UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1627

September Term, 2015

JOHN DURNIAK

v.

MICHELLE BOURDELAIS

Graeff,
Reed,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: October 28, 2016

John Durniak, the appellant, and Michelle Bourdelais, the appellee, are the biological parents of two minor children, S.D. and K.D. The children have been the subject of custody and protection proceedings since 2012. This appeal centers around a petition for protective order filed by the appellee on August 3, 2015, and the granting thereof by the Circuit Court for Anne Arundel County on September 15, 2015. The appellant filed a timely appeal and presents three questions for our review, which we increase to four and rephrase:[1]

1. Did the trial court commit reversible error where it declined to take judicial notice of the transcript of the July 23, 2015, hearing that took place in the Circuit Court for St. Mary's County?

2. Was the August 3, 2015, petition for protective order barred by the doctrine of *res judicata*, or in the alternative the doctrine of collateral estoppel?

3. Was the trial court's factual finding that the appellant "punched" one of his minor children clearly erroneous based on the evidence presented at the hearing on the August 3, 2015, petition for protective order?

4. Did the trial court deny the appellant due process?

[1] The appellant presents the following questions:

1. Whether the lower court erred in denying the Motion to Dismiss the protective order based upon the principles of *res judicata*, or in the alternative collateral estoppel and further erred in denying the request to take judicial notice of the July 23, 2015 transcript?

2. Whether the findings of fact by the lower court were clearly erroneous based upon the actual evidence presented?

3. Whether the lower court denied the Appellant due process?

For the following reasons, we answer the first question in the negative and the second question in the affirmative and, because of our answer to the second question, need not address the third or fourth. Accordingly, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The appellant was first awarded sole physical and legal custody of S.D. and K.D. in August of 2013. However, this Court vacated that initial custody award and remanded for further proceedings after holding that the lower court had improperly imposed a discovery sanction upon the current appellee. *See Bourdelais v. Durniak*, No. 2389, Sept. Term, 2013 (filed Dec. 4, 2014). The custody proceedings resumed on remand with a hearing that took place on May 26-27, 2015, and June 17-18, 2015. Thereafter, by Order dated June 24, 2015, the lower court once again granted sole physical and legal custody of the minor children to the appellant. Less than a month later, however, the appellee was found in contempt for violating the newly-imposed custody order. The case then proceeded on appeal a second time, wherein we vacated the finding of contempt but otherwise affirmed the judgment of the lower court. *See Bourdelais v. Durniak*, No. 1154, Sept. Term 2015 (filed April 8, 2016).

The parties have not only been at odds during the above-mentioned custody proceedings, but also over a number of petitions for protective order that the appellee has filed against the appellant dating back to 2012. In that year, on July 10, July 17, December 10, and December 11, respectively, the appellee filed four such petitions, all of

which were denied.[2] The appellee filed a fifth protective order petition against the appellant on or about July 23, 2015. The basis of the fifth protective order petition was an alleged incident in which the appellant "punched" S.D. in her side/ribs while she was having a sleepover with one of her friends. After a full evidentiary hearing, the July 23, 2015, protective order petition, like the first four, was also denied. In its oral ruling, the trial court indicated three primary reasons it was denying the July 23, 2015, petition: First, the court determined that the appellee had not proved that the alleged "punch" occurred by a preponderance of the evidence; second, the court indicated that it did not credit the appellee's testimony, in part because of the November 14, 2014, *Alford* plea she tendered for making false statements to a law enforcement officer regarding the appellant; and lastly, the court questioned the appellee's motivation for waiting until July, *i.e.*, just after the appellant was awarded sole custody of the children, to file a protective order petition, even though she had indicated during the initial custody hearing that the punching incident took place in the Spring.

