FAIRLAKE CAPITAL, LLC *v.* PETER LATHOURIS ET AL.
(AC 43872)

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

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, the alleged breach of a guaranty agreement. The plaintiff alleged that C Co. extended a loan to L Co., evidenced by a note executed on behalf of L Co. by the defendant L, acting as attorney-in-fact for the defendant S, the president of L Co. The note was secured by a mortgage on certain real property located in New York. Additionally, L, individually and as attorney-in-fact for S, executed a guaranty agreement, guaranteeing the debt under the note. L Co. defaulted on its payments, and C Co. commenced an action in New York to foreclose on the property. Thereafter, L Co. filed for bankruptcy, and the Bankruptcy Court issued an order approving the sale of the property pursuant to an approved bankruptcy plan. C Co. assigned its claims against L Co. to the plaintiff, and the plaintiff alleged that the defendants were liable under the guaranty for all amounts remaining due under the note. The defendants filed a motion for summary judgment in which they argued that the plaintiff's claims were barred by the doctrine of res judicata and that, pursuant to New York statute (N.Y. Real Prop. Acts. Law § 1371), it was necessary for the plaintiff to move for a deficiency judgment in order to recover under the guaranty. The trial court denied the motion, concluding that § 1371 did not apply because the property was not sold in a foreclosure action, and the defendants appealed to this court. *Held* that the trial court did not err in denying the defendants' motion for summary judgment, as the plaintiff's claims were not barred by the doctrine of res judicata: by its terms, § 1371 applies only when a foreclosure sale occurs, and, because the property was sold pursuant to a bankruptcy plan, rather than a foreclosure sale, § 1371 did not require the plaintiff to seek a

deficiency judgment, the defendants had not filed for bankruptcy and were not parties to L Co.'s bankruptcy proceedings, and, thus, there was no reason for the Bankruptcy Court to address whether there was any deficiency from the sale that would trigger the defendants' obligations under the guaranty; moreover, although the Bankruptcy Court determined the amount that L Co. owed the plaintiff after the sale of the property, the parties agreed to litigate claims arising out of the guaranty agreement in Connecticut state court; furthermore, this court was not satisfied that the plaintiff had an adequate opportunity to litigate its breach of guaranty claims against the defendants in L Co.'s bankruptcy proceeding, and this court was unaware of a case in which a plaintiff has pursued a breach of guaranty claim in a bankruptcy court against a guarantor who was not the subject of the underlying bankruptcy proceeding.

Argued November 17, 2021—officially released March 1, 2022

Procedural History

Action seeking damages for, inter alia, breach of a guaranty agreement, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Lee*, *J.*, denied the defendants' motion for summary judgment, and the defendants appealed to this court. *Affirmed*.

Todd R. Michaels, with whom, on the brief, were *Ann H. Rubin* and *Drew J. Cunningham*, for the appellants (defendants).

Yan Margolin, pro hac vice, with whom was *Patrick McCabe*, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The defendants, Peter Lathouris and Patricia Spanos Lathouris,[1] appeal from the judgment of the trial court denying their motion for summary judgment against the plaintiff, Fairlake Capital, LLC. The defendants claim that the trial court erred in denying their motion for summary judgment because the plaintiff's breach of guaranty claims against them are

[1] We will use the defendants' first names when referring to them in their individual capacities.

barred by the doctrine of res judicata. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant to this appeal. The plaintiff commenced the underlying action on April 26, 2017. The plaintiff filed its second amended complaint, which is the operative complaint, on June 26, 2018. Counts one and two of that complaint allege claims of breach of guaranty against Peter and Patricia, respectively, and count three alleges a claim of unjust enrichment against both defendants.

In its memorandum of decision denying the defendants' motion for summary judgment, the trial court summarized the allegations of the operative complaint as follows: "[O]n or about July 7, 2006, [Patricia] executed a statutory short form power of attorney appointing her husband, [Peter], her attorney-in-fact. On August 1, 2006, Carlyle Financial, LLC (Carlyle) extended a loan to Lagoon Development Corporation (Lagoon) in the amount of $1,500,000, evidenced by a note executed on behalf of Lagoon by [Peter], acting as attorney-in-fact for [Patricia], [the] president of Lagoon. The note was secured by and made subject to the terms of a commercial mortgage on real property located in Bronx, New York. Additionally, [Peter], individually and as attorney-in-fact for [Patricia], executed a guaranty agreement, guaranteeing the debt under the note. Pursuant to the note, Lagoon was required to make monthly interest payments commencing on September 1, 2006, with the entire principal balance and all interest due and payable in full on February 1, 2007. Lagoon defaulted on its payments, and Carlyle accelerated the entire debt. On or about October 9, 2009, Carlyle commenced an action in the Supreme Court of the State of New York for Bronx County to foreclose on the mortgaged property.

"The plaintiff further alleges that on or about October 31, 2013, [before the foreclosure case went to judgment], Lagoon filed for Chapter 11 protection in [the] Bankruptcy Court. In an assignment of claim, dated February 12, 2016 . . . Carlyle assigned its claims against Lagoon in the bankruptcy action, as well as the mortgage and guaranty agreement to the plaintiff. The assignment was recorded in Bronx County. The Bankruptcy Court approved the sale of the mortgaged property for $5,000,000, said sale being consummated on December 20, 2016. At the time of the sale, Lagoon owed the plaintiff $4,160,850, yet the plaintiff only received $1,862,631.54 from the sale of the property, resulting in a shortfall of $2,167,604.57. The plaintiff alleges that the defendants are liable under the guaranty for all amounts due and owing under the note on account of Lagoon's failure to make the payments when they became due."[2]

On October 31, 2018, the defendants filed a motion for summary judgment in which they argued that "[t]here [was] no genuine issue as to any material fact," and that they were entitled to judgment as a matter of law because, among other things, "[the] plaintiff's claims in counts one and two are barred by the doctrine of res judicata and New York Real Property Actions and Proceedings Law § 1371 . . . ."[3] Specifically, the defen-

[2] For clarity, we note that the second amended complaint alleges that both defendants reside in Connecticut. Additionally, the guaranty agreement, which the defendants filed as an exhibit with their motion for summary judgment, provides in relevant part: "The undersigned acknowledge and agree that the loan and this Guaranty have been made and entered into in the State of Connecticut and do hereby agree and consent to in personam jurisdiction and waive any claim of lack of in personam jurisdiction of the courts of the State of Connecticut, and do further waive right to trial by jury. . . .

"This agreement is intended to take effect as a sealed instrument and its validity and construction shall be determined by the laws of the State of Connecticut."

[3] The defendants also argued in their motion for summary judgment that each count was barred by the applicable statute of limitations, that count

dants contended that the plaintiff had an opportunity to raise a claim for a deficiency judgment in the foreclosure or bankruptcy proceedings but failed to do so. In support of the motion, the defendants filed a memorandum of law, various exhibits and the signed and sworn affidavit of Peter. On February 15, 2019, the plaintiff filed an objection to the defendants' motion along with various exhibits. On March 8, 2019, the defendants filed a reply memorandum.

In their memorandum of law, the defendants first argued that New York law applied to the plaintiff's claims, and that § 1371[4] required the plaintiff to obtain

three must be dismissed for lack of subject matter jurisdiction because the plaintiff lacked standing to assert a claim of unjust enrichment and that count three failed as a matter of law because the defendants were not unjustly enriched. The court rejected each of these arguments and denied the defendants' motion on those grounds as well. Those portions of the court's ruling are not at issue in this appeal.

[4] Section 1371 of N.Y. Real Property Actions and Proceedings Law is titled "[d]eficiency judgment" and provides in relevant part: "(1) If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

"(2) Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. . . . Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances

a deficiency judgment. Because the plaintiff did not move for a deficiency judgment in accordance with § 1371, they argued, the proceeds from the sale of the property constituted a full satisfaction of Lagoon's debt to the plaintiff, and the plaintiff was barred from seeking recovery under the guaranty. The defendants further argued that the plaintiff's breach of guaranty claims in counts one and two of the operative complaint were barred by res judicata because the issue of "whether any amount is owed by Lagoon under the note" could have been litigated in the foreclosure action or the bankruptcy proceedings. In making this argument, the defendants again relied on § 1371, stating that "New York law requires that [a] deficiency judgment be sought in the same action as the foreclosure (or in the bankruptcy) within ninety days of the sale."[5]

On April 8, 2019, the trial court held a hearing on the defendants' motion for summary judgment. On August 13, 2019, the trial court issued a memorandum of decision, denying the motion in its entirety. Before reaching

with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

"(3) If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist. . . ." N.Y. Real Prop. Acts. Law § 1371 (McKinney 2008).

[5] We note that the defendants' argument before the trial court focused on § 1371 and how that statute applied in Lagoon's bankruptcy proceedings. Accordingly, the trial court's memorandum of decision similarly focused on the applicability of § 1371 and whether the plaintiff could have sought a deficiency judgment pursuant to that statute in either the foreclosure court or the Bankruptcy Court. On appeal to this court, the defendants do not rely so heavily on § 1371. Instead, they have shifted their focus to the "indebtedness claim" that the plaintiff could have raised in Lagoon's bankruptcy proceedings, regardless of whether a foreclosure sale had taken place. See footnote 6 of this opinion. In so doing, they attempt to borrow the concept of a deficiency judgment from § 1371 and apply it in the context of a bankruptcy sale.

the defendants' res judicata argument, the trial court addressed their argument that it was necessary for the plaintiff to obtain a deficiency judgment pursuant to § 1371. The trial court stated in relevant part: "[A]lthough Carlyle did foreclose on the mortgage, there was no foreclosure sale, either in the foreclosure action or in the bankruptcy proceeding. Instead, the property was sold pursuant to 11 U.S.C. § 363, as provided for in the approved bankruptcy plan. . . . The terms of the [New York Real Property Actions and Proceedings Law], therefore, do not apply because the property was not sold in a New York foreclosure action pursuant to New York law." The trial court concluded that, "[b]ecause the property was not sold pursuant to a foreclosure action, § 1371 is inapplicable and the plaintiff was not required to seek a deficiency judgment." The trial court, relying on that conclusion, denied the defendants' motion for summary judgment, concluding that the breach of guaranty claims against them were not barred by res judicata.

On September 3, 2019, the defendants filed a "motion to reargue/reconsider summary judgment." On January 10, 2020, the trial court denied that motion in all respects relevant to this appeal. On January 29, 2020, the defendants appealed to this court.

On March 18, 2020, the defendants filed a motion for articulation with the trial court "so that [they] and the Appellate Court [could] understand the basis of the trial court's decision denying [their] motion for summary judgment on res judicata grounds." On September 8, 2020, the trial court issued an articulation in which it stated in relevant part: "[T]he court held that [§] 1371 was inapplicable because the defendants removed the proceedings to Bankruptcy Court. As a result, there was no foreclosure sale, which is a condition precedent to an application for a deficiency judgment under New York law . . . . The failure to apply for a deficiency

judgment in the [§] 1371 proceeding cannot support a res judicata finding because it was not only an unnecessary component of the proceeding, it was precluded by the defendants' removal to Bankruptcy Court. The defendants cannot have it both ways. They cannot derail the foreclosure proceeding by removal, and then escape liability because the plaintiff did not obtain a foreclosure sale." Additional facts and procedural history will be set forth as necessary.

The defendants claim that the trial court erred in denying their motion for summary judgment because the plaintiff's breach of guaranty claims against them are barred by res judicata. We disagree.

We begin by setting forth the applicable legal principles and standard of review governing this claim. An interlocutory appeal may be taken from the denial of a motion for summary judgment based on res judicata or collateral estoppel. *Deutsche Bank AG* v. *Sebastian Holdings, Inc.*, 331 Conn. 379, 383 n.3, 204 A.3d 664 (2019). "The doctrine of res judicata holds that an existing final judgment rendered [on] the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. . . . If the same cause of action is again sued on, the judgment is a bar with respect to any claims relating to the cause of action [that] were actually made or [that] might have been made. . . .

"The applicability of the [doctrine] of . . . res judicata presents a question of law that we review de novo. . . . Because [the doctrine is a] judicially created [rule] of reason that [is] enforced on public policy grounds . . . we have observed that whether to apply [the] doctrine in any particular case should be made based [on]

a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments [that] undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . . The judicial [doctrine] of res judicata . . . [is] based on the public policy that a party should not be able to relitigate a matter [that] it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs [that] results when a controversy is finally laid to rest. . . .

"We also have recognized, however, that the application of [the] doctrine has dramatic consequences for the party against whom it is applied, and that we should be careful that the effect of the doctrine does not work an injustice. . . . Thus, [t]he [doctrine] . . . should be flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Citation omitted; internal quotation marks omitted.) *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 65–66, 171 A.3d 409 (2017). "Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 156–57, 129 A.3d 677 (2016). An "adequate opportunity to

litigate" does not include a situation in which a court in prior litigation clearly does not have jurisdiction or clearly would have declined to exercise jurisdiction over a claim pursued by a plaintiff in subsequent litigation before a different court. See *Connecticut National Bank* v. *Rytman*, 241 Conn. 24, 44, 694 A.2d 1246 (1997) ("[i]f . . . the court in the first action *would clearly not have had jurisdiction* to entertain the omitted theory or ground (or, having jurisdiction, *would clearly have declined to exercise it as a matter of discretion*), then a second action in a competent court presenting the omitted theory or ground should [be held not] precluded" (emphasis in original; internal quotation marks omitted)).

The defendants argue that the plaintiff could have pursued its claims under the guaranty agreement[6] in prior litigation. In their brief to this court, they state that "res judicata applies when a plaintiff has the *opportunity* to assert a claim in prior litigation, regardless of whether there is a requirement to do so." (Emphasis in original.) The prior litigation referred to is the New York Supreme Court foreclosure action as to the Bronx property against Lagoon and the Chapter 11 bankruptcy action filed by Lagoon. The crux of the defendants'

[6] In their brief to this court, the defendants state: "[The plaintiff's] claim against [the defendants in the present case] is premised on [the plaintiff's] assertion that, notwithstanding confirmation and completion of [the bankruptcy plan] in Lagoon's bankruptcy proceeding, which included selling the mortgaged property and distributing the proceeds, Lagoon remains indebted to [the plaintiff] in an amount of $2,167,604.57 (the 'indebtedness claim')." Throughout their brief, the defendants use the term "indebtedness claim" to refer to the breach of guaranty claims in the present case, as well as to the request for a deficiency judgment that they argue the plaintiff could have made in Lagoon's foreclosure and bankruptcy cases. Essentially, they use this term to assert that there is a single claim that the plaintiff had the opportunity to raise prior to commencing the present action against them. We disagree, as the claims in the present case allege breaches of the guaranty agreement between the plaintiff and the defendants, rather than breaches of an agreement with Lagoon.

argument is that because the plaintiff had the opportunity to raise its claims in the present case in the prior litigation, but did not, res judicata should bar it from raising those claims now. In response, the plaintiff disputes the applicability of res judicata to this case.

The following additional facts and procedural history are relevant. On December 15, 2016, the Bankruptcy Court issued an "order approving plan administrator's sale of property and proposed distribution of proceeds pursuant to plan." That order stated in relevant part that 33.87 percent of the proceeds from the sale of the property shall be distributed to the plaintiff, "which sum is less than the Allowed Amount of its Class 2C Claim[7] of $4,156,300 . . . ." (Footnote added.) The plaintiff argues that the Bankruptcy Court determined that Lagoon owed it $4,156,300 when it approved the "allowed amount" in its claim.[8] (Internal quotation marks omitted.) In its brief to this court, the plaintiff states: "To the extent this court is persuaded that the plaintiff had to determine the amount owed to it at bankruptcy in order to proceed against the guarantor (which is not the law), the sale order calculated this amount [to be $4,156,300 minus the proceeds from the sale]."

The defendants rely primarily on two bankruptcy cases to argue that the plaintiff "had an adequate opportunity to address its indebtedness claim against Lagoon

[7] Title 11 of the United States Code, § 1122, allows a proponent of a bankruptcy plan to classify substantially similar claims in a particular class. The plan of reorganization that was filed as part of Lagoon's bankruptcy proceedings lists each claim against Lagoon and its corresponding class number. The claim that the plaintiff points to was classified as a Class 2C claim.

[8] In its complaint, the plaintiff alleged that, at the time of the bankruptcy sale, Lagoon owed it a total of $4,160,850. The record contains no explanation for the relatively small discrepancy between that amount and the allowed amount listed in the Bankruptcy Court's sale order.

in Lagoon's bankruptcy."[9] First, in *Crossland Federal Savings Bank* v. *LoGuidice-Chatwal Real Estate Investments Co.*, 159 B.R. 413, 420 (Bankr. S.D.N.Y. 1993) (*LoGuidice-Chatwal*), a bankruptcy court confirmed the foreclosure sale of certain real property and entered a deficiency judgment against the defendants after finding the market value of the property. The named defendant owned property on which an apartment building was constructed. Id., 414. Upon completion of the building, the named defendant obtained a mortgage, and it was unable to make the mortgage payments to the plaintiff. Id. After the plaintiff initiated a foreclosure action against the property, the named defendant filed for bankruptcy. Id. The Bankruptcy Court rendered a judgment of foreclosure and sale of the property. Id. A foreclosure sale was held pursuant to § 1371, and the plaintiff, as the highest bidder, purchased the property. Id. The plaintiff then sought from the Bankruptcy Court a deficiency judgment against the defendants for the difference between the amount owing on the mortgage and the sale price. Id., 414–15.

The defendants in *LoGuidice-Chatwal* argued that the " 'fair and reasonable market value' " of the property was higher than the sale price and sought a finding of this value from the Bankruptcy Court. Id., 415. The Bankruptcy Court held a trial in which the plaintiff and the defendants presented evidence regarding their appraisals of the property. Id. The court then found the market value of the property and entered a deficiency judgment against the defendants pursuant to § 1371. Id., 420.

[9] We disagree with the defendants' characterization of the issue in the present case. The real inquiry with regard to the defendants' res judicata argument is whether Lagoon's bankruptcy proceedings provided the plaintiff with an adequate opportunity to litigate the breach of guaranty claims against the defendants in their individual capacities. In other words, it is not the claim against Lagoon that the plaintiff should have litigated in the prior proceedings but the plaintiff's claim against the defendants as guarantors.

The facts of *LoGuidice-Chatwal* are easily distinguishable from those of the present case. Although *LoGuidice-Chatwal* illustrates that bankruptcy courts can enter deficiency judgments, they can do so only when a property is sold pursuant to a foreclosure sale. As the trial court noted in its memorandum of decision, there was no foreclosure sale in the present case. Nevertheless, the defendants argue that "*LoGuidice-Chatwal* demonstrates that there is no substantive difference between the bankruptcy and the foreclosure as it pertained to the sale of the Lagoon Property and [the plaintiff's] ability to pursue the indebtedness claim to obtain a deficiency judgment." In making this argument, the defendants appear to borrow from the requirements regarding deficiency judgments that are set forth in § 1371 and seek to apply them in the context of a bankruptcy sale. The defendants contend that the plaintiff "had an adequate opportunity to fully litigate its claim against Lagoon" by requesting a deficiency judgment from the Bankruptcy Court once the property was sold. The defendants have not cited any case in which a bankruptcy court has entered a deficiency judgment when a property is sold through a bankruptcy sale, rather than a foreclosure sale. They also do not explain what procedure the Bankruptcy Court would employ for doing so, or why the Bankruptcy Court would have an interest in making such a determination when the defendants were not parties to Lagoon's bankruptcy case.

The second case on which the defendants rely, *In re Futterman*, 602 B.R. 465, 468 (Bankr. S.D.N.Y. 2019) (*Futterman*), involved a deficiency claim by RWNIH-DL 122nd Street 1, LLC (RWN), a creditor, in the bankruptcy case of Hans Futterman, a real estate developer. The deficiency claim arose out of the bankruptcy cases of Ladera Parent, LLC, and Ladera, LLC (Ladera debtors). Id. Futterman signed a personal guaranty for loans

to the Ladera debtors to develop certain real property. Id., 468–69. The loans were secured by, among other things, priority mortgage liens and security interests on the real property and other development rights and interests Futterman had in certain other entities (Ladera properties). Id., 469. The Ladera debtors defaulted on the loans, and both entities filed for bankruptcy. Id. The Ladera properties were sold at auction pursuant to a bankruptcy sale. Id., 470. Around the same time, Futterman filed a personal bankruptcy petition, and RWN subsequently filed a claim in his case asserting a right to recover approximately $10 million pursuant to the guaranty. Id.

In disputing RWN's claim, Futterman relied in part on § 1371 and argued that he was entitled to a hearing to determine the fair market value of the Ladera properties. Id., 472–73. The court noted that § 1371 was inapplicable because no foreclosure judgment had entered, and no foreclosure sale had occurred. Id., 473. Rather, the Ladera properties were sold pursuant to a plan of reorganization. Id. The court reasoned that, even if § 1371 were applicable, "[t]he relevant 'foreclosure' action . . . would have been the proceedings that occurred in the Ladera [d]ebtors' cases, and it would have been in those cases (not . . . Futterman's bankruptcy case) that the amount of a deficiency judgment against the Ladera [d]ebtors would have been determined. The [c]ourt did make a determination, in the Ladera [d]ebtors' cases, of the amount of the deficiency claim for which the Ladera [d]ebtors themselves were liable." Id., 474. Furthermore, the RWN plan of reorganization provided that RWN would have an "RWN Deficiency Claim" against the Ladera debtors with a set formula as to how the deficiency would be calculated. (Internal quotation marks omitted.) Id. Thus, the court reasoned, in this hypothetical scenario, RWN would be able to

hold Futterman liable for the deficiency calculated in the Ladera debtors' bankruptcy cases.

In the present case, the defendants rely on the *Futterman* court's hypothetical discussion of § 1371 to argue that "claims identical to [the plaintiff's] indebtedness claim can be addressed by the Bankruptcy Court, regardless of whether . . . § 1371 applies." Again, the defendants fail to cite a case, and we have found none, in which a bankruptcy court has entered a deficiency judgment after a property is sold pursuant to a bankruptcy sale. Furthermore, the facts of *Futterman* are significantly distinguishable from the facts in the present case. Futterman himself had filed for bankruptcy, and, consequently, the Bankruptcy Court had reason to determine his obligations to his creditors arising from the guaranty. Id., 470. In the present case, however, the defendants had not filed for bankruptcy and were not parties to the Bankruptcy Court proceeding. Therefore, there was no reason for the Bankruptcy Court to address whether there was any deficiency from the sale that would trigger their obligations under the guaranty.

Accepting the defendants' argument as correct, however, the record indicates that the Bankruptcy Court did, in fact, determine the remaining amount that Lagoon owed the plaintiff after the sale of the property when it approved the "[a]llowed amount" in the plaintiff's Class 2C claim. Although the defendants assert on appeal that the Bankruptcy Court's statement that the allowed amount is $4,156,300 was in error or a misstatement, we are in no position to resolve such a factual question. Thus, the defendants' suggestion, at most, raises a question of fact that further undermines their claim that they are entitled to summary judgment. Regardless of the allowed amount recognized by the Bankruptcy Court, however, pursuant to the terms of the guaranty agreement, the parties were to litigate

claims arising under the agreement in Connecticut state court.

In the alternative, the defendants argue that the plaintiff could have obtained relief from the bankruptcy stay to pursue its foreclosure action in New York state court. Had the plaintiff pursued the foreclosure action, they argue, the plaintiff could have obtained a deficiency judgment from that court pursuant to § 1371. We reject the notion that the plaintiff was required to do so in order to avoid the application of res judicata.

As the trial court noted, Carlyle commenced a foreclosure action in New York state court, but, because the defendants filed for bankruptcy and the property was sold pursuant to a bankruptcy sale, there was no foreclosure sale. By its terms, § 1371 only applies when a foreclosure sale occurs. See, e.g., *In re Futterman*, supra, 602 B.R. 473 ("[§] 1371 only applies if a foreclosure judgment is issued and if a foreclosure sale occurs"); *Berkshire Bank* v. *Tedeschi*, Docket No. 1:11-CV-0767 (LEK/CFH), 2013 WL 1291851, *8–9 (N.D.N.Y. March 27, 2013) (§ 1371 did not apply because defendant sold property and no foreclosure sale occurred), aff'd, 646 Fed. Appx. 12 (2d Cir. 2016); *Hometown Bank of Hudson Valley* v. *Colucci*, 127 App. Div. 3d 702, 704, 7 N.Y.S.3d 291 (2015) (§ 1371 did not apply because no foreclosure sale occurred). Thus, because the Lagoon property was sold pursuant to the bankruptcy plan, § 1371 did not apply to require the plaintiff to seek a deficiency judgment from the New York state court.

Nevertheless, the defendants argue that the plaintiff had the *opportunity* to litigate its "indebtedness claim" against Lagoon in the foreclosure action by seeking relief from stay in the bankruptcy proceedings. In support of this argument, they repeatedly cite *Steuben Trust Co.* v. *Buono*, 254 App. Div. 2d 803, 803–804, 677 N.Y.S.2d 852 (1998), and *In re Pittsford Polo Club, Inc.*,

188 B.R. 339, 344–45 (Bankr. W.D.N.Y. 1995), two cases that illustrate that bankruptcy courts have the power to lift automatic stays in order to allow parties to pursue pending state court foreclosure actions against debtors' real property. The foreclosure action against Lagoon was never completed because Lagoon filed for bankruptcy.[10] Thus, the relevant proceeding here is the bankruptcy proceeding, and the issue is whether the plaintiff had the opportunity to fully litigate its breach of guaranty claims in *that* forum. By filing for bankruptcy, Lagoon evinced its intention to avoid a foreclosure sale. It would be unfair to prevent the plaintiff from pursuing the present action against the defendants merely because the plaintiff did not take issue with having the sale of the property occur in the venue of Lagoon's choosing.

In sum, we conclude that the trial court correctly held that the plaintiff's breach of guaranty claims against the defendants were not barred by the doctrine of res judicata. On the basis of our review of the case law and the record before us, we are unpersuaded that the plaintiff should be precluded, on the basis of res judicata, from bringing its claims in counts one and two. First, we are not satisfied that the plaintiff had an adequate opportunity to litigate its breach of guaranty claims against the defendants in Lagoon's bankruptcy proceeding. We are unaware of a case in which a plaintiff has

[10] On May 16, 2013, the foreclosure court issued an amended order regarding Carlyle's motion for summary judgment in the foreclosure action against Lagoon. That order provided that a referee would be appointed to determine the amount owed, and, "on the confirmation of [the] [r]eferee's report, [Carlyle] shall have judgment of foreclosure and sale as prayed for in the [c]omplaint . . . ." On October 31, 2013, Lagoon filed for bankruptcy and the foreclosure action automatically was stayed pursuant to 11 U.S.C. § 362 (2012). The record does not indicate that the court ever rendered a judgment of foreclosure. The record contains a "[c]ase [d]etail" for the foreclosure action from the New York State Unified Court System that simply lists a "[d]isposition [d]ate" of September 20, 2018.

pursued a breach of guaranty claim in a bankruptcy court against a guarantor who is not the subject of the underlying bankruptcy proceedings. See *Connecticut National Bank* v. *Rytman*, supra, 241 Conn. 44 (plaintiff does not have adequate opportunity to litigate when court in prior litigation would not have had jurisdiction over ground pursued by plaintiff in current litigation).

Furthermore, it was Lagoon, not the defendants, that was the subject of the bankruptcy proceedings. Thus, the Bankruptcy Court would not have had an interest in any contractual dispute between the plaintiff and the defendants, as guarantors, regarding the amount that the defendants owed. The defendants have not pointed to any relevant authority in which a guarantor has used res judicata to preclude a creditor from pursuing claims against it when it was not a party to the bankruptcy proceedings against the debtor.

We similarly conclude that the underlying principles of the doctrine of res judicata would not be served by precluding the plaintiff from bringing its claims in this case. In our view, this would not reduce repetitive litigation or prevent inconsistent judgments, nor would it provide repose to vexatious litigation. See *Wellswood Columbia, LLC* v. *Hebron*, supra, 327 Conn. 66. Finally, we conclude that the application of res judicata would unfairly impede the plaintiff's interest in the vindication of a potentially just claim. Id.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DANIEL M.*
(AC 44355)

Alvord, Cradle and Lavine, Js.

Syllabus

Convicted of the crimes of sexual assault in the fourth degree and risk of injury to a child, the defendant appealed to this court. At trial, the trial court admitted the testimony of the victim, W, and W's mother, that the defendant physically abused W's mother. The state offered this testimony to explain W's alleged delayed disclosure of sexual abuse by the defendant when she was a minor. On appeal, the defendant claimed that the court erred in admitting the allegations of domestic violence as evidence of uncharged prior misconduct. *Held* that the defendant could not prevail on his claim that the trial court abused its discretion in admitting the uncharged misconduct evidence because it incorrectly determined that the probative value of that evidence was not substantially outweighed by its prejudicial effect: the evidence was relevant because, when assessed in light of the expert testimony offered at trial regarding domestic violence as a reason a victim may delay disclosure of abuse, it was probative of W's credibility, as it provided an explanation as to why she delayed in disclosing the sexual abuse against her, although the defendant did not hit W or threaten her with violence, W testified that she observed the violence between the defendant and her mother, which occurred on a near weekly basis, and it scared her; moreover, the probative value of the challenged testimony was not outweighed by its prejudicial effect, as the evidence of domestic violence between the defendant and W's mother was less extreme and therefore less prejudicial than the uncharged domestic violence evidence considered by this court in *State* v. *Gerald A.* (183 Conn. App. 82), and it did not tend to unnecessarily arouse the jurors' emotions, especially in light of the nature of the crimes with which the defendant had been charged, namely, sexual abuse of a child, did not create a distracting side issue as it pertained to the credibility of the state's key witnesses, and presentation of the evidence did not consume an inordinate amount of time during the trial; furthermore, the fact that the court provided a contemporaneous,

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

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

limiting instruction during the testimony about the domestic violence, as well as a limiting instruction in its final charge to the jury, reduced any prejudicial impact the evidence might have had.

Argued January 3—officially released March 1, 2022

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number one, and tried to the jury before *Blawie*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Sydney Geer, certified legal intern, with whom were *Matthew A. Weiner*, assistant state's attorney, and, on the brief, *Paul J. Ferencek*, state's attorney, *Daniel Cummings*, assistant state's attorney, *Elizabeth K. Moran*, assistant state's attorney, and *Jennifer F. Miller*, former assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Daniel M., appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (2)[1] and two counts of risk of injury to a child in violation of General

[1] General Statutes § 53a-73a (a) (2) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when . . . such person subjects another person to sexual contact without such other person's consent . . . ."

Statutes § 53-21 (a) (2).[2] On appeal, the defendant claims that the trial court erred in admitting evidence of uncharged prior misconduct. We disagree and, therefore, affirm the judgment of conviction.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. In or about 2007,[3] the defendant met M. R., the victim's mother, at a party. Although the defendant was married with children, M. R. and the defendant began a sexual relationship.[4] Early in their relationship, M. R. became pregnant with the defendant's daughter, M. At around the same time, M. R. traveled to the Philippines, in order to move her daughter, W, who was born in 2002 and was five or six at the time of the move, to the United States.[5]

[2] General Statutes § 53-21 (a) (2) (B) provides in relevant part: "Any person who . . . has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

General Statutes § 53a-65 (8) defines "[i]ntimate parts" as "the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts."

[3] The defendant testified that he met M. R. in 2009. The testimony of W and M, however, coupled with the defendant's testimony, establishes that they met in 2007. Given that W arrived in the United States when she was five or six years old and was born in 2002, and because her arrival coincided with the start of the defendant's relationship with M. R., the two must have met in 2007 or 2008, at the latest. We note this discrepancy but conclude that it is immaterial to our disposition of the defendant's claim on appeal.

[4] Shortly after the defendant began the relationship with M. R., his wife discovered the affair. The defendant then made no effort to hide that he has dividing his time between the two women and their children. The marriage continued until 2013. The defendant's sexual relationship with his wife continued after the dissolution of their marriage.

[5] The defendant was unaware of W's existence until M. R. left to pick up W from the Philippines.

Initially, the family, which included W, M. R., W's grandmother, and W's half-sister M, lived in a very small apartment in Norwalk. Because W's grandmother did not like the defendant, he would "sneak in" to the apartment at night to be with M. R. When W was in fifth grade, the family moved to an apartment in Stamford. At this point, the defendant began to spend more time in the apartment and no longer covertly arrived at night.

While the family lived in Stamford, when W was twelve or thirteen years old, the defendant began sexually abusing W. "It started with little subtle things" at first, and W became "uncomfortable physically" around the defendant. "During car rides, [the defendant] would place his hand on [W's] upper inner thigh and force [her] to hold his hand."[6] This would happen every time the defendant gave her a ride. The defendant would also "hug [W] from behind and press himself against [her]." "The feeling of him" made her uncomfortable because she testified: "I would just feel that he was aroused behind me."

Additionally, on weekends when her mother and grandmother were at work and W was still in bed,[7] the defendant would climb up to her top bunk, get in the bed, hug her from behind, and touch her breasts. As he "cuddle[d]" her, she would "feel that he was aroused." In an attempt to make him stop, W would tell the defendant that he was going to break the bunk bed, but he would reply that it was fine. W testified that when the defendant would do this "[it] felt like my whole body went numb. I—even if I could try to scream for help my mouth wouldn't open."

[6] The defendant testified that W used to sit in the back seat of the car whenever he gave her a ride, but she moved to the front when he encouraged her to sit closer to him.

[7] Due to the small size of the apartment, the living room also functioned as W's bedroom. W shared a bunk bed with her half sister, M.

On one occasion, in or around the summer of 2016, the defendant was at the apartment with W and M—M. R. and W's grandmother were at work—watching television in the living room. The family kept a mattress in the living room, which they would pull out in front of the couch when watching television. On this evening, M was on the couch and W and the defendant were laying on the pullout mattress (pullout mattress). While watching television, after checking to see that M was not looking, the defendant pulled a blanket over himself and W and moved closer to W. He then put his hand under W's shirt and "grop[ed]" her breasts, commenting that "[they] were coming in nicely" and were "a nice shape." He then "placed his hand under [W's] pants and underwear and touched [her] vagina" and whispered to her "that it was his." The defendant then forced W to touch his erect penis and told her to "shake it." W then pretended to fall asleep, and the defendant left the room.

Another incident occurred around the same date. W was sitting on the pullout mattress watching television when the defendant came into the room and laid down on the couch. He then asked W if she could keep a secret, grabbed W's hand, forced her to touch his erect penis, and asked her how it felt. W did not respond and pretended to fall asleep, at which point the defendant left. Although the defendant continued to touch W's leg and hold her hand during car rides, no subsequent incidents of sexual abuse occurred.

At around this time, M. R. noticed a change in W's behavior when she was around the defendant. M. R. testified about two incidents when W began to cry for no clear reason. One night, when out to dinner with the defendant and M, W began to cry and would not tell M. R. what she was upset about. Later, on a trip to New York City, the family was taking a ferry to see the Statue of Liberty and W started crying and again told

her mother that she did not want to talk about what was wrong. M. R. expressed concern to the defendant, who responded, "she's fine, she's just like jealous that we're together with [M]. And she just want[s] attention."

In late September, 2016, W told her mother about the defendant's abuse.[8] M. R. immediately called the defendant and told him to come to the apartment right away. When he arrived, M. R. told the defendant that W had told her that he had "touch[ed] her private part."[9] Initially, the defendant claimed that W was lying because she "didn't want him around anymore." [10] He eventually admitted to touching W and claimed that he did it because he wanted to break up with M. R. He later told M. R. that he did it because he wanted to get close to W and said that "if he and [W] had like sexual thing . . . she will feel comfortable around him." M. R. did not tell anyone about the abuse.[11] The defendant did not cease living in the apartment.[12]

In November, 2016, the family moved to Greenwich, and the defendant began to spend even more time living with the family. In early 2017, W told her aunt about the abuse and her aunt encouraged her to tell someone at school.[13] W then told her school's social worker, who

[8] M. R. testified that W told her that she no longer wanted the defendant in the house because he had been touching "her private part."

[9] The defendant testified that he assumed that M. R. had discovered his relationship with a third woman and that was why she had called him to the apartment.

[10] Even as late as the investigation into the defendant's conduct, the defendant maintained that W was lying and told M. R. that she should send W back to the Philippines.

[11] After the confrontation, M. R. took W shopping with her grandmother. M. R. said nothing about the abuse. W understood this as meaning the information should be kept between the two of them.

[12] In fact, the defendant only stopped living in the apartment when he was arrested in July, 2017.

[13] W testified that an incident that occurred on New Year's Eve of 2016 impacted her decision to tell her aunt about the abuse: "We were coming home from a New Year's Eve party . . . . [The defendant] was drunk but he insisted that he was going to drive. The house [we were leaving] was all the way on top of a hill. And when he was pulling out of the driveway, he

reported the abuse to the Stamford Police Department. Following the police investigation, the defendant was arrested.

Prior to trial, on July 15, 2019, the state filed a notice of its intent to present evidence of uncharged misconduct pursuant to § 4-5 (c) of the Connecticut Code of Evidence.[14] Specifically, the state notified the defendant that it intended to present evidence "of the defendant's acts of domestic violence toward the mother of the victim at times prior to the victim reporting the events from which the current case arises." The state asserted that "[t]his evidence is relevant to corroborate crucial prosecution testimony, to complete the story, and to explain any alleged delay in disclosure of sexual abuse."

The defendant filed a written objection to the uncharged misconduct evidence, arguing that "[t]he probative value of such evidence is outweighed by its prejudicial value" and that "the evidence would also prolong the trial as evidence may be introduce[d] to counter the allegation of domestic violence."

On September 9, 2019, a hearing was held before the court, *Blawie*, *J.* The state argued that the uncharged misconduct evidence would "corroborate crucial prosecution testimony, and [would] explain any delayed disclosure." The state relied on *State* v. *Gerald A.*, 183

sped all the way down the hill and we almost crashed into the tree." The defendant and M. R. then got into a "huge fight" which became verbal and physical.

Although W testified that she told her aunt about the abuse in December, 2016, given this testimony about the New Year's Eve incident, she likely spoke to her aunt in January, 2017, and not December, 2016. We note this discrepancy but conclude that it is immaterial to our disposition of the defendant's claim on appeal.

[14] Section 4-5 (c) of the Connecticut Code of Evidence provides: "Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as 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. App. 82, 106–10, 191 A.3d 1003 (concluding that court did not abuse its discretion in admitting evidence of domestic violence as uncharged misconduct evidence in child sex abuse case as explanation for delayed disclosure of abuse), cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018), for the proposition that evidence of domestic violence can show that W "had reason to fear the defendant because he would regularly commit acts of violence in front of her against her mother causing injuries to her mother, and that explains in part why she did not make an immediate disclosure when the alleged abuse occurred." Defense counsel objected to the uncharged misconduct, arguing that the evidence was more prejudicial than probative. Defense counsel acknowledged, however, that *Gerald A.* "seem[ed] to be on point."

The court then made the following oral ruling: "I think it is pretty much on point. I understand that there's also maybe some statements made by either the complaining witness or a family member that would undermine the allegations. And again it may be irrelevant on multiple points.

"But I think that I will await the evidence, but I'm inclined to allow it if there's an adequate foundation. If I do allow it, I intend on using language similar, if not identical, to the limiting instruction offered by the trial court in *State* v. *Gerald A.* . . .

"So again, I'm not necessarily granting the motion. I am going to ask you to excuse—that the jury be excused at the time you intend to proffer it, and then I will make a ruling on the basis of the record as it exists at that time. . . .

"All right. If there's an adequate foundation, I'm inclined to allow it, but I'll have to await the evidence."

On September 11, 2019, the first day of evidence, the state called W as a witness. W testified that the defendant and her mother would get into fights that often turned physical.[15] She testified that the defendant "would grab [M. R.] by the hair, grab her by the arm and twist her arm . . . pull her hair, choke her." W testified that this violence scared her and was the reason she "never liked" the defendant. Following this testimony, the court gave a limiting instruction.[16] W then testified that she had observed bruises on her mother's arms and stomach as a result of the violence. W also testified that once, when she was twelve years old, she yelled at the defendant to stop hitting her mother, and he "grabbed [W] and raised his voice . . . and started yelling . . . ."

The state also called M. R. during its case-in-chief. M. R. testified that she and the defendant fought every week, that the fights sometimes became physical, and that the defendant would grab her, pull her hair, and choke her.[17] She also testified that W and M had wit-

[15] W also testified that many of these fights were provoked by the fact that the defendant continued to have a sexual relationship with his wife (later ex-wife) and M. R. She also testified that M. R., and not the defendant, was sometimes the initial aggressor.

[16] The court instructed the jury as follows: "[T]he evidence that you're hearing, I must instruct you, that evidence is to be used by you if you decide to use it at all, for one purpose. And that is to assess the credibility of this witness' testimony.

"It cannot be used for any other purpose, including as substantive evidence that the defendant is guilty or not guilty of the crimes charged in this case. It only may be used to assess the credibility of this witness.

"And you cannot use that evidence that the defendant allegedly attacked the witness' mother in determining whether the defendant is guilty or not guilty of the crimes charged in this case. I will give you more instructions on this in a moment.

"But understand that this evidence is offered for a limited purpose."

[17] M. R. testified that she and the defendant fought over the situation with his other family and her jealousy. She also testified that sometimes she was the one who became violent and would "scratch" the defendant.

nessed these verbal fights become physical. The court then provided a limiting instruction.[18]

The state also presented the testimony of Lynn Nichols, the director of victim's services at the Women's Center of Greater Danbury and a forensic interviewer. Nichols testified that domestic violence can be a reason for delayed disclosure of abuse and that a victim could "fear that another family member might get hurt" if they were to disclose the abuse. In addition, when asked by the prosecutor, Nichols agreed that "if . . . the person's primary caregiver was a victim of violence by the abuser" it could "affect their willingness to come forward."

After the close of evidence, the court instructed the jury with respect to this evidence as follows: "Now, you will recall that I told you at the start of this trial that some testimony may be admitted for a limited purpose. Any testimony which I've identified as being limited to a purpose must be considered by the jury only as it relates to the limits for which it was allowed. And you should not consider such testimony in finding any other facts as to any other issue.

"In this case the state has offered evidence through both the complainant, [W], and the complainant's mother, [M. R.], about the defendant's alleged acts of domestic violence with [M. R.]. This evidence was not admitted to prove the bad character, propensity, or criminal tendency of the defendant. Such evidence was admitted solely in an attempt to show or to establish a possible reason why the complainant may have delayed reporting the allegations of sexual assault. However, you may not consider such evidence as establishing a predisposition on the part of the defendant to commit

[18] The court instructed: "[T]his evidence is being offered for a limited purpose and I will explain that to you more fully in my final instructions. But recall, the defendant's not on trial for domestic violence. All right."

any of the crimes charged or to demonstrate a criminal propensity. You may consider such evidence if you believe it and if you further find that it logically, rationally, and conclusively supports the issues for which it is being offered by the state but only as it may bear on the issues of a possible delay in reporting.

"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 issues for which it was offered by the state, then you may not consider that testimony for any purpose. Otherwise it may predispose your mind uncritically to believe that the defendant [may be] guilty of the offenses charged merely because of alleged acts of domestic violence. For this reason, you may consider the evidence only on the issues of a possible reason for a delayed reporting by [W] and for no other purposes."

The jury found the defendant guilty of all four counts: two counts of sexual assault in the fourth degree in violation of § 53a-73a (a) (2) and two counts of risk of injury to a child in violation of § 53-21 (a) (2). The court sentenced the defendant to a total effective term of twenty years of incarceration suspended after eight years followed by twenty years of probation. In addition, the court entered a standing protective order with respect to W and M. R. and ordered lifetime registration as a sex offender. This appeal followed.

On appeal, the defendant claims that the trial court improperly admitted evidence of uncharged misconduct in the form of the testimony of M. R. and W that the defendant physically abused M. R. Specifically, the defendant asserts that "[t]he trial court incorrectly determined that the probative value of this evidence was not substantially outweighed by its prejudicial effect." We are not persuaded.

We begin by setting forth the applicable standard of review and legal principles 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. . . .

"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. . . . 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.[19] 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." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Gerald A.*, supra, 183 Conn. App. 106.

We first address the relevance of the challenged evidence. The defendant argues that the evidence had "little to no" probative value for the purposes of the balancing test, suggesting that "[o]vercoming the probative value of this evidence with undue prejudice would be easier than ripping through a wet paper bag." In making

[19] "Under the first prong of the test, the evidence must be relevant for a purpose other than showing the 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." (Footnote omitted; internal quotation marks omitted.) *State* v. *Gerald A.*, supra, 183 Conn. App. 106–107.

this argument, the defendant attempts to distinguish *State* v. *Gerald A.*, supra, 183 Conn. App. 82, by comparing the nature of the domestic violence evidence in that case to the domestic violence evidence in the present case.

In *Gerald A.*, this court addressed the use of domestic violence as uncharged misconduct evidence in child sexual abuse cases and determined that the "uncharged misconduct evidence provided an explanation for why [the children] 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." Id., 108.

The defendant points out that the domestic violence in *Gerald A.* included violence against the victim of the sexual abuse, was long-standing, and involved threats of violence against the victim if she were to disclose the abuse. Therefore, because the defendant in this case did not threaten W, he never hit W, and the violence was not as "long-standing,"[20] the defendant argues that "the entire issue of domestic violence did not shed any light on whether [W] was credible or whether there was a legitimate reason for her delayed disclosure." We disagree. Assessed in light of the expert testimony regarding delayed disclosure, that the defendant did not hit W or threaten her with violence does not diminish the fact that W observed the violence between the defendant and her mother and it scared her. The evidence of the domestic violence between the defendant and M. R., which occurred on a near weekly basis, is probative of W's credibility as it provided an explanation as to why W delayed in disclosing the sexual

[20] We note that M. R. testified that she fought with the defendant every week and that the relationship between M. R. and the defendant lasted "[a]bout nine years."

abuse.[21] See *State* v. *Gerald A.*, supra, 183 Conn. App. 108. Therefore, we disagree with the defendant's contention that the evidence had "little to no" probative value.

We next turn to whether the probative value of the prior misconduct evidence outweighed its prejudicial effect. See id., 106. "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 undue delay, waste of time or needless presentation of cumulative evidence. [T]he determination of whether the prejudicial impact of evidence outweighs it 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., 108–109.

The defendant argues that the evidence was "dangerously prejudicial" because it unnecessarily aroused the jurors' emotions and created a secondary issue that

[21] "Issues 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.) *State* v. *Estrella J.C.*, 169 Conn. App. 56, 98, 148 A.3d 594 (2016); see also footnote 19 of this opinion.

became "a side show." Therefore, he asserts that "[g]iven the evidence's scant probative value, this prejudicial impact outweighed its probative value and the trial court erred in granting the state's motion to admit it into evidence." The state contends that the probative value of the evidence outweighed any prejudicial effect, especially in light of the nature of the case and the court's limiting instructions.[22] We agree with the state.

We conclude that the court did not abuse its discretion in determining that the probative value of the challenged testimony was not outweighed by its prejudicial effect. At the outset, we note that this court previously considered uncharged misconduct evidence in *State* v. *Gerald A.*, supra, 183 Conn. App. 109, and concluded that the trial court properly determined that the probative value of the evidence outweighed its prejudicial effect. In that case, the state presented evidence of the defendant hitting his children with a belt on multiple occasions, hitting their mother in front of them, and threatening them with violence if they disclosed the sexual abuse as relevant to why the two children delayed reporting the sexual abuse that they suffered at the hands of their father. Id., 101–104. Because the

[22] The state also argues that that the defendant's claim is not preserved because "the trial court expressly deferred its ruling on the admissibility of the uncharged misconduct evidence until the state presented such evidence" and the defendant was required to object to the evidence when it was presented at trial in order to preserve the claim of evidentiary error. Thus, the state asserts that the defendant's claim is unreviewable for lack of a final ruling. The defendant, however, argues that the court's "ruling was unambiguous that the evidence was coming in subject to the state's ability to lay foundation" and that because he objected and the objection was overruled, he "had no further role in this procedure."

Here, the defendant objected to the evidence and the court held a hearing, ruled that, barring a lack of foundation, the evidence was admissible, noted that it would provide a limiting instruction along with the evidence, and provided such a limiting instruction. Further, we agree with the defendant's assertion in his reply brief that the cases on which the state relies fail to support its contention that the defendant's claim is not preserved. Therefore, we conclude that the defendant's claim is reviewable.

uncharged misconduct evidence was dissimilar from the charged crimes, went to the essence of the state's case (i.e., the credibility of the victim-witnesses), and did not consume an inordinate amount of time at trial, this court concluded that the trial court did not abuse its discretion in admitting the evidence. Id., 109–10. Here, as the defendant points out, the evidence of domestic violence is less extreme and, therefore, less prejudicial, than the domestic violence evidence in *Gerald A.*, supporting our conclusion that the uncharged misconduct evidence was properly admitted in this case.

Furthermore, the uncharged misconduct evidence did not tend to unnecessarily arouse the jurors' emotions, especially in light of the nature of the crimes with which the defendant had been charged, namely sexual abuse of a child. See id., 109; 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).

Moreover, despite the defendant's assertions to the contrary, the evidence 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.*, 169 Conn. App. 56, 99–100, 148 A.3d 594 (2016). Additionally, presentation of the uncharged misconduct evidence and counterproof of it did not consume an inordinate amount of time during the trial.[23] Therefore, the court did not abuse its discretion in admitting the uncharged misconduct evidence.

Finally, the fact that the court provided a contemporaneous limiting instruction during both W's and M. R.'s

[23] Further, there was no surprise because the state notified the defendant of its intent to present this evidence and court held a hearing and gave the defendant the opportunity to be heard on the issue. See *State* v. *Gerald A.*, supra, 183 Conn. App. 109–10.

testimony about the domestic violence, as well as in its final charge to the jury, reduced any prejudicial impact the evidence might have had.[24] See *State* v. *Gonzalez*, 167 Conn. App. 298, 310, 142 A.3d 1227 ("[w]here . . . [t]he court also [gives] a limiting instruction immediately, the prejudicial impact is lessened and the evidence is more likely admissible" (internal quotation marks omitted)), cert. denied, 323 Conn. 929, 149 A.3d 500 (2016); see also *State* v. *Pereira*, 113 Conn. App. 705, 715, 967 A.2d 121 ("Proper limiting instructions often mitigate the prejudicial impact of evidence of prior misconduct. . . . Furthermore, a jury is presumed to have followed a court's limiting instructions, which serves to lessen any prejudice resulting from the admission of such evidence." (Internal quotation marks omitted.)), cert. denied, 292 Conn. 909, 973 A.2d 106 (2009).

The judgment is affirmed.

In this opinion the other judges concurred.

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[24] The defendant asks us to disregard our long-standing rule that a jury is presumed to have followed a court's limiting instruction. The defendant argues that "[s]omewhere, in sorting out these salacious details and watching this drama play out in the courtroom, the jury was supposed to limit their consideration of evidence of domestic violence to explain why [W] should be believed and why she delayed her disclosure. That would have been next to impossible. The jury was put on a street corner at the time of a car crash and told to look away. The jury's task was beyond the limits of human nature, they could not have been expected not to be offended by this evidence." According to the defendant, the "noxious cocktail of the facts of the case" was "too much for the jury to bear." As the state correctly points out in its brief to this court, however, "[t]hat argument finds no support in either the law or the record." See *State* v. *Pereira*, 113 Conn. App. 705, 715, 967 A.2d 121, cert. denied, 292 Conn. 909, 973 A.2d 106 (2009). Consequently, we reject it.

JOAN O'ROURKE *v.* DEPARTMENT OF LABOR ET AL. (AC 43519)

Alvord, Prescott and DiPentima, Js.

Syllabus

The plaintiff, a former employee of the defendant Department of Children and Families (department), appealed to this court from the judgment of the trial court dismissing her administrative appeal from the decision of the defendant Department of Labor, State Board of Labor Relations, concluding that she had failed to establish that the defendant union had breached its duty of fair representation during arbitration proceedings with the department regarding whether the department had just cause to terminate the plaintiff's employment. In her position with the department, the plaintiff investigated allegations of child abuse and neglect. After completing an investigation of a particular case involving a mother's alleged neglect of her two children, the plaintiff submitted to her supervisor, F, a draft investigative report, which concluded that, with respect to one of the children, the allegation was not substantiated. F disagreed with various parts of the draft report and made various changes in the final draft of that report to address her concerns. On the basis of the information included in the final report, the department filed an application for an ex parte order of temporary custody. The plaintiff, believing that the final report contained false and misleading information and omitted certain exculpatory information, and without notifying or obtaining permission from the department, sent a copy of the draft report to the attorney who represented the mother in the order of temporary custody proceedings. Thereafter, a human resources specialist for the department initiated an investigation of the plaintiff relating to her disclosure of the confidential, draft report. He determined that she had violated various department policies, a state statute ((Supp. 2010) § 17a-28), and a state regulation (§ 5-240-1a (c)), and the department terminated her employment. The union filed a grievance on behalf of the plaintiff, claiming that the department had terminated her employment without just cause in violation of the applicable collective bargaining agreement. C, an agent of the union, represented the plaintiff in the proceedings related to her grievance. After a hearing officer dismissed the grievance, the union requested review by an arbitrator. At the conclusion of the arbitration proceedings, the arbitrator dismissed the grievance, and the plaintiff filed a complaint with the board against both the department and the union. The board dismissed the action, and the plaintiff appealed to the trial court, which dismissed her appeal. *Held*:

1. This court declined to review the plaintiff's unpreserved claim that the union breached its duty of fair representation by failing to argue to the arbitrator that the plaintiff was required to release the draft report

pursuant to (Supp. 2010) § 17a-28 (f) and (m): the plaintiff conceded that she did not raise her argument concerning the applicability of the statute to the board; moreover, the mere fact that the arbitrator, the board, and the union were aware that (Supp. 2010) § 17a-28 existed was insufficient to establish that the plaintiff distinctly or precisely articulated to the board why the statute was applicable or how it obligated the plaintiff to release the draft report.

2. The plaintiff failed to meet her burden of demonstrating that the board had acted unreasonably, arbitrarily, illegally or in abuse of its discretion in determining that the union had not acted arbitrarily or in bad faith in its representation of the plaintiff by failing to argue that *In re Lindsey P.* (49 Conn. Supp. 132) required the plaintiff to disclose the draft report: it was unclear whether the directive issued by the trial court in *In re Lindsey P.* applied outside of that case and to conclude that C had acted arbitrarily or in bad faith by failing to present such a legal argument would impose a duty on the union greater than that of fair representation; moreover, even if the directive set forth in *In re Lindsey P.* did apply outside of that case, it arguably was inapplicable to the plaintiff in the present case, as it instructed the department, rather than individual social workers, to include information that was exculpatory or favorable to the parents in its application for an ex parte order of temporary custody; furthermore, the trial court properly determined that substantial evidence supported the factual finding of the board that C had argued to the arbitrator that the draft report contained exculpatory information, as he brought to the attention of the arbitrator the differences between the draft and final reports.

Argued December 1, 2021—officially released March 1, 2022

Procedural History

Appeal from the decision of the named defendant dismissing the plaintiff's complaint challenging the termination of her employment by the defendant Department of Children and Families and alleging that the defendant AFSCME, AFL-CIO, Council 4, Local 2663 breached its duty of fair representation, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Austin Berescik-Johns, for the appellant (plaintiff).

Frank N. Cassetta, general counsel, with whom was *J. Brian Meskill*, assistant general counsel, for the appellee (named defendant).

Richard T. Sponzo, assistant attorney general, for the appellee (defendant Department of Children and Families).

Anthony J. Bento, for the appellee (defendant AFSCME, AFL-CIO, Council 4, Local 2663).

Opinion

PRESCOTT, J. In this administrative appeal, the plaintiff, Joan O'Rourke, appeals from the decision of the Superior Court, affirming the dismissal of her hybrid action[1] against the defendant AFSCME, AFL-CIO, Council 4, Local 2663 (union) and the defendant Department of Children and Families (department) by the Department of Labor, State Board of Labor Relations (board), a codefendant in this case. Following the termination of the plaintiff's employment with the department, the union filed a grievance on her behalf and represented her in an arbitration proceeding. After the arbitrator

[1] "[An] employee may seek judicial enforcement of his contractual rights [under a collective bargaining agreement when] . . . the union has sole power under the [agreement] to invoke the higher stages of the grievance procedure . . . and . . . the [employee] has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. . . . [In such a case, an employee may file a hybrid action, which] comprises two causes of action. The [action] against the employer rests on . . . a breach of the collective-bargaining agreement. The [action] against the union is one for breach of the union's duty of fair representation . . . . [T]he two claims are inextricably interdependent. To prevail against either the [employer] or the [u]nion . . . [the employee] must [show] not only . . . that [her] discharge was contrary to the [agreement] but must also carry the burden of demonstrating breach of [the] duty [of fair representation] by the [u]nion. . . . The [action] is thus not a straightforward breach-of-contract [action] . . . but a hybrid [breach of contract]/fair representation claim, amounting to a direct challenge to the private settlement of disputes under [the collective bargaining agreement]." (Citation omitted; internal quotation marks omitted.) *Piteau* v. *Board of Education*, 300 Conn. 667, 676–77 n.12, 15 A.3d 1067 (2011).

determined that the department had just cause to terminate the plaintiff's employment, the plaintiff filed a complaint with the board and, ultimately, appealed the decision of the board to the Superior Court. On appeal, the plaintiff claims that the Superior Court improperly determined that substantial evidence supported the findings of the board and that the board reasonably concluded that the plaintiff had failed to establish that the union breached its duty of fair representation. The plaintiff specifically contends that the union breached its duty of fair representation because it failed to make two particular legal arguments to the arbitrator. We affirm the decision of the Superior Court.

The following facts, which the board found, and procedural history are relevant to our resolution of the present appeal. The union represents a bargaining unit composed of department employees, including social workers and social work supervisors. In 2004, the department hired the plaintiff as a social work trainee and, in 2006, promoted her to the position of full-time social worker.

In 2009, the plaintiff became an investigative social worker for the department.[2] In this position, the plaintiff investigated allegations of child abuse and neglect to determine whether there was evidence to substantiate the allegations. Generally, after being assigned a case, the plaintiff would review the family's prior history with the department, conduct home visits, review relevant records, and conduct interviews with individuals, including the children, their parents, other family members, witnesses, health care providers, counselors, school staff, and law enforcement officials. The plaintiff would document her investigation and her conclusions concerning the safety of the children in a draft investigative

[2] During all relevant times of her employment with the department, the plaintiff was a member of the bargaining unit that the union represented.

report.[3] Once she completed her investigation, the plaintiff would submit electronically her draft investigative report to her supervisor for approval. If her supervisor determined that the investigative report required additional information, the supervisor either would add the additional information or request that the plaintiff make the necessary changes.

In March, 2011, Sandra Fitzpatrick, a social work supervisor for the department, became the immediate supervisor of the plaintiff. In the following two months, the department received reports that alleged that a mother of two children was neglecting them. Specifically, according to the allegations, the mother had refused to take her son to outpatient therapy sessions or to have her son evaluated by a psychiatrist, which evaluation the son needed in order to attend school. Further, the mother allegedly had prevented her daughter from attending school. Fitzpatrick assigned the plaintiff to investigate the allegations, and, following the completion of her investigation, the plaintiff submitted to Fitzpatrick a thirty page, draft investigative report.

In the draft report, the plaintiff concluded that the allegation of educational neglect of the son was not substantiated.[4] According to the plaintiff, a school psychologist who had examined the son determined that " '[the son] [wa]s [psychotic] because he [was] hear[ing] voices,' " but a clinician who had evaluated the son did not observe that the son had experienced any such auditory hallucinations. According to the plaintiff, after the son was hospitalized in connection with concerns about his mental health, administrators from his school

[3] The department and its employees refer to the investigative reports as "protocols." For the purpose of clarity, we refer to these reports as "investigative reports" throughout this opinion.

[4] The plaintiff, however, concluded that evidence substantiated the allegation of educational neglect of the daughter.

would not allow him to return to school until he underwent a psychiatric evaluation. The plaintiff reported that, although the son had not received a psychiatric evaluation and, thus, had not returned to school, the school nonetheless had excused his absences. She thus determined that the mother and the school administrators simply were "at odds" with respect to the needs of the son. The plaintiff recommended that the case be transferred to another unit within the department and that further support be provided to the family.

Fitzpatrick reviewed the draft investigative report and disagreed with various parts of it. For example, Fitzpatrick contended that a *clinician*, not school administrators, recommended that the son be evaluated by a psychiatrist before returning to school. Fitzpatrick made changes to the draft investigative report to address her concerns, including removing a reference to the fact that the clinician who had evaluated the son did not observe that the child was "hear[ing] voices" and editing the report to reflect that the *clinician*, not school administrators, had directed that the son be evaluated by a psychiatrist before he returned to school. Fitzpatrick also added that the clinician had "wanted to admit" the son to the hospital but that his "mother [had] refused," notwithstanding the fact that the son was "hearing voices and . . . [expressed] at [the] hospital that he wanted to kill himself . . . ." The final version of the report incorporated the changes that Fitzpatrick had made. Fitzpatrick subsequently removed the plaintiff from investigating the case and reassigned the case to another social worker.

In light of the information in the final investigative report, the department filed an application for an ex parte order of temporary custody (OTC) of both children. When the plaintiff became aware that the department had filed the application for an OTC, she felt "troubled . . . ." The plaintiff believed that the final

investigative report and the documents related to the application, both of which she had reviewed, contained false and misleading information that did not represent accurately the circumstances surrounding the family. The plaintiff submitted a complaint to Vannessa Dorantes, an office director for the department, in which the plaintiff insisted that Fitzpatrick had removed "exculpatory information" or, in her words, information " 'that . . . tend[ed] to [demonstrate] the innocence of' " the mother, which the plaintiff intentionally had included in the draft investigative report. The plaintiff contended that the documents that the department filed in conjunction with its application for an OTC likewise omitted the "exculpatory" information that she had included in the draft investigative report. The plaintiff maintained that Fitzpatrick had mishandled the investigation and had mischaracterized the facts of the case in the final investigative report.

The plaintiff also sent a copy of her draft investigative report to assistant attorney general Cynthia Mahon, who represented the department in the proceedings on the application for an OTC. Mahon compared the draft and final investigative reports, ultimately disagreed with the plaintiff that the final investigative report omitted " 'salient exculpatory information' " that the plaintiff had included in the draft investigative report, and concluded that the final investigative report correctly represented the relevant facts of the case. The department then proceeded with its filing of an application for an ex parte OTC of the children.

On June 23, 2011, without notifying or obtaining permission from the department, the plaintiff sent a copy of the confidential,[5] draft investigative report to the

[5] As we explain in greater detail later in this opinion, the draft investigative report constituted a "confidential" report pursuant to statute. See General Statutes (Supp. 2010) § 17a-28.

attorney who represented the mother in the OTC proceedings. At a hearing concerning the application for an OTC that same day, counsel for the mother brought the draft investigative report to the attention of the court, and the department agreed to withdraw the application for an OTC of the daughter,[6] so long as the mother abided by certain conditions, including bringing her daughter to therapy sessions. On the following day, however, the department filed a second application for an OTC of the daughter after the department received allegations of sexual abuse of the daughter.

Tyrone Mellon, a principal human resources specialist for the department, subsequently initiated an investigation of the plaintiff regarding her disclosure of the confidential, draft investigative report. As part of his investigation, Mellon searched the plaintiff's work computer and her e-mail communications. He uncovered that, between March, 2006, and September, 2010, the plaintiff had sent nine e-mails, which contained confidential department information, to her then husband, who was not an employee of the department. Additionally, the department received a report that, in May, 2011, the plaintiff had left a five year old child unattended in a car while transporting children to foster homes on behalf of the department. The plaintiff admitted to Mellon that she had sent the draft investigative report to counsel for the mother without authorization from the department, e-mailed confidential information to a nonemployee on nine occasions, and left the five year old child unattended in a car. At the conclusion of his investigation, Mellon determined that, in his opinion, the plaintiff had violated various department policies, a state statute, and a state regulation.[7]

[6] The department did not withdraw the application for an OTC of the son, who was hospitalized at the time.

[7] Specifically, Mellon determined that the plaintiff had violated the following department policies: Policy 7-4-3.1, Employee Conduct, Neglect of Duty; Policy 7-4-3.10, Employee Conduct, Confidentiality; Policy 31-8-5, Case Related Issues, Confidentiality; and Policy 31-10-3, Office of Legal Affairs,

On November 17, 2011, Dorantes notified the plaintiff by letter that, effective November 29, 2011, her employment with the department would be terminated. Dorantes provided as grounds for the termination that the plaintiff had released the confidential, draft investigative report without authorization from the commissioner of the department or her designee, had sent via e-mail confidential department information to a nonemployee, and had left a child, who was in the care of the department, unattended in a car.

The union filed a grievance on behalf of the plaintiff, claiming that the department had terminated her employment without just cause in violation of the applicable collective bargaining agreement.[8] Neal Cunningham, an agent of the union, represented the plaintiff in the proceedings related to her grievance. The state office of labor relations convened a step two grievance hearing, and a hearing officer dismissed the grievance, concluding that the department had just cause to terminate the plaintiff's employment. The union requested review by an arbitrator of the dismissal of the grievance, and an arbitration proceeding took place over several nonconsecutive days in May through August, 2012.

Confidentiality. Mellon also concluded that, in his opinion, the plaintiff had violated General Statutes § 17a-28 and § 5-240-1a (c) (8), (11), and (13) of the Regulations of Connecticut State Agencies.

[8] Article sixteen of the collective bargaining agreement provides in relevant part: "No permanent employee . . . shall be . . . dismissed *except for just cause*." (Emphasis added.)

Section 5-240-1a (c) of the Regulations of Connecticut State Agencies defines " '[j]ust cause' " to mean "any conduct for which an employee may be suspended, demoted or dismissed and includes, but is not limited to . . . [d]eliberate violation of any law, state regulation or agency rule . . . [n]eglect of duty, or other employment related misconduct . . . [or] [e]ngaging in any activity which is detrimental to the best interests of the agency or of the state."

Article sixteen of the collective bargaining agreement also provides: "Just cause may include but is not necessarily restricted to incompetency, inefficiency, neglect of duty, misconduct or insubordination."

Cunningham, in his capacity as a union agent, represented the plaintiff during the arbitration proceeding. Cunningham called witnesses, including the plaintiff, to testify on her behalf and cross-examined the witnesses called by the department. Following the conclusion of the arbitration hearing, Cunningham submitted a brief to the arbitrator on behalf of the plaintiff, in which he argued that the department lacked just cause to terminate her employment.

The arbitrator dismissed the grievance. The arbitrator determined that the department had just cause to terminate the plaintiff's employment based solely on her unauthorized disclosure of the confidential, draft investigative report to counsel for the mother.[9] The arbitrator acknowledged that the plaintiff believed that the only way she could remediate what she understood to be "false" representations in the final investigative report "was to [release] confidential [department] records" to counsel for the mother without first obtaining permission from the department. The arbitrator, however, disagreed with the plaintiff that she had the right to release the draft investigative report under the circumstances. The arbitrator stated that the plaintiff could have addressed her concerns in a way that would not have violated various confidentiality rules, such as testifying about the case in court.[10]

Following the issuance of the arbitration award, the plaintiff filed a complaint with the board against the

[9] Because the arbitrator determined that the decision of the plaintiff to release the draft investigative report without authorization from the commissioner or her designee provided the department sufficient just cause to terminate her employment, the arbitrator did not reach the question of whether her release of the confidential information in the e-mails or her decision to leave the child in the car unattended also constituted just cause to terminate her employment.

[10] The arbitrator also rejected the plaintiff's argument that Fitzpatrick improperly had targeted the plaintiff and improperly influenced the decision of the department to terminate her employment.

union and the department. The plaintiff alleged in her complaint to the board a hybrid claim that the union violated the Collective Bargaining for State Employees Act (act), General Statutes § 5-270 et seq., by breaching its duty of fair representation during the arbitration proceeding and that the department violated the act by terminating her employment without just cause. The plaintiff argued, inter alia, that the union had breached its duty of fair representation by failing to emphasize certain arguments to the arbitrator—namely, that Fitzpatrick had "lied" in the final investigative report and had "targeted" the plaintiff—and by mischaracterizing or omitting facts and arguments in the postarbitration brief it filed on her behalf. The plaintiff contended that the department had terminated her employment without just cause and that, had the union fairly represented her during the arbitration proceeding, she would have been reinstated to her position of employment with the department. The board held a series of hearings between April, 2014, and February, 2018, and, following the conclusion of the hearings, received posthearing briefs from the parties.

In a memorandum of decision dated September 6, 2018, the board dismissed the hybrid action. The board rejected each of the arguments that the plaintiff raised and concluded that the plaintiff had failed to establish that the union breached its duty of fair representation. The board noted that, because the plaintiff admitted that she had committed each instance of conduct for which she was terminated, the union reasonably focused its argument to the arbitrator on attacking whether the department had just cause to terminate her in light of her undisputed conduct or, instead, should have imposed some other form of lesser discipline. The board acknowledged that the union specifically emphasized to the arbitrator that the final investigative report contained " 'inaccuracies' " and omitted

information that the plaintiff believed to be " 'exculpatory,' " which, in the view of the plaintiff, triggered her right or duty to release the draft investigative report. The board found that the union had stressed to the arbitrator that the plaintiff had raised her concerns to the department and Mahon and, when the department and Mahon took no action to address them, that the plaintiff felt that she had no choice but to release the draft investigative report. Although the board acknowledged that the union did not "highlight every" difference between the draft and final investigative reports to the arbitrator, it determined that the union had underscored to the arbitrator the changes that the plaintiff believed to be significant.

The board determined that the plaintiff did not meet her burden of establishing that the union breached its duty of fair representation. Although the board noted that the plaintiff was "dissatisf[ied] with the union's strategy and tactics," the board concluded that Cunningham "made legitimate tactical and strategic choices as expected of a union advocate" and that the union did not, as the plaintiff contended, act arbitrarily, discriminatorily, or in bad faith in its representation of her.

The plaintiff appealed the decision of the board to the Superior Court, and the court ultimately dismissed her appeal. The court determined that substantial evidence supported the findings of the board. The court determined that the board reasonably concluded that the plaintiff had failed to establish that the union breached its duty of fair representation. This appeal followed. Additional procedural history will be set forth as necessary.

On appeal to this court, the plaintiff claims that the Superior Court improperly determined that substantial evidence supported the findings of the board and that the board reasonably concluded that the plaintiff had

failed to establish that the union breached its duty of fair representation. In connection with her sole claim on appeal,[11] the plaintiff advances two related arguments. First, she argues that the union acted arbitrarily, discriminatorily, or in bad faith by failing to argue to the arbitrator that she was *required* by statute to release the draft investigative report to counsel for the mother. Second, she asserts that the union acted arbitrarily or in bad faith by failing to argue to the arbitrator that, under *In re Lindsey P.*, 49 Conn. Supp. 132, 864 A.2d 888 (2004) (*Lindsey P.*), she was required to release the draft investigative report to counsel for the mother because Fitzpatrick removed from the final investigative report "exculpatory" information that the plaintiff had included in the draft investigative report.

We begin our analysis by setting forth the well established standard governing our review of this claim. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those

[11] To the extent that the plaintiff claims in her principal appellate brief that the department violated the collective bargaining agreement by terminating her without just cause, we find it unnecessary to reach this claim. In connection with her hybrid action, the plaintiff not only was obligated to establish "that [her] discharge was contrary to the [collective bargaining agreement] but . . . [she] *also* [*was required to*] . . . *demonstrat*[*e*] [*a*] *breach of* [*the*] *duty* [*of fair representation*] *by the* [*u*]*nion*." (Emphasis added; internal quotation marks omitted.) *Piteau* v. *Board of Education*, 300 Conn. 667, 677 n.12, 15 A.3d 1067 (2011). The board determined that the plaintiff failed to establish that the union had breached its duty of fair representation and, thus, did not reach the merits of whether she was terminated for just cause.

facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . The court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of [its] discretion." (Internal quotation marks omitted.) *AFSCME, AFL-CIO, Council 4, Local 2405* v. *Norwalk*, 156 Conn. App. 79, 85–86, 113 A.3d 430 (2015).

Before we turn to the law that governs the plaintiff's claim, we emphasize that, pursuant to statute, records, defined as "information created or obtained in connection with the department's child protection activities or activities related to a child while in the care or custody of the department"; General Statutes (Supp. 2010) § 17a-28 (a) (5); that are maintained by the department are "confidential" and generally "shall not be disclosed" in the absence of "written consent" from the individual about which the record is written, his parent, or his authorized representative.[12] General Statutes (Supp. 2010) § 17a-28 (a) (1) and (b). Accordingly, the draft investigative reports prepared by the plaintiff were "confidential" records. General Statutes (Supp. 2010) § 17a-28 (b). *Only* the "commissioner or the commissioner's designee . . . [was authorized by statute to]

[12] Although the plaintiff disclosed the confidential, draft investigative report to counsel for the parent of the child about which the report was created; see General Statutes (Supp. 2010) § 17a-28 (a) and (b); the plaintiff did not argue to the board, to the Superior Court, or to this court that the mother had provided her " '[c]onsent,' " defined as "permission given in writing by a person, his attorney or his authorized representative to disclose specified information, within a limited time period, regarding the person to specifically identified individuals"; General Statutes (Supp. 2010) § 17a-28 (a) (4); to disclose the confidential record.

provide copies of [these confidential] records, without . . . consent . . . to . . . (9) a party in a custody proceeding under section 17a-112 or 46b-129, in the Superior Court where such records concern[ed] a child who [wa]s the subject of the proceeding or the parent of such child . . . ." General Statutes (Supp. 2010) § 17a-28 (f).

We next turn to the applicable law that governs a claim of breach of the duty of fair representation by a union. General Statutes § 5-271 (d) provides in relevant part: "When an employee organization has been designated . . . as the exclusive representative of employees in an appropriate unit, it shall have a duty of fair representation to the members of that unit." "This duty of fair representation derives from the union's status as the sole bargaining representative for its members. As such, the union has the exclusive right and obligation to act for its members and to represent their interests." *Labbe* v. *Pension Commission*, 239 Conn. 168, 193, 682 A.2d 490 (1996). "The duty of fair representation requires the union to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and honesty, and to avoid arbitrary conduct." (Internal quotation marks omitted.) *Piteau* v. *Board of Education*, 300 Conn. 667, 674 n.7, 15 A.3d 1067 (2011). "Employee organizations or their agents are prohibited from . . . (4) breaching their duty of fair representation . . . ." General Statutes § 5-272 (b). Consequently, "[a] union must represent its members in good faith." (Internal quotation marks omitted.) *Piteau* v. *Board of Education*, supra, 674 n.7.

We note that neither our jurisprudence nor the applicable statutory scheme imposes on agents of a union, in the representation of bargaining unit members, a duty beyond the duty of fair representation. See id., 674 n.7, 677 n.12; see also General Statutes § 5-271. It is

therefore axiomatic that union agents, in the representation of bargaining unit members, are not obligated to, for example, exercise the same degree of skill as lawyers in their representation of clients. See, e.g., *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 649, 850 A.2d 145 (2004) (discussing legal malpractice and requiring lawyers to "exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the [legal] profession" (internal quotation marks omitted)). Put differently, and as the United States Court of Appeals for the Sixth Circuit has explained, "union agents are not lawyers,[13] and as a general proposition, cannot be held to the same standard as that of licensed professionals." (Footnote added.) *Garrison* v. *Cassens Transport Co.*, 334 F.3d 528, 539 (6th Cir. 2003), cert. denied, 540 U.S. 1179, 124 S. Ct. 1413, 158 L. Ed. 2d 80 (2004).

"The standard for a claim of breach of duty of fair representation is well established." *Council 4, AFSCME, AFL-CIO* v. *State Board of Labor Relations*, 111 Conn. App. 666, 673, 961 A.2d 451 (2008), cert. denied, 291 Conn. 901, 967 A.2d 112 (2009). "A union breaches th[e] duty [of fair representation] if it acts arbitrarily, discriminatorily or in bad faith." (Internal quotation marks omitted.) *Piteau* v. *Board of Education*, supra, 300 Conn. 674 n.7. The plaintiff has "the burden of demonstrating breach of [the] duty [of fair representation] by the [u]nion." (Internal quotation marks omitted.) Id., 677 n.12.

"[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness . . . as to be irrational."

[13] During oral argument to this court, the plaintiff conceded that the union agent that represented her at the arbitration was not a lawyer.

(Internal quotation marks omitted.) *Labbe* v. *Pension Commission*, supra, 239 Conn. 195. For example, "[a] union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion . . . ." (Internal quotation marks omitted.) *Tedesco* v. *Stamford*, 222 Conn. 233, 248, 610 A.2d 574 (1992); see also *Vaca* v. *Sipes*, 386 U.S. 171, 191, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). Our Supreme Court has explained that, although a union does not "have unfettered discretion when deciding *whether* to take [an employee's meritorious] grievance to arbitration"; (emphasis added) *Tedesco* v. *Stamford*, supra, 247; it properly may exercise, in good faith, its "discretion . . . to [determine] *which* grievances [are meritorious and thus should be] submit[ted] to arbitration" on behalf of the employee. (Emphasis added.) Id., 248.

"[A] union's actions are in bad faith if the union acts fraudulently or deceitfully . . . or does not act to further the best interests of its members." (Citation omitted.) *Labbe* v. *Pension Commission*, supra, 239 Conn. 195. For example, our Supreme Court has observed that, when a union "*deliberately* misrepresent[ed] to employees . . . [that the] rights [that were] guaranteed [to them] under [a] collective bargaining agreement [had changed, the union had] violat[ed] [its] duty of fair representation . . . ." (Emphasis added; internal quotation marks omitted.) Id., 197; see also *Lewis* v. *Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1143 (2d Cir. 1994). By contrast, if there is no evidence that the union acted fraudulently or intentionally to deceive an employee, it cannot be said that the union acted in bad faith. See *Labbe* v. *Pension Commission*, supra, 196–97. For instance, "[a] breach [by a union agent] of the [union] bylaws alone, unaccompanied by proof of malicious intent, hostility, discrimination, dishonesty or fraud is insufficient to prove bad faith." Id., 198 n.17.

I

The plaintiff first contends that the court improperly determined that the board reasonably concluded that the union did not breach its duty of fair representation because the union acted arbitrarily, discriminatorily, or in bad faith by failing to argue to the arbitrator that she was *required* to release the draft investigative report by General Statutes (Supp. 2010) § 17a-28 (f) (9) and (m).[14] Although the plaintiff did not raise this argument before the board, as she acknowledged during oral argument to this court, or before the Superior Court, the plaintiff maintains that this court nonetheless may consider the merits of the argument. Specifically, the plaintiff contends that, because the department cited General Statutes (Supp. 2010) § 17a-28 as a basis for the termination of her employment, the arbitrator referenced the statute in its award, and the union submitted the statute to the board as an exhibit, her argument is preserved. We are not persuaded.

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal." *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619, 99 A.3d 1079 (2014). "This rule applies to appeals from administrative proceedings . . . ." *Ferraro* v. *Ridgefield European Motors, Inc.*, 313 Conn. 735, 759, 99 A.3d

[14] General Statutes (Supp. 2010) § 17a-28 (f) provides in relevant part: "The *commissioner or the commissioner's designee* shall, upon request, promptly provide copies of records, without the consent of a person, to . . . (9) a party in a custody proceeding under section 17a-112 or 46b-129, in the Superior Court where such records concern a child who is the subject of the proceeding or the parent of such child . . . ." (Emphasis added.)

General Statutes (Supp. 2010) § 17a-28 (m) provides in relevant part: "[A]ny person, regardless of age, his authorized representative or attorney shall have the right of access to any records made, maintained or kept on file by the department, whether or not such records are required by any law or by any rule or regulation, when those records pertain to or contain information or materials concerning the person seeking access thereto, including but not limited to records concerning investigations [or] reports . . . of the person seeking access thereto . . . ."

1114 (2014). "A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board." *Dragan* v. *Connecticut Medical Examining Board*, 223 Conn. 618, 632, 613 A.2d 739 (1992). Thus, "[t]he failure to raise [a] claim . . . at the time of the [administrative] hearing precludes [a party] from raising the issue on appeal." *Berka* v. *Middletown*, 205 Conn. App. 213, 218, 257 A.3d 384, cert. denied, 337 Conn. 910, 253 A.3d 44 (2021), cert. denied, U.S. , 142 S. Ct. 351, 211 L. Ed. 2d 186 (2021).

Our Supreme Court has explained that, within the context of administrative appeals, appellate courts "shall not be bound to consider a claim unless it was *distinctly* raised at the [administrative hearing] or arose subsequent to the [hearing]. . . . Indeed, it is the appellant's responsibility to present such a claim clearly to the [administrative board] so that the [board] may consider it and, if it is meritorious, take appropriate action." (Emphasis added; internal quotation marks omitted.) *Ferraro* v. *Ridgefield European Motors, Inc.*, supra, 313 Conn. 758–59. "The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked." (Emphasis in original; internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, supra, 313 Conn. 620; see also *Commissioner of Mental Health & Addiction Services* v. *Saeedi*, 143 Conn. App. 839, 855–56, 71 A.3d 619 (2013) (setting forth same principle in administrative appeal and applying it to claim that was not distinctly raised before administrative board).

In the present case, a review of the transcripts from the board hearings and the posthearing briefs that the plaintiff submitted to the board reveal, and the plaintiff has conceded, that she did not raise before the board that the union breached its duty of fair representation by

failing to argue to the arbitrator that she was *required* to release the draft investigative report by General Statutes (Supp. 2010) § 17a-28 (f) (9) and (m). Because the record demonstrates that the plaintiff neither distinctly nor precisely articulated her argument concerning the applicability of the statute to the board; see *White* v. *Mazda Motor of America, Inc.*, supra, 313 Conn. 620; see also *Commissioner of Mental Health & Addiction Services* v. *Saeedi*, supra, 143 Conn. App. 855–56; her reliance on the arbitrator's, the board's, and the union's general awareness of General Statutes (Supp. 2010) § 17a-28 is misplaced. The mere fact that the arbitrator, the board, and the union were aware that the statute existed is insufficient to establish that the plaintiff distinctly or precisely articulated to the board why the statute was applicable in the present case or how the statute obligated *the plaintiff* to release the draft investigative report. Accordingly, we conclude that the issue was not preserved adequately for appellate review, and we decline to review it.[15]

II

The plaintiff next argues that the court improperly determined that the board reasonably concluded that

[15] Alternatively, the plaintiff argues that she should prevail on this claim pursuant to the plain error doctrine. "[The plain error] doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . It is a rule of reversibility . . . that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy." (Internal quotation marks omitted.) *Reville* v. *Reville*, 312 Conn. 428, 467–68, 93 A.3d 1076 (2014). "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable." (Internal quotation marks omitted.) *Board of Education* v. *State Board of Labor Relations*, 166 Conn. App. 287, 297, 142 A.3d 304 (2016). After a thorough review of the record, we are unpersuaded that the board committed the type of obvious and readily

the union did not breach its duty of fair representation because the union acted arbitrarily or in bad faith by failing to argue to the arbitrator that, in accordance with *In re Lindsey P.*, supra, 49 Conn. Supp. 132, the plaintiff was required to release the draft investigative report to the court and counsel for the mother because the final investigative report improperly omitted information that was exculpatory and favorable to the mother.[16] The plaintiff specifically asserts that the union should have argued to the arbitrator that the Superior Court in *Lindsey P.* mandated the department to include in any application for an ex parte OTC all information that is exculpatory or favorable to the respondents. The plaintiff also argues that the decision in *Lindsey P.* obligated the plaintiff to turn over the draft investigative report because the court in that case had admonished a social worker for omitting from an affidavit certain information that was favorable to the respondent and directed the department to turn over information that was exculpatory or favorable to the respondent. In connection with this argument, the plaintiff also contends that the union did not emphasize sufficiently to the arbitrator that the draft investigative report contained exculpatory information that Fitzpatrick omitted from the final investigative report, such that, under *Lindsey P.*, she was obligated to turn over the draft investigative report.

We begin our analysis with a brief overview of the decision of the Superior Court in *Lindsey P.* In that case, the department filed an ex parte OTC application, based on the alleged physical abuse of a child by her father. Id., 132–33. In conjunction with its application

discernible error that would meet this extraordinarily high standard and warrant reversal.

[16] The plaintiff properly preserved this claim for review by raising it to the board. See *Ferraro* v. *Ridgefield European Motors, Inc.*, supra, 313 Conn. 758–59.

for the ex parte order, the department submitted an affidavit from a social worker. Id., 133. The affidavit averred that the child had sustained a fractured clavicle as a result of the physical abuse inflicted on her by her father and, in light of her injuries and prior, unrelated instances of abuse of the other children of the father, the child was in immediate physical danger. Id. The social worker also represented in the affidavit that the child had been physically examined by a specific doctor in connection with her injuries. Id. The department and the father later presented to the court, *Lopez*, *J.*, an agreement under which, inter alia, the father would enter a plea of nolo contendere to the underlying neglect petition and the court would enter a dispositional order of protective supervision for a limited time period. Id., 132–33.

Before it accepted the agreement, the court requested that the doctor who the social worker had identified in the affidavit testify concerning the extent of the child's injuries. Id., 133. The doctor testified, contrary to the representations that the social worker had made in the affidavit, that he had not physically examined the child; he merely had reviewed the medical reports that the department had provided to him. Id., 134. The doctor also testified, consistent with the report he had prepared, that the injuries could have been inflicted on the child " 'accidental[ly]' " and that he recommended that the father be enrolled in parenting classes. Id., 133–34. The affidavit accompanying the OTC application did not include the opinion of the doctor that the injuries could have been accidental or his recommendation that the father be enrolled in parenting classes. Id., 134. The social worker also failed to include in her affidavit the conclusion of the child's pediatrician that the injuries to the child did not necessarily result from physical force but, instead, could have resulted from the child falling out of her bed. Id., 134–35, 145.

The court held a series of hearings to determine whether it would hold the department in contempt for failing to provide accurate information to the court when it initially had filed its application for the ex parte OTC of the child. Id., 134–35. The court ultimately decided not to hold the department in contempt. Id., 149. The court, however, stated that the social worker had included in the sworn affidavit "misleading and inaccurate statements," which she knew to be "[un]true and [in]accurate," in order to "mislead the court into believing that [the child] was in immediate physical danger" in the custody of her father. Id., 146, 148–49. The court "[found] the conduct of the department, or its employees, to be . . . outrageous and insensitive"; id., 149; and, in turn, stated that it would employ its "inherent supervisory authority . . . [to] deter similar conduct by the department in the future." Id., 152. The court thus stated: "The *department* is therefore directed, when presenting an application for an ex parte order of temporary custody, to include in its materials all information which is exculpatory or favorable to the parents or guardians." (Emphasis added.) Id., 153. The court additionally ordered the supervisors and administrators of the unit of the department in which the social worker worked to appear before the court and address the steps that the unit had taken to prevent similar misrepresentations from being made to the court in the future. Id.

In assessing whether the union breached its duty of fair representation by failing to argue to the arbitrator that *Lindsey P.* required the plaintiff to disclose the draft report, we emphasize that it is entirely unclear, as a matter of law, whether the directive set forth in *Lindsey P.* applies outside of that case.[17] Indeed, a split of authority among the Superior Courts exists as to

[17] It is also entirely unclear whether the court had the authority to order the department to engage in a specific procedure when it files OTC applications in the future. The court, sua sponte and apparently without providing the parties with notice or an opportunity to be heard on the directive, stated

whether the directive issued in *Lindsey P.* binds the department in all cases that it brings.[18] At least one other Superior Court has determined that the directive

that, "*under its inherent supervisory authority*, [it could] deter similar conduct by the department in the future" by directing the department to follow a specific procedure when it files future OTC applications. (Emphasis added.) *In re Lindsey P.*, supra, 49 Conn. Supp. 152–53.

In *In re Darlene C.*, 247 Conn. 1, 2, 717 A.2d 1242 (1998), our Supreme Court reviewed a trial court's sua sponte decision to permanently enjoin the commissioner of the department from filing petitions for the termination of parental rights that had been prepared, signed, and filed by individuals who were not admitted to the practice of law. Our Supreme Court ultimately determined that the relevant statutory scheme explicitly permitted individuals who were not admitted to the practice of law to draft and sign such petitions. Id., 9–14. Our Supreme Court further noted, however, that it "disapprov[ed] of the procedure employed by the trial court in rendering an injunction, sua sponte, without first affording the parties notice and an opportunity to be heard." Id., 9 n.22. Our Supreme Court specifically stated that it "[did] not doubt that the action of the trial court, in issuing an injunction against the commissioner, was well intentioned. As [the Supreme Court had] noted previously . . . however, [b]asic principles of courtesy and fairness govern the conduct of courts as well as that of litigants and their counsel. The trial court's conduct did not comport with these principles." (Internal quotation marks omitted.) Id.

Likewise, the court in *Lindsey P.*, in its ruling concerning whether it would hold the department in contempt, sua sponte issued a directive that obligated the department to comply with certain procedures when it files future OTC applications. *In re Lindsey P.*, supra, 49 Conn. Supp. 152–53. Although the court instructed the department to "show cause" concerning why it should not be held in contempt, a thorough reading of its decision does not indicate that it provided the parties with notice or the opportunity to be heard concerning the directive before it set forth the directive. See id., 134. Further, neither the court in *Lindsey P.* nor the plaintiff in the present case has identified a statutory, constitutional, or common-law basis that granted the court the authority to impose on an agency an order that bound the department in its future applications. Although we need not reach whether the court in *Lindsey P.* had the authority to issue such a directive, we emphasize that Cunningham was not obligated to raise to the arbitrator this particular legal question in order to satisfy his duty of fair representation, so long as he did not act arbitrarily, discriminatorily, or in bad faith in his representation.

[18] The plaintiff requests that this court mandate the department to turn over all information that is potentially exculpatory to the opposing party whenever it files an OTC application. We decline to do so. At issue in this case is *not* whether the department must provide to an opposing party in an OTC proceeding all information that is potentially exculpatory. As we have explained, at issue in this case is whether the court improperly determined that substantial evidence supported the findings of the board and whether the board reasonably concluded that the union did not breach its duty of fair representation.

set forth in *Lindsey P.* does not apply outside of that case. See *In re Heather F.*, Superior Court, judicial district of Middlesex, Docket No. L-15-CP-08008515-A (November 12, 2008). In *In re Heather F.*, a father filed a motion for contempt against the department, alleging that, when the department filed an affidavit from a social worker in conjunction with an application for an ex parte OTC of his child, the department had failed to comply with the directive set forth in *Lindsey P.* Id. Specifically, the father alleged that the social worker excluded from the affidavit information that was exculpatory or favorable to him. See id.

The court, *Bear*, *J.*, determined that the father had failed to establish that the directive set forth by Judge Lopez applied in cases outside of *Lindsey P.* See id. Judge Bear specifically noted that "the court in *Lindsey P.* seem[ed] to have give[n] authoritative instructions to [the department]." (Internal quotation marks omitted.) Id. Because the court in *Lindsey P.*, however, had "used the word 'directed' instead of the word 'ordered' " in its instruction to the department to turn over the exculpatory or favorable information; id.; Judge Bear presumed that Judge Lopez did not *order* the department to include, under penalty of contempt, all exculpatory or favorable information to the parents or guardians in its *future* applications for ex parte orders of temporary custody. See id. The court in *In re Heather F.* additionally stated that, if a social worker failed to include in an application for an ex parte OTC "any, some or all . . . relevant exculpatory or favorable material" to the parents, that information "[could] and mostly like [would] be raised at a contested hearing" concerning the application and would inform the ruling of the court on the application. Id.

In the present case, the plaintiff contends that the union breached its duty of fair representation because it failed to argue to the arbitrator that the directive in

Lindsey P. required her to disclose the draft investigative report in the manner that she did. As we have emphasized, whether the directive applies outside of *Lindsey P.* is subject to serious debate. The plaintiff does not point us to any authority to support the proposition that the failure of a union to argue that a directive set forth in a Superior Court case, which neither our appellate courts nor, uniformly, our Superior Courts have adopted, required her to act in the present case constitutes arbitrary action or action in bad faith. As we have explained, union agents are not lawyers. Cunningham, in his capacity as a union agent, was not obligated to exercise the degree of skill that a lawyer must exercise when representing a client, so long as he did not act arbitrarily, discriminatorily, or in bad faith. See *Piteau* v. *Board of Education*, supra, 300 Conn. 674 n.7. To conclude that Cunningham acted arbitrarily or in bad faith because he failed to present to the arbitrator this legal argument would be to impose on the union a duty greater than its duty of fair representation.

Additionally, although the plaintiff appears to argue that the court's directive in *Lindsey P.* obligated *social workers*, such as herself, to turn over to the court *and the parents* any information that is " 'exculpatory' " or favorable to the parents, the plaintiff fails to identify any such directive. We acknowledge that the court in *Lindsey P.* admonished the social worker for excluding from a " 'subscribed and sworn' " affidavit; *In re Lindsey P.*, supra, 49 Conn. Supp. 139, 146; clearly relevant and favorable information to the father. See id., 148–49. The court, however, did not indicate that the *social worker*, personally, had an obligation to turn over to the court and the father any information that was exculpatory and favorable to the father. See id., 153. Rather, the court directed that the *department* must ensure that its initial application for an ex parte OTC includes the exculpatory and favorable information. Id. The

court additionally required the *supervisors* of the social worker—not the social worker, personally—to appear before the court to address the remedial efforts that the unit had implemented to assure that misrepresentations would not be made to the court in the future. Id.

Because the court in *Lindsey P.* instructed the *department* to include in its application information that was exculpatory and favorable to the father; see id.; the court's directive arguably was inapplicable to the plaintiff, personally, and did not require or authorize her to send the draft investigative report to counsel for the mother. The plaintiff does not point us to any authority to support the proposition that the failure of a union to formulate a legal argument that misconstrues the case on which it relies constitutes arbitrary action or action in bad faith. Accordingly, we cannot conclude that the board acted unreasonably, arbitrarily, illegally, or in abuse of its discretion by concluding that the union did not breach its duty of fair representation because it failed to argue to the arbitrator that the directive in *Lindsey P.* obligated her to release the confidential, draft investigative report. See *AFSCME, AFL-CIO, Council 4, Local 2405* v. *Norwalk*, supra, 156 Conn. App. 86.

To the extent that the plaintiff contends that the union failed to emphasize sufficiently to the arbitrator that the draft investigative report contained exculpatory information, we conclude that substantial evidence exists in the record to support the board's contrary finding that the union *did* argue that the draft investigative report contained " 'exculpatory' " information. The arbitrator delineated in the arbitration award the differences between the draft and final investigative reports that, according to the arbitrator, the plaintiff thought to be "significant" and that, according to the arbitrator, the plaintiff believed to demonstrate that Fitzpatrick had removed " 'exculpatory' " information from the final investigative report. As the board noted in its decision,

the fact that the arbitrator recognized the differences between the draft and final investigative reports that the plaintiff found to be significant reflects that Cunningham brought these differences to the attention of the arbitrator.

Further, in the plaintiff's postarbitration brief, Cunningham emphasized to the arbitrator that the plaintiff sent the draft investigative report to counsel for the mother because she believed that the final investigative report presented the facts of the family's case in a "false" light and that the information Fitzpatrick had removed was "salient" and "exculpatory . . . ."[19] We conclude, therefore, that the court properly determined that substantial evidence supported the factual finding of the board that Cunningham argued to the arbitrator that the draft investigative report contained exculpatory information. To the extent that this factual finding informed the conclusion of the board that the union did not act arbitrarily or in bad faith in its representation of the plaintiff, we agree with the court that the plaintiff has not met her burden of demonstrating that the board

[19] The plaintiff emphasizes in her principal appellate brief that Cunningham acted improperly by using the word " 'believed,' " when he stated in the postarbitration brief that the plaintiff " 'believed' " that the omitted information was exculpatory. She specifically argues that, by stating that she " 'believed' " that the information was exculpatory instead of stating that the information "was" exculpatory, Cunningham cast doubt on whether the omitted information was, in fact, exculpatory.

We are not persuaded. The fact that a union agent used one word over another in the postarbitration brief that he filed on behalf of the plaintiff does not constitute action that is "so far outside a wide range of reasonableness . . . as to be irrational," that is fraudulent or deceitful, or that hinders "the best interests of its members." (Internal quotation marks omitted.) *Labbe* v. *Pension Commission*, supra, 239 Conn. 195. Further, the administrative record reflects that the arbitrator considered, and ultimately rejected, the position of the plaintiff that, because the information was exculpatory, she was required to release the draft investigative report. Accordingly, we conclude that the contentions that the plaintiff has raised concerning the specific words used by the union are not sufficient to undermine the board's determination that the union did not breach its duty of fair representation.

acted unreasonably, arbitrarily, illegally, or in abuse of its discretion by so concluding. See *AFSCME, AFL-CIO, Council 4, Local 2405* v. *Norwalk*, supra, 156 Conn. App. 86.

The judgment is affirmed.

In this opinion the other judges concurred.

L. D. *v.* G. T.*
(AC 44386)

Prescott, Elgo and Eveleigh, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the application for relief from abuse filed by the plaintiff and issuing an order of protection against him pursuant to the applicable statute ((Rev. to 2019) § 46b-15). The trial court granted the plaintiff's ex parte application for relief from abuse on behalf of herself and the parties' minor child, and issued a domestic violence order of protection against the defendant that required him, inter alia, not to assault, threaten, abuse, harass, follow, interfere with, or stalk the plaintiff. The court thereafter conducted a hearing on whether to extend the ex parte order, at which the plaintiff testified regarding her allegations against the defendant. At that hearing, the court denied the request of the defendant's counsel to cross-examine the plaintiff. The court rendered judgment granting the continuation of the order, from which the defendant appealed to this court. *Held* that the trial court abused its discretion in denying the defendant the opportunity to cross-examine the plaintiff during the hearing on the plaintiff's application for relief from abuse; this court disagreed with the trial court's reasoning that the posture of the proceeding at issue as a hearing, as opposed to a trial, obviated the need to provide an opportunity for cross-examination, as cross-examination would have aided the court in assessing credibility, including any bias, motive, interest and prejudice of the plaintiff.

Argued November 15, 2