The following facts inform our review. In March, 2011, the plaintiff commenced an action seeking a judgment of strict foreclosure against the defendant, to which the defendant responded. On January 14, 2016, the trial court rendered summary judgment as to liability, finding that the plaintiff was in possession of the note, which was endorsed in blank, and that the plaintiff had been assigned the mortgage. The court also found that the defendant was in default on the payments due under the note. The record supports those findings. On November 14, 2016, the court rendered a judgment of strict foreclosure, with a law day of February 6, 2017. On November 21, 2016, the defendant filed a motion for reconsideration, which the court denied. This appeal followed.

The defendant first claims that the plaintiff lacks standing in the case. We disagree. "The rules for standing in foreclosure actions when the issue of standing is raised may be succinctly summarized as follows. When a holder seeks to enforce a note through foreclosure, the holder must produce the note. The note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party *or by means of a blank endorsement to bearer*. If the foreclosing party shows that it is a valid holder of the note and can produce the note, it is presumed that the foreclosing party is

the rightful owner of the debt. That presumption may be rebutted by the defending party, but the burden is on the defending party to provide sufficient proof that the holder of the note is not the owner of the debt, for example, by showing that ownership of the debt had passed to another party. It is not sufficient to provide that proof, however, merely by pointing to some documentary lacuna in the chain of title that might give rise to the possibility that some other party owns the debt. In order to rebut the presumption, the defendant must prove that someone else is the owner of the note and debt. Absent that proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note." (Emphasis altered; internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 254–55, A.3d (2018). As found by the trial court, and as supported by the record evidence, the plaintiff is the holder of the note, endorsed in blank, and it has been assigned the mortgage. The defendant has submitted no proof that someone else is the owner of the note and mortgage. Accordingly, the plaintiff has standing.

The defendant next claims that the trial court did not have jurisdiction to render a judgment of strict foreclosure in light of the defendant's discharge of the debt in bankruptcy. We disagree. "Subject matter jurisdiction involves the authority of the court to adjudicate *the type of controversy* presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . [T]his court has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time." (Emphasis added; internal quotation marks omitted.) *Deutsche*

Bank National Trust Co. v. *Thompson*, 163 Conn. App. 827, 831, 136 A.3d 1277 (2016).

"[A] creditor with a loan secured by a lien on assets of the debtor who becomes bankrupt before the loan is repaid [has been allowed] to ignore the bankruptcy proceeding and look to the lien for the satisfaction of the debt. . . . A valid judicial lien is not affected by a discharge in bankruptcy. [T]he discharge in bankruptcy does not extinguish the underlying debt. It only prevents [the] debtor from being personally liable for the discharged debt and forecloses collection of any deficiency judgment, thereby limiting the claimant to enforce its collection efforts in in rem actions against property subject to a valid, prebankruptcy lien guaranteeing payment of the debt." (Internal quotation marks omitted.) *Rino Gnesi Co.* v. *Sbriglio*, 98 Conn. App. 1, 12, 908 A.2d 1, cert. denied, 280 Conn. 945, 912 A.2d 480 (2006).

Although the defendant contends that the bankruptcy discharge order somehow prevents the court from considering the plaintiff's action for a judgment of strict foreclosure, the law is to the contrary. Nevertheless, during oral argument, the defendant explained that he had listed his debt to the plaintiff as "unsecured" in his bankruptcy filings, and, because of that, the debt and the note automatically became unsecured, despite the valid mortgage lien. We are unaware of any law, federal or state, that invalidates a *mortgage lien* simply because the mortgagor lists *the debt* and the note as unsecured for purposes of bankruptcy, and the defendant points us to no such law.

Indeed, put simply, the law is quite clear that liens that survive discharge in bankruptcy include, among others, the in rem liability of mortgages. See *Johnson* v. *Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991); 3 W. Norton & W. Norton, Bankruptcy Law and Practice (3d Ed. 2018) § 58:4. To

that extent, the Bankruptcy Code provides that a creditor's right to foreclose a mortgage survives or passes through the bankruptcy because a discharge extinguishes only the in personam liability of the debtor, not the in rem liability. See *Johnson* v. *Home State Bank*, supra, 84 ("a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem"). As explained in 3 W. Norton & W. Norton, supra, § 58:4, the Bankruptcy Code "does not bar the creditor from enforcing a valid, prebankruptcy lien or security interest against property that has been retained by the estate or by the debtor after discharge. . . . Actions to collect against the debtor personally are enjoined. The creditor's action in enforcing a lien *is against the property and is an action in rem* with no recourse available against the debtor . . . ." (Emphasis added; footnotes omitted.) The defendant cannot avoid this conclusion by unilaterally describing in his bankruptcy filings his obligation as something it is not. We, therefore, conclude that the defendant's claim is without merit.

Finally, the defendant claims that the trial court refused to apply the best evidence rule and the clean hands doctrine to this case. He argues that the trial court "simply chose to ignore key evidence by ignoring that it exists." He also argues that the "loan was table-funded, which meant the transaction was predatory per se," and that, therefore, the court should have applied the clean hands doctrine. We have considered the defendant's arguments regarding these claims and conclude that they are baseless.

The judgment is affirmed.

STATE OF CONNECTICUT *v.* STANLEY MORRIS (AC 40453)

Sheldon, Prescott and Elgo, Js.

Syllabus

The plaintiff in error, D Co., a bail bonds company, brought this writ of error from the order of the trial court denying its motion for release from its obligations under a certain surety bail bond that it had posted on behalf of the defendant in the underlying criminal action. D Co. claimed that the trial court violated its right to due process in numerous ways during the adjudication of the bond forfeiture proceedings. *Held* that the trial court properly denied D Co.'s motion for release from its surety obligations; although D Co.'s unpreserved claims that the trial court violated its right to due process during the adjudication of the bond forfeiture proceedings were reviewable under *State* v. *Golding* (213 Conn. 233), D Co.'s right to due process was not infringed in any manner.

Argued April 23—officially released July 3, 2018

Procedural History

Writ of error from the order of the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, *Hernandez, J.*, denying a motion filed by the plaintiff in error for release from certain surety bond obligations, brought to the Supreme Court, which transferred the matter to this court. *Writ of error denied.*

Thomas Becker, for the plaintiff in error (Dad's Bail Bonds, LLC).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the defendant in error (state).

Opinion

PER CURIAM. The plaintiff in error, Dad's Bail Bonds, LLC, brings this writ of error challenging the judgment of the trial court denying its motion for release from surety obligations arising out of a $45,000 bond it

had posted on behalf of the defendant in the underlying criminal case, Stanley Morris. After Morris failed to appear in court as required, the court ordered the bond forfeited. The plaintiff in error claims that the trial court violated its right to due process in numerous ways during the adjudication of its motion for release and that, pursuant to General Statutes § 54-65c, it was entitled to release from its surety obligation.

The plaintiff in error's procedural due process claims were not preserved below, and we have, therefore, reviewed them pursuant to the standard set forth in *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). Having thoroughly reviewed the record, we are not persuaded that the plaintiff in error's right to due process was infringed in any manner. We also conclude that the court properly denied the plaintiff in error's motion for release from its surety obligations. Accordingly, we affirm the judgment of the trial court denying the plaintiff in error's motion for release.

The writ of error is denied.

KIM MAGSIG *v.* MICHAEL MAGSIG
(AC 39544)

DiPentima, C. J., and Prescott and Bozzuto, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the trial court's denial of her postjudgment motion for contempt, in which she claimed that the defendant had breached the terms of parties' separation agreement that made the defendant responsible for certain debt to W Co. and required that the plaintiff be held harmless for that debt. Specifically, she claimed that the defendant had not made the required payments to W Co. for approximately one year and had not notified her of any significant developments or discussions regarding this debt, namely, that he intentionally had

defaulted on the loan. As a result, the plaintiff claimed that she suffered losses, including diminished creditworthiness. The defendant maintained that because W Co. had not commenced any proceedings regarding that debt, his obligation to hold the plaintiff harmless had not yet been triggered. The trial court denied the plaintiff's motion for contempt on the ground that the plaintiff failed to prove, by clear and convincing evidence, that the defendant wilfully and intentionally had violated the separation agreement, reasoning that the agreement did not require the plaintiff to be indemnified for any collateral damages that may be caused directly or indirectly by the nonpayment of the W Co. debt. *Held*:

1. The plaintiff's claim that, because the agreement was unambiguous, the trial court improperly considered evidence outside of the four corners of the contract in determining the parties' intent with respect to the indemnification language of the agreement was unavailing; the defendant's testimony regarding his understanding of what triggered his obligation to indemnify the plaintiff was admitted for the purpose of determining whether he had wilfully violated the agreement and the court did not use that evidence to interpret the parties' intent with respect to the agreement, as the mere fact that the court permitted the defendant to testify about his understanding of the agreement did not mean, a fortiori, that the court used that testimony to interpret the parties' separation agreement, particularly where the court specifically identified the basis of its conclusion in its memorandum of decision and noted that the defendant's testimony was admitted for the purpose of determining whether he had violated the agreement wilfully.

2. The plaintiff could not prevail on her claim that because similar language used in the agreement has been interpreted in other cases as an indemnity against liability and not simply loss, she was not required to wait until she sustained an actual loss to bring a successful motion for contempt: although the indemnification clause provided that the defendant would hold the plaintiff harmless from "any loss, injury, debt, charge, legal fees, or liability" with respect to the debt to W Co., the agreement further required that the defendant secure his indemnification obligation with particular assets and notify the plaintiff of any and all material, significant developments regarding that debt, and those provisions would have been rendered useless and unnecessary under the plaintiff's interpretation of the agreement, under which she already would have been entitled to full and immediate recourse on the indemnification provision on the day of the dissolution judgment; accordingly, the trial court properly concluded that the defendant's indemnity obligation was not triggered until W Co. commenced an action against the plaintiff or otherwise took affirmative steps to collect from her with respect to the debt.

Argued February 13—officially released July 3, 2018

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, and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Colin, J.*, denied the plaintiff's motion for contempt, and the plaintiff appealed to this court. *Affirmed.*

Meredith C. Braxton, for the appellant (plaintiff).

Edward M. Kweskin, with whom, on the brief, was *Sarah E. Gleason*, for the appellee (defendant).

Opinion

DiPENTIMA, C. J. The plaintiff, Kim Magsig,[1] appeals from the denial of her postdissolution motion for contempt. On appeal, she claims that the trial court improperly concluded that the defendant, Michael Magsig, had not violated an indemnification obligation contained in the parties' separation agreement. We disagree and, accordingly, affirm the judgment of the trial court.[2]

The record reveals the following relevant facts and procedural history. On April 16, 2013, the court, *Hon. Stanley Novack*, judge trial referee, dissolved the marriage of the parties. In accordance with General Statutes § 46b-66, the judgment of dissolution incorporated by reference the parties' separation agreement

[1] The judgment of dissolution restored the plaintiff's name to Kim Carney.

[2] In the proceedings before the trial court, the plaintiff sought attorney's fees pursuant to §§ 9.2 and 11.3 of the parties' separation agreement. The trial court denied her motion for contempt and her request for attorney's fees. On appeal, the plaintiff argued that if we reverse the judgment of the trial court, then, pursuant to the terms of the separation agreement, the defendant should be ordered to pay her trial and appellate attorney's fees. As a result of our conclusion that the judgment of the trial court should be affirmed, we need not address the plaintiff's claim regarding attorney's fees.

(agreement). Article 9 of the agreement addressed past and future debts of the parties.

Section 9.2 of the agreement provided: "*The* [*defendant*] *shall be solely responsible for the Wells Fargo Bank debt* (formerly the home equity line of credit on the parties' foreclosed Greenwich property) as a support obligation *and shall indemnify and hold the* [*plaintiff*] *harmless from any loss*, *injury*, *debt*, *charge*, *legal fees*, *or liability whatsoever with respect thereto*. The [plaintiff] shall secure this indemnification obligation with his Schwab IRA and Korn Ferry 401 (K) and provide the [plaintiff] semiannually with a statement for each account so long as he shall have this indemnification obligation. The [defendant] shall notify the [plaintiff] of any and all material, significant developments or discussions that take place between him and his representatives and Wells Fargo or its representatives. The [defendant] shall promptly notify the [plaintiff] in the event he learns that Wells Fargo is about to commence an action or seek a lien on the [plaintiff's] real property. In the alternative, if the [defendant] is able to remove the [plaintiff's] name as a joint and severally liable obligor on the promissory note to Wells Fargo, which shall be no later than November 16, 2018, the time of the expiration of the statute of limitations on the Wells Fargo liability, all obligations to the [plaintiff] to hold her harmless from liability from Wells Fargo shall terminate." (Emphasis added.)

On January 23, 2014, the plaintiff filed a motion for contempt pursuant to Practice Book § 25-27, alleging that the defendant had violated § 9.2 of the agreement. Specifically, she claimed that the defendant had not made the "required, regular payments to [the Wells Fargo debt] for approximately one year" and had not notified her of "any and all material, significant developments or discussions" regarding this debt; namely, that

he intentionally had defaulted on the loan, resulting in an immediate debt of $434,958.

The plaintiff further alleged that the defendant had agreed to indemnify her for both loss and liability and that, under Connecticut law, she became entitled to indemnification as soon as the defendant caused her to be liable to Wells Fargo for the entire balance due. Additionally, she claimed injury in that, as a result of the defendant's actions, (1) her credit score had "dropped precipitously"; and (2) she would not be able to remove him from the mortgage note for a South Carolina property as required by the terms of the agreement. Finally, the plaintiff requested attorney's fees pursuant to § 11.3 of the agreement.[3]

The defendant filed an objection to the plaintiff's contempt motion, disputing her claims. Specifically, he argued that because Wells Fargo had not commenced a legal action to enforce its right on the debt, his indemnification obligation had not been triggered. He further claimed that the agreement did not require him to make any payments at any particular time to Wells Fargo. The defendant also maintained that he had secured his indemnity obligation as required by the agreement and had not learned of any material, significant developments regarding the debt, nor had he had any discussions with Wells Fargo. Finally, the defendant requested attorney's fees incurred in responding to the plaintiff's motion and on the basis of "litigation misconduct."

On September 4, 2015, the plaintiff filed a reply in further support of her motion. She iterated that, under Connecticut law, she was entitled to prosecute this

[3] Section 11.3 of the agreement provided: "In the event a party is found to have breached this [a]greement, or to be in contempt of any of the provisions of this [a]greement, that Party shall be responsible for the reasonable legal fees and costs associated with the enforcement of this [a]greement."

motion at the time her liability was incurred and was not required to wait for an actual loss. She also claimed that relevant principles of contract interpretation supported her position.

The court, *Colin*, *J.*, conducted hearings on May 18, May 19, and May 20, 2016.[4] An employee of Wells Fargo, the plaintiff and the defendant testified, and, following the presentation of evidence, the court heard argument from counsel. On May 23, 2016, the court issued a memorandum of decision denying the plaintiff's motion for contempt. The court concluded that the plaintiff failed to prove, by clear and convincing evidence, that the defendant wilfully and intentionally had violated § 9.2 of the agreement.

Specifically, the court found that the plaintiff had not produced sufficient evidence that she had suffered any loss, injury, debt, charge, legal fees or liability as to the Wells Fargo debt since the date of the dissolution of the marriage. The court also found that although prior to judgment, the real property that originally secured the Wells Fargo debt had been foreclosed and the debt was in default status, Wells Fargo had not taken any "formal collection actions against the parties."

[4] Prior to the hearings on the contempt motion, the plaintiff filed a motion in limine, pursuant to Practice Book § 15-3, to preclude the testimony of attorneys Judith Ellenthal and Jill Bicks, who previously had represented the plaintiff and the defendant respectively. The plaintiff also joined Ellenthal's motion to quash the subpoena filed by the defendant. The plaintiff argued that the defendant sought to question Ellenthal and Bicks regarding the negotiation of the terms of the agreement and that such parol evidence was irrelevant and inadmissible where the terms of the agreement were unambiguous.

On April 22, 2016, the court held a hearing on the motion in limine and the motion to quash. After hearing from the parties, the court issued an oral ruling granting the plaintiff's motion in limine as follows: "Extrinsic evidence of the intent of the parties shall be inadmissible to vary or contradict the language of the separation agreement unless the trial court determines that parol evidence will be permitted." The court denied the motion to quash.

The court noted that the plaintiff had produced evidence that "due to a derogatory reference on her credit report regarding the Wells Fargo debt, she was unable to secure a rental property for herself and therefore must continue to live in the more expensive South Carolina property . . . . The court finds that this claim is not a 'loss' or 'injury' . . . with respect [to the Wells Fargo debt] contemplated by the parties' agreement." Put another way, the court determined that this type of impact was "collateral damage" and was not within the scope of the indemnification clause.[5]

The court also examined the language of § 9.2 of the agreement and concluded that the defendant's indemnification obligation was triggered when the plaintiff suffered an actual loss, injury, debt, charge, legal fees, or liability directly related to the Wells Fargo debt; in other words, when Wells Fargo "actually makes a claim against the plaintiff or otherwise takes an affirmative step against the plaintiff to collect the funds due. That has not happened, and it may not happen." The court reached this conclusion by considering the entire language of § 9.2; that is, the requirement that the defendant keep the plaintiff informed of material and significant developments and discussions regarding the debt, his obligation to notify her if he learned that Wells Fargo was about to commence an action or seek a lien on her property and the reference to the 2018 statute of limitations regarding the Well Fargo debt. The court also noted that the parties had agreed that § 9.2 did not require the defendant to pay Wells Fargo on time each month. Simply stated, the court determined that "[t]he agreement does not provide that the plaintiff shall be

[5] The court also determined that the plaintiff had failed to meet her burden of proving that her credit score changed from the date of the dissolution to the present date. It noted that the parties' failure to pay the Wells Fargo debt prior to the dissolution of the marriage and the loss of the collateral, through foreclosure, likely caused the decline in her credit score, rather than the postdissolution events.

indemnified for any collateral damages that may be caused directly or indirectly by the nonpayment of the Wells Fargo debt, such as the impact on the plaintiff's credit rating or her ability to rent a dwelling or obtain a car loan . . . ."

Next, the court concluded that the relevant language of § 9.2 of the agreement was clear and unambiguous. Then, it explained the flaw in the plaintiff's interpretation of the indemnification clause. "Under the plaintiff's theory of the case, once liability attached to her, the defendant's indemnification obligation is triggered and she is entitled to compensation. The plaintiff's liability in connection with this joint [Wells Fargo] debt attached before the date of the dissolution degree, when the parties signed the note and borrowed the money. Thus, under her theory, the defendant's indemnification obligation arguably was triggered immediately upon the dissolution court's approval and entry of the decree. If that is the case, then the other portions of [§] 9.2 would likely be rendered useless. For example, why would the defendant need to secure his obligation with anything if he was already required to fulfill the indemnification obligation and pay off the debt? If the defendant was already required to fulfill the indemnification obligation, then why would he need to notify the plaintiff of any future collection actions taken by the lender? These provisions would be unnecessary under the plaintiff's present argument since the plaintiff would already have been entitled to full and immediate recourse on the indemnification provision on the day of the dissolution court's entry of judgment. The court rejects this interpretation of the agreement because it is inconsistent with the parties' intent . . . . The plaintiff has failed to prove that, since the date of the dissolution of the marriage, she has suffered 'any loss, injury, debt, charge, legal fees, or liability . . . with respect to [the Wells Fargo Bank debt]' within the meaning of [§] 9.2

of the parties' agreement. The plaintiff is now attempting to read into the parties' agreement a payment obligation by the defendant that is not contained in the language of the document."

The court further determined that the plaintiff had not incurred a new postdissolution liability and that she was liable for the Wells Fargo debt at the time of the dissolution judgment. Therefore, it concluded "the parties did not intend that this preexisting liability would be used as the basis for an action, postjudgment, under the indemnification from liability provision of [§] 9.2 *without there being any additional affirmative actions being taken by the lender*." (Emphasis added.) Accordingly, the court denied the plaintiff's motion for contempt and her requests for "nearly $500,000 plus counsel fees . . . ."[6] This appeal followed.

As an initial step, we set forth the relevant legal principles and applicable standards of review. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . A contempt judgment cannot stand when, inter alia, the order a contemnor is held to have violated is vague and indefinite, or when the contemnor, through no fault of his own, was unable to obey the court's order." (Internal quotation marks omitted.) *Gabriel* v. *Gabriel*, 324 Conn. 324, 330, 152 A.3d 1230 (2016); see also *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 181–82, 138 A.3d 1069 (2016).

"First, we must resolve the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . This is a legal inquiry subject to de novo review. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine

[6] The court also denied the defendant's request for attorney's fees.

whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . A finding of contempt is a question of fact, and our standard of review is to determine whether the court abused its discretion in [finding] that the actions or inactions of the [party] were in contempt of a court order. . . . In domestic relations cases, [a] judgment rendered in accordance with . . . a stipulation of the parties is to be regarded and construed as a contract. . . . Accordingly, our resolution of the plaintiff's claim is guided by the general principles governing the construction of contracts." (Citation omitted; internal quotation marks omitted.) *Mettler* v. *Mettler*, 165 Conn. App. 829, 835–36, 140 A.3d 370 (2016); see also *Gabriel* v. *Gabriel*, supra, 324 Conn. 330–31; *Dowd* v. *Dowd*, 96 Conn. App. 75, 79, 899 A.2d 76, cert. denied, 280 Conn. 907, 907 A.2d 89 (2006).

"When construing a contract, we seek to determine the intent of the parties from the language used interpreted *in the light of the situation of the parties and the circumstances connected with the transaction.* . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law." (Emphasis in

original; internal quotation marks omitted.) *Dejana* v. *Dejana*, 176 Conn. App. 104, 114, 168 A.3d 595, cert. denied, 327 Conn. 977, 174 A.3d 195 (2017); see also *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 191–92, 112 A.3d 144 (2015); *Schimenti* v. *Schimenti*, 181 Conn. App. 385, 396–97, A.3d (2018).

In the present case, the plaintiff's appellate argument rests on two foundations. First, she contends that because the language of § 9.2 is unambiguous[7] and the agreement contains a merger clause in § 11.4[8] resulting in an integrated contract, the court was prohibited from considering anything except the language contained in the agreement.[9] Essentially, she claims that the court

[7] "A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Dejana* v. *Dejana*, supra, 176 Conn. App. 115.

[8] Section 11.4 of the agreement provided: "The [defendant] and the [plaintiff] have incorporated in this [a]greement their entire understanding, and no oral statement or prior written matter extrinsic to this [a]greement. The parties agree that each is not relying upon any representations other than those expressly set forth herein."

[9] "[T]he parol evidence rule is not an exclusionary rule of evidence . . . but a rule of substantive contract law . . . . The rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversations, or circumstances, or usages . . . in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme. . . . Ordinarily, a merger

improperly heard and used parol evidence, namely, the defendant's testimony regarding his understanding when his indemnification obligation was triggered, to interpret § 9.2. Second, she argues that the language used in § 9.2 of the agreement should be interpreted as indemnity against liability, and, therefore, she was not required to wait until a loss occurred to initiate and prevail on her motion for contempt. See *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, 239 Conn. 284, 306, 685 A.2d 305 (1996); see also *Amoco Oil Co.* v. *Liberty Auto & Electric Co.*, 262 Conn. 142, 148, 810 A.2d 259 (2002); *Balboa Ins. Co.* v. *Zaleski*, 12 Conn. App. 529, 534–35, 532 A.2d 973, cert. denied, 206 Conn. 802, 535 A.2d 1315 (1987). We consider each argument in turn.

First, we consider the plaintiff's argument that the court improperly considered evidence outside of the four corners of the contract in determining the parties' intent with respect to § 9.2 of the agreement. The parties and the court agreed that § 9.2 was unambiguous. Additionally, the plaintiff contends that, due to the use of a merger clause in § 11.4, the agreement was completely integrated. For these reasons, the plaintiff maintains

clause provision indicates that the subject agreement is completely integrated, and parol evidence is precluded from altering or interpreting the agreement. . . .

"The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract. Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. By implication, such evidence may still be admissible if relevant . . . to prove [inter alia] a collateral oral agreement which does not vary the terms of the writing . . . ." (Citations omitted; internal quotation marks omitted.) *Weiss* v. *Smulders*, 313 Conn. 227, 248–49, 96 A.3d 1175 (2014); see also *Perricone* v. *Perricone*, 292 Conn. 187, 194, 972 A.2d 666 (2009).

that it was improper for the court to use parol evidence to determine the parties' intent with respect to § 9.2.

The court did admit into evidence the defendant's testimony regarding his understanding of what triggered his indemnification obligation to the plaintiff. This evidence, however, was admitted for the purpose of determining whether the defendant had wilfully violated § 9.2 of the agreement. After a review of the record and the court's decision, we are persuaded that the court did not use this evidence to interpret the parties' intent with respect to § 9.2.

The following additional facts are necessary for our discussion. During direct examination the defendant stated that he had not taken any action with respect to making payments to Wells Fargo. He testified that he chose not to act after consulting with a foreclosure attorney. The court interjected as follows: "It seems like now everybody agreed—everybody agrees that [the defendant] didn't have to do anything in connection with the bank. The question is what does he have to pay or what does he have to do in connection to his former wife?" The defendant's counsel agreed with the court's statement and suggested that the remaining question was when the defendant's indemnity obligation was triggered.

The defendant's counsel then sought permission to question the defendant regarding his understanding of what would activate his obligation to indemnify the plaintiff. The purpose of this testimony was to determine if the defendant had wilfully violated the parties' agreement. The court permitted the following question from the defendant's counsel to the defendant: "So what is your understanding about when this indemnity is triggered, sir?" The defendant responded that he believed that the indemnification clause was triggered

if Wells Fargo notified the defendant or his representatives that it intended to take action on the debt, such as filing a lawsuit or referring the matter to a collection agency. Thereafter, the court inquired: "So is it your understanding, sir, that if Wells Fargo never comes after [the plaintiff] ever for this loan, then your indemnification obligation never gets triggered?" The defendant responded in the affirmative.

On appeal the plaintiff argues that the court first should have construed § 9.2 of the agreement according to its plain language and then determined whether the defendant had wilfully violated its terms. "Instead, the court admitted parol evidence to determine [the] defendant's wilfulness but then used it to interpret the indemnification provision based on [the] defendant's intent . . . ."

Contrary to the plaintiff's claims, the court did not use the defendant's testimony to determine the parties' intent with respect to § 9.2 of the agreement. As explicitly stated in its memorandum of decision, the court relied on "the other provisions in [§] 9.2, including (a) the defendant's obligation to keep the plaintiff informed of any 'material, significant developments or discussions between him and his representatives and Wells Fargo or its representatives'; (b) the defendant's obligation to notify the plaintiff 'in the event he learns that Wells Fargo is about to commence an action or seek a lien on the [plaintiff's] real property'; and (c) the reference to the expiration of the statute of limitation in 2018 on the Wells Fargo liability, at which time 'all obligations to the [plaintiff] to hold her harmless from liability from Wells Fargo shall terminate.' "

The mere fact that the court permitted the defendant to testify about his understanding of § 9.2 does not mean, a fortiori, that the court used that testimony to interpret the parties' separation agreement. This is

particularly true given that the court (1) specifically noted that the defendant's testimony was admitted for the purpose of determining whether he had violated the agreement wilfully, and (2) specifically identified the basis of its conclusion in a memorandum of decision. This court will presume that the trial court acted properly in the performance of its duties. See *Zenon* v. *Mossy*, 114 Conn. App. 734, 737, 970 A.2d 814 (2009). Finally, we note that the plaintiff's appellate argument that the court improperly used the testimony regarding the defendant's understanding of § 9.2 to interpret that part of the agreement amounts to nothing more than conjecture and speculation, which have no place in appellate review. *Konefal* v. *Konefal*, 107 Conn. App. 354, 360, 945 A.2d 484, cert. denied, 288 Conn. 902, 952 A.2d 810 (2008). For these reasons, we disagree that the court improperly used the defendant's testimony to interpret the intent of § 9.2 of the parties' agreement.

Next, we consider the plaintiff's argument that the court misinterpreted § 9.2 of the agreement. Specifically, she contends that the language used in § 9.2 has been interpreted as indemnity against liability in other cases, and therefore she was not required to wait until a loss to bring a successful motion for contempt. We disagree.

The plaintiff relies primarily on *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, supra, 239 Conn. 284, and *Balboa Ins. Co.* v. *Zaleski*, supra, 12 Conn. App. 529, in support of this argument. In the former, the defendant contracted to "defend, indemnify and hold the plaintiff harmless from and against any liabilities, losses, damages, costs or expenses (including reasonable attorneys' fees) of any nature arising from the environmental conditions of or problems with the Property [that the plaintiff had purchased from the defendant], which conditions or problems arose prior to Closing and whether known . . . or unknown."

(Internal quotation marks omitted.) *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, supra, 288.

In that case, our Supreme Court then set forth the relevant legal principles regarding indemnification clauses. "Generally, indemnity agreements fall broadly into two classes, those where the contract is to indemnify against liability and those where it is to indemnify against loss. In the first, the cause of action arises as soon as liability is incurred, but in the second it does not arise until the indemnitee has actually incurred the loss. . . . Where an indemnity agreement, however, indemnifies against liability as well as against loss . . . the indemnitee does not have to wait until the loss occurs, but may sue on the agreement as soon as liability is incurred." (Internal quotation marks omitted.) Id., 306; see also *Fairfield* v. *D'Addario*, 149 Conn. 358, 361, 179 A.2d 826 (1961).

The court then rejected the defendant's claim that it was liable only for the costs actually incurred by the plaintiff, that is, its obligation was limited to a loss suffered by the plaintiff rather than liability. *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, supra, 239 Conn. 306. "On the issue of whether, in the event of a breach of the contract, the plaintiff's damages would be limited to those actually incurred, this contract presents clear and definitive language that for more than sixty years has been interpreted but one way. The terms . . . are unambiguous in their requirement that the defendant will hold the plaintiff harmless from and against any liabilities, losses, damages, costs or expenses arising from an environmental condition of the property. . . . Because the indemnity protects against liability in addition to loss, the plaintiff need not wait until an actual loss occurs, but may sue once liability is incurred. . . . Accordingly, we conclude as a matter of law . . . that the plaintiff's damages are not limited to those costs it actually incurred." (Citations

omitted; emphasis omitted; internal quotation marks omitted.) Id., 306–307. This court reached the same conclusion with respect to similar contract language in *Balboa Ins. Co.* v. *Zaleski*, supra, 12 Conn. App. 535–36.

The plaintiff argues that the indemnification language used in § 9.2 of the agreement is similar to that used in *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, supra, 239 Conn. 287–88, and *Balboa Ins. Co.* v. *Zaleski*, supra, 12 Conn. App. 535–36, and, accordingly, must be interpreted as requiring the defendant to indemnify her from liability and not simply loss. This argument, however, ignores the other language used by the parties in § 9.2. The indemnification clause provided that the defendant would hold the plaintiff harmless from "any loss, injury, debt, charge, legal fees, or liability" with respect to the Wells Fargo debt. It also obligated the defendant to "secure this indemnification obligation with his Schwab IRA and Korn Ferry 401 (K) and provide the [plaintiff] semiannually with a statement for each account so long as he shall have this indemnification obligation." Section 9.2 further required the defendant to notify the plaintiff of "any and all material, significant developments or discussions" between himself and his representatives and Wells Fargo and its representatives. The defendant also was obligated to notify the plaintiff if Wells Fargo was "about to commence an action or seek a lien on the [plaintiff's] real property."

The trial court properly concluded that these provisions would be rendered useless and unnecessary under the plaintiff's interpretation of § 9.2. "The law of contract interpretation militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *Barber* v. *Skip Barber Racing School, LLC*, 106 Conn. App. 59, 81, 940 A.2d 878 (2008); see also *24 Leggett Street Ltd. Partnership* v. *Beacon Industries, Inc.*, supra, 239 Conn. 298 (because

parties ordinarily do not insert meaningless provisions into agreements, every provision of contract must be given effect if it can be done reasonably); *Snydergeneral Corp.* v. *Lee Parcel 6 Associates Ltd. Partnership*, 43 Conn. App. 32, 36, 681 A.2d 1008 (1996) (same); *Plikus* v. *Connecticut Light & Power Co.*, 42 Conn. App. 299, 303, 679 A.2d 401 (1996) (same).

Significantly, the court found that the parties were liable for the entire Wells Fargo debt prior to the dissolution judgment incorporating the agreement of the parties.[10] As aptly stated by the trial court, other obligations of the defendant set forth in § 9.2 would be unnecessary because, under the plaintiff's interpretation, she "would already have been entitled to full and immediate recourse on the indemnification provision on the day of the dissolution court's entry of judgment." There would be no need for the defendant to notify the plaintiff of future collection actions or to secure his obligation with his retirement accounts under her interpretation of § 9.2.

We conclude, therefore, that the court's interpretation of § 9.2 of the agreement was not improper given the court's obligation "to determine the intention of the parties from the language used interpreted *in the light of the situation of the parties and the circumstances connected with the transaction*." (Emphasis added.) *Kronholm* v. *Kronholm*, 16 Conn. App. 124, 130, 547 A.2d 61 (1988); see also *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008). Under these facts and circumstances, where the debt was incurred and the entire amount was due prior to the dissolution judgment and their agreement, and in light of the language used in § 9.2, we agree with the trial court that the defendant's

[10] This factual finding is supported by the testimony of Stephen Miller, an employee of Wells Fargo, who stated that the relevant account has been in default status since January, 2013.

indemnity obligation is not triggered until Wells Fargo commences an action against the plaintiff or otherwise takes an affirmative step to collect from the plaintiff with respect to the debt. Accordingly, the plaintiff's claim that the court misinterpreted § 9.2 must fail.

The judgment is affirmed.

In this opinion the other judges concurred.