Less than two weeks after the denial of her fifth protective order petition, on August 3, 2015, the appellee filed the protective order petition that is the subject of the present appeal. The basis of the August 3, 2015, petition was, again, that the appellant "punched" S.D. on July 23, 2015. The same day the petition was filed, the Circuit Court for Anne Arundel County issued a temporary protective order against the appellant and

[2] The July 10 and July 17, 2012, protective order petitions were filed in the Circuit Court for Calvert County, while the December 10 and December 11, 2012, petitions were filed in the Circuit Court for St. Mary's County.

scheduled a hearing for August 10, 2015. The appellant filed a motion to dismiss on August 7, 2015, on the grounds that the principles of *res judicata* and collateral estoppel barred the issue of the alleged "punch" from being re-litigated. The hearing began on August 10, 2015, and was continued on August 25, September 1, and September 15, 2015. On the last day of the hearing, the circuit court issued a final protective order against the appellant, finding that on or about July 23, 2015, he "punched S[.D.] in the ribs on [the] right side."

The appellant noted a timely appeal on October 1, 2015. [3]

DISCUSSION

A. Parties' Contentions

The appellant argues that the circuit court erred in denying his motion to dismiss the August 3, 2015, petition for protective order because the principle of *res judicata*, or in the alternative the principle of collateral estoppel, operated so as to bar re-litigation of the alleged "punch" to S.D.'s side. The appellant asserts that it was "both erroneous and illogical" for the court to deny the motion on the grounds that "I have no transcripts that I was able to review prior to today that would indicate to me whether or not this case was,

[3] On July 13, 2016, the Appellee filed their brief with the Court of Special Appeals. On July 29, 2016 the Appellant filed a "Motion to Strike Brief of Appellee and Related Relief". Upon consideration of the Appellant's Motion the Court issued an Order for the Appellee to show cause in writing by September 5, 2016 why the Appellee's brief should not be stricken and the Appellee not should not be barred from presenting oral argument. No response was filed by the Appellee. Counsel for the Appellee asserted that he had not received the Motion via email. The Court heard the argument of counsel concerning the Motion. The Court denied the "Motion to Strike the Brief of the Appellee and Related Relief". Counsel for the Appellee was permitted to argue.

in fact, tried in St. Mary's County," and then subsequently deny his request for judicial notice of the July 23, 2015, transcript.[4]

In addition, the appellant contends that the circuit court's findings of fact on which the final protective order was issued are clearly erroneous in light of the actual evidence presented.

Finally, the appellant argues that his due process rights were violated because while the petition alleged that the "punch" was committed on July 23, 2015, S.D. indicated in an interview with the court on September 15, 2015, that her father "punched me in the right side *a half month* ago after I was doing my nails." (Emphasis added). Therefore, because the petition and S.D.'s statement contained vastly different dates for when the "punch" occurred, the appellant asserts that he "could not have been provided notice and an opportunity to defend this allegation."

The appellee responds that the circuit court did not err where it declined to take judicial notice of the July 23, 2015, hearing transcript because it allowed the appellant to enter into evidence an exhibit (Exhibit D) containing all relevant portions of the transcript at issue.

Regarding the effect of *res judicata* and collateral estoppel, the appellee argues that neither of those principles barred the August 3, 2015, petition because S.D. was not interviewed by the judge who presided over the July 23, 2015, hearing. The fact that S.D.

[4] The July 23, 2015, petition was originally filed in the Circuit Court for Anne Arundel County, but was later transferred to the Circuit Court for St. Mary's County. The August 3, 2015, petition, from which this appeal originated, was both filed and heard in the Circuit Court for Anne Arundel County.

testified at one hearing but not the other is, according to the appellee, enough to sustain the circuit court's finding that "[t]he appellations in the petitions are different." If the appellee is aware of any other reasons why the principles of *res judicata* and collateral estoppel do not apply, she did not present them before this Court.

Additionally, the appellee asserts that the lower court's factual finding that the appellant "punched" S.D. in the ribs is not clearly erroneous. She contends that S.D.'s interview with the hearing judge, combined with the corroborating report of the Department of Social Services ("DSS"), is enough to support the occurrence of the "punch" by a preponderance of the evidence.

Lastly, the appellee disputes the appellant's due process argument. She claims that the appellant was aware of the facts contained in the petition, and that "[f]or the appellant to argue that the child's memory regarding the exact date is more accurate than that of the appellee would be absurd and unrealistic."

B. Standards of Review

When it comes to a trial court's decision whether or not to take judicial notice of a certain matter, "[w]e review the trial court's decision under the 'clearly erroneous' standard, keeping in mind '[t]he principle that there is a legitimate range within which notice may be taken or declined and that there is efficacy in taking it, when appropriate.'" *Abrishamian v. Washington Med. Grp., P.C.*, 216 Md. App. 386, 413 (2014) (quoting *Smith v. Hearst Corp.*, 48 Md. App. 135, 141 (1981)) (second alteration in original).

On the other hand, the standard of review upon the denial of a motion to dismiss is

> whether the well-pleaded allegations of fact contained in the complaint reveal any set of facts which would support the claim made. *Flaherty v. Weinberg*, 303 Md. 116, 135–136, 492 A.2d 618 (1985). The court must accept as true all well-pleaded material facts in the complaint, as well as any reasonable inferences that may be drawn therefrom. *Sharrow v. State Farm Mutual*, 306 Md. 754, 768, 511 A.2d 492 (1968). Any ambiguity in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader. *Id.*

Skinner Logsdon Const. & Equip., Inc. v. First United Church of Jesus Christ (Apostolic), 88 Md. App. 434, 437 (1991).

Additionally, upon review of a grant of a final protective order, we apply the following standard of review:

> The burden is on the petitioner to show by clear and convincing evidence that the alleged abuse has occurred. *See Ricker v. Ricker*, 114 Md. App. 583, 586, 691 A.2d 283 (1997); FL § 4–506(c)(1)(ii). "If the court finds that the petitioner has met the burden, it may issue a protective order tailored to fit particular needs that the petitioner has demonstrated are necessary to provide relief from abuse." *Ricker*, 114 Md. App. at 586, 691 A.2d 283. When conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous. *See* Md. Rule 8–131(c); *Riddick v. State*, 319 Md. 180, 183, 571 A.2d 1239 (1990). As to the ultimate conclusion, however, we must make our own independent appraisal by reviewing the law and applying it to the facts of the case. *See Aiken v. State*, 101 Md. App. 557, 563, 647 A.2d 1229 (1994), *cert. denied*, 337 Md. 89, 651 A.2d 854 (1995).

Piper v. Layman, 125 Md. App. 745, 754–55 (1999).

Finally, we apply the *de novo* standard of review to alleged violations of procedural due process under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. *See Regan v. Bd. of Chiropractic Examiners*, 120 Md. App. 494, 509 (1998), *aff'd sub nom. Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397, 735 A.2d 991 (1999) (citing *Liberty Nursing Ctr., Inc. v. Dep't of Health & Mental Hygiene*, 330 Md. 433, 443 (1993)).

C. Analysis

1. Failure to Take Judicial Notice of the Hearing Transcript

We shall first address the appellant's argument that "[the lower court] erred in denying the request to take judicial notice of the July 23, 2015 transcript." For the following reasons, we shall hold that even if the trial court did err in this regard, the resulting error would be harmless.

We begin our analysis by noting that Md. Rule 5-201, which governs judicial notice of adjudicative facts, provides:

> **(a) Scope of Rule.** This Rule governs only judicial notice of adjudicative facts. Sections (d), (e), and (g) of this Rule do not apply in the Court of Special Appeals or the Court of Appeals.
>
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> **(c) When Discretionary.** A court may take judicial notice, whether requested or not.

> **(d) When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> **(e) Opportunity to Be Heard.** Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
>
> **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.
>
> **(g) Instructing Jury.** The court shall instruct the jury to accept as conclusive any fact judicially noticed, except that in a criminal action, the court shall instruct the jury that it may, but is not required to, accept as conclusive any judicially noticed fact adverse to the accused.

(Underline added).

We also note that pursuant to *In re Nathaniel A.*, 160 Md. App. 581, 598 (2005), the taking of judicial notice of prior hearing transcripts is appropriate under certain circumstances. In *Nathaniel A.*, a mother appealed after the circuit court adjudicated her children CINA based on a finding of maternal abuse. *Id.* at 589. One of the issues on appeal was whether the circuit court erred in taking judicial notice of "the transcript of the prior proceedings that detailed the CINA determination as to [the two oldest children] and the Petition to declare [the youngest child] a CINA." *Id.* at 597. We held that the circuit court did not err when it took judicial notice of the transcript, explaining that the following factors informed our decision:

> The mother was a party to the prior hearings; she had the opportunity to defend herself through cross-examination; she was represented by counsel at those hearings; the facts relied

> upon were identical to the facts in the prior litigation; neither party demonstrated that circumstances had changed for the better since the prior hearings; the prior transcripts pertained to judicial findings deciding the allegations by the same circuit court; the transcripts were identified, moved into evidence, and made a part of the record; and the circuit court independently analyzed the evidence before it and made its own conclusion.

Id. at 598.

Applying the above factors to the case at bar, we note that the present case is distinguishable on the basis of only two. First, the appellee was not represented by counsel at the July 23, 2015, hearing.[5] Second, the July 23, 2015, transcript did not "pertain[ ] to judicial findings deciding the allegations by the same circuit court." *Id.* We do not think that, for purposes of judicial notice, it is dispositive that the appellee was not represented by counsel at the July 23, 2015, hearing. The portions of the hearing transcript that were relevant to the hearing on the August 3, 2015, petition were those that pertained to the appellee's allegation that the appellant had "punched" S.D. in the ribs. When it comes to the alleged "punch," the appellee, *i.e.*, the party who objected to the taking of judicial notice of the prior transcript, was not the party who was defending herself against an allegation of abuse of a minor child. Instead, she was the party who, at the July 23, 2015, hearing, was trying to prove that the appellant had committed an act of abuse. Therefore, because

[5] After being interrupted on one occasion by the appellee, the July 23, 2015, hearing judge admonished her, saying:

> As I told you before, *don't take advantage of the fact that you're Pro Se* to think that you can do things that no attorney otherwise would do, by interrupting.

(Emphasis added).

the purpose of the factor regarding representation by counsel at the previous hearing is to protect the rights of parties to "refute, impeach or explain the evidence against [them]," *id.* at n.1 (quoting *In the Interest of C.M.W.*, 813 S.W.2d 331, 333 (Mo. Ct. App. 1991)), we hold that the fact that the appellee appeared *pro se* at the July 23, 2015, hearing is not dispositive of the issue of judicial notice.

It is not as clear how the failure to take judicial notice is affected by the fact that the prior hearing took place before a different circuit court. *See Nathaniel A.*, 160 Md. App. at 598. However, because the appellant has not shown that he was prejudiced by the court's failure to take judicial notice of the prior transcript, any potential error resulting therefrom was harmless. We explain.

In *Flanagan v. Flanagan*, 181 Md. App. 492 (2008), we explained that

> [i]t has long been the policy in this State that this Court will not reverse a lower court judgment if the error is harm less. *Greenbriar v. Brooks,* 387 Md. 683, 740 [878 A.2d 528] (2005); *Crane v. Dunn,* 382 Md. 83, 91 [854 A.2d 1180] (2004). The burden is on the complaining party to show prejudice as well as error. *Greenbriar,* 387 Md. at 740 [878 A.2d 528]; *Crane,* 382 Md. at 91 [854 A.2d 1180]; *Beahm v. Shortall,* 279 Md. 321, 330 [368 A.2d 1005] (1977).

Flanagan, 181 Md. App. at 515 (quoting *Flores v. Bell*, 398 Md. 27, 33 (2007)). We went on to quote at length the Court of Appeals' definition of the "prejudice" prong for reversible error:

> Precise standards for determining prejudice have not been established and depend upon the facts of each individual case. *Fry v. Carter,* 375 Md. 341, 356, 825 A.2d 1042 (2003); *see also State Deposit v. Billman,* 321 Md. 3, 17, 580 A.2d 1044 (1990) (reiterating that appellate court balances the

> probability of prejudice from the face of the extraneous matter with the circumstances of the particular case). Prejudice can be demonstrated by showing that the error was likely to have affected the verdict below; an error that does not affect the outcome of the case is harmless error. *Crane,* 382 Md. at 91, 854 A.2d 1180; *Beahm,* 279 Md. at 331, 368 A.2d 1005. We have also found reversible error when the prejudice was substantial. *Fry,* 375 Md. at 356, 825 A.2d 1042. The focus of our inquiry is on the probability, not the possibility, of prejudice. *Crane,* 382 Md. at 91, 854 A.2d 1180; *Harford Sands, Inc. v. Groft,* 320 Md. 136, 148, 577 A.2d 7 (1990). We discussed the standard of review in civil cases in *Crane,* 382 Md. 83, 854 A.2d 1180, noting as follows:
>
> > Prejudice will be found if a showing is made that the error was likely to have affected the verdict below. "It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry." . . . Substantial prejudice must be shown. To justify the reversal, an error below must have been ". . . both manifestly wrong and substantially injurious."

Flanagan, 181 Md. App. at 515-16 (quoting *Flores*, 398 Md. at 33-34).

We hold that in the case at bar, the appellant has not shown that he was prejudiced by any error that may have resulted from the lower court's failure to take judicial notice of the July 23, 2016, transcript. In his brief, he acknowledges that "[t]he lower court did accept into evidence portions of the transcript from the July 23, 2015 hearing on the previous protective order filed by [the appellee] which were collectively marked as Defendant's Exhibit D." Appellant's Br. at 8. However, he has not made any arguments before this Court as to why the contents of Exhibit D were insufficient for purposes of entering the prior testimony and findings regarding the alleged "punch" into evidence. In other words, he has not claimed that any relevant portions of the July 23, 2015, hearing transcript were

not admitted into evidence in Exhibit D. In fact, he even admits that his counsel "argued to the lower court that Exhibit D contained sufficient information for the court to determine that the allegations were barred by *res judicata*, or in the alternative collateral estoppel." Appellant's Br. at 8 (underline added). Accordingly, because the appellant has not made a showing before this Court that "the [alleged] error was likely to have affected the verdict below," *Flanagan*, 181 Md. App. at 516 (quoting *Flores*, 398 Md. at 33), we hold that the lower court's failure to take judicial notice of the prior hearing transcript is not dispositive of whether it erred in denying the motion to dismiss.

2. Application of Res Judicata, or in the Alternative Collateral Estoppel

We now turn to whether the August 3, 2015, protective order petition was barred by *res judicata* or, alternatively, collateral estoppel.

The Court of Appeals has indicated that

> [t]he doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit[.]

Alvey v. Alvey, 225 Md. 386, 390 (1961). It "is designed to avoid the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions." *Douglas v. First Sec. Fed. Sav. Bank, Inc.*, 101 Md. App. 170, 181 (1994) (quoting *DeLeon v. Slear*, 328 Md. 569, 580 (1992)) (internal quotations and citations omitted).

> Under Maryland law, the requirements of *res judicata* or claim preclusion are:
>
> > 1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute, 2) that the claim presented in the current action is identical to the one determined in the prior adjudication, and 3) that there was a valid final judgment on the merits.

Douglas, 101 Md. App. at 181 (quoting *Major v. First Virginia Bank-Cent. Maryland*, 97 Md. App. 520, 533–34 (1993)) (internal quotations and citations omitted).

On the other hand, "[f]our questions must be answered in the affirmative in order for the doctrine of collateral estoppel to be applicable." *Pat Perusse Realty Co. v. Lingo*, 249 Md. 33, 45 (1968). Those four questions are:

> Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Id. With regard to collateral estoppel, or issue preclusion, "[a]ll that due process requires is that 'the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and did actually litigate it.'" *Id.* (quoting *United States v. United Airlines, Inc.*, 216 F. Supp. 709, 726 (E.D. Wash. 1962), *aff'd in part, modified in part sub nom. United Air Lines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964)).

In the present case, the appellant filed his motion to dismiss on the basis of *res judicata*, or in the alternative collateral estoppel, on August 7, 2015. The circuit court initially denied the motion on August 10, 2015, stating:

> And with regards to the Motion to Dismiss, I understand that this matter has been – because I was the Judge who heard preliminarily the last time that you all were here.
>
> * * *
>
> It was referred to . . . our Administrative Judge[] to transfer it to St. Mary's County.
>
> What I can tell you, from what I recall, the original petition, in that case, alleged mental abuse;
>
> Now, it appears to me, that there are new allegations regarding physical abuse;
>
> That on its face, the Compaint's [sic] do not appeal to be the same;
>
> I have nothing under oath;
>
> I have no transcripts that I was able to review prior to today that would indicate to me whether or not this case was, in fact, tried in St. Mary's County;
>
> Without having anything under oath I cannot from the fact of the pleadings, although frankly I know that Ms. Bordelais [sic] has been here before; I know that, but other than that I have nothing under oath;
>
> * * *
>
> In order to make a decision that it is either collateral estoppel or res judicata I would have to have something, and I don't;
>
> I am going to deny the Motion to Dismiss[.]

On August 25, 2015, the day the hearing resumed, the appellant formally requested that the court take judicial notice of the prior hearing transcript. In denying the request, the court reiterated its belief that "[t]he allegations in the Petitions are different." Nevertheless, the court indicated to the appellant's counsel that

> you're welcome to read it into evidence. You're welcome to use it as the rules permit. But I'm not going to read the entire transcript at this juncture, and determine whether or not all the issues in this case were referenced in a previous proceeding.

Thereafter, the appellant's counsel was ultimately able to enter the relevant portions of the previous transcript into evidence as Defendant's Exhibit D. He also went on to argue before the trial court that the alleged "punch" to S.D.'s ribs "was [already] tried on July 23rd of this year in the Circuit Court for St. Mary's County." Accordingly, we shall hold that on the basis of the contents of Exhibit D, the circuit court should have determined that the August 3, 2015, petition was barred by the principle of *res judicata*, or in the alternative, collateral estoppel. We explain.

It is clear, based on the portions of the July 23, 2015, hearing transcript that were entered into evidence, that the alleged "punch" to S.D.'s ribs had previously been fully and finally litigated. At the July 23, 2015, hearing, the appellee alleged that the appellant "punched S[.D.] in the ribs," and that he committed that act of abuse "recent[ly], like within the last month or two." The appellee further testified at the previous hearing that S.D. was having a sleepover with her best friend when the alleged "punch" occurred. In defending himself against the allegation, the appellant testified that S.D. and her friend were using

nail polish around the time that the supposed "punch" was committed. We outlined *supra* the various reasons why the July 23, 2015, petition for protective order was ultimately denied.

We agree with the appellant that the "punch" that was litigated during the July 23, 2015, hearing was the same alleged act of abuse that was the basis for the August 3, 2015, petition for protective order. In her interview with the court on September 15, 2015, S.D. advised that she was punched in her ribs while she was "doing her nails" during a sleepover with her best friend. Notably, while the appellee points to the lower court's finding that the July 23 and August 3, 2015, petitions contained "different" allegations, she does not argue that the alleged "punch" described in the latter petition was actually a different "punch" than the one litigated during the hearing on the former. Instead, she simply asserts that "the fact that the appellee mentioned a punch to S[.D.]'s ribs does not trigger *res judicata* because Judge Hill, during the July 23, 2015, hearing, failed to interview S[.D.] regarding any incident." Appellee's Br. at 6. However, the fact that S.D. was not interviewed as part of the July 23, 2015, hearing has no bearing on whether relitigation of the alleged "punch" was barred by the doctrine *res judicata* or collateral estoppel. Instead, all that matters is whether the elements of one or both of the aforementioned doctrines are satisfied.

Based on the record before us, it is clear that all three elements of *res judicata*, as well as all four elements of collateral estoppel, have been satisfied with regard to the August 3, 2015, petition for protective order and the alleged "punch" upon which it centers. We begin by applying the elements of *res judicata* to the facts in the record: (1) The parties

to the August 3, 2015, petition for protective order were identical to the parties to the July 23, 2015, petition; (2) The July 23 and August 3, 2015, petitions for protective order amounted to identical claims because, as we explained *supra*, they were based on the same allegation of abuse; and (3) There was a final judgment on the merits of the previous petition, as evidenced by the Order dated July 23, 2015, as well as the following oral ruling from the bench earlier that day:

> THE COURT: [W]e'll deal with the Protective Order first. The allegations are serious, but then I also question the motivation for [the appellee] to file the – well I should say to wait until July to file for the Protective Order. It was referenced, either directly or (inaudible) about this rib incident.
>
> When I held the initial custody hearing, [the appellee] says the incident took place in the Spring and, but she didn't file the Protective Order in [the] Spring. And if it had actually occurred, if it was actually related to her, I don't know, . . . why did you not do anything. Why didn't you go to see Dr. Truss if you were concerned? . . .
>
> * * *
>
> Again, [the appellee] knew, she says in March about this incident, didn't file any Protective Orders during this whole time.
>
> * * *
>
> But what is clear, and again, as the Court said before, I find now those questions ironic because you entered an *Alford* plea to filing a false police report. You entered an *Alford* plea to filing a false police report against [the appellant.] . . .
>
> * * *
>
> As I was saying before I was interrupted, there was an *Alford* plea to filing a false police report against [the appellant]

> which was done, again, at that time, for only the assistance in helping with the custody case.
>
> So taking all the evidence considered, the Court doesn't find that the Petitioner has met their burden [with respect to the protective order] by a preponderance of the evidence.

Thus, the appellee was precluded by *res judicata* from bringing the August 3, 2015, claim for protection from child abuse.

Likewise, relitigation of the issue of whether or not the "punch" occurred was barred by the doctrine of collateral estoppel: (1) Whether the appellant "punched" S.D. in the ribs while painting her nails during a sleepover with her friend was decided at the conclusion of the July 23, 2015, hearing; (2) As we have already explained in detail, there was a final judgment on the merits of whether the "punch" was committed; (3) The appellee was a party to the prior adjudication; and (4) The appellee was given a fair opportunity to be heard during a full evidentiary hearing on the July 23, 2015, petition, which involved the issue of whether the appellant actually "punched" S.D. in the ribs. Therefore, similarly to how the claim for protection from child abuse based on the alleged "punch" to S.D.'s ribs should have been barred by *res judicata*, the issue of whether or not the "punch" actually occurred should have been precluded from redetermination by the doctrine of collateral estoppel.

Accordingly, notwithstanding any harmless error that might have resulted from the failure to take judicial notice of the prior hearing transcript, we hold that the lower court erred where, based on the portions of the prior transcript that were actually admitted into evidence, it did not dismiss the August 3, 2015, petition for protective order on the basis of *res judicata* or collateral estoppel.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. COSTS TO BE PAID BY APPELLEE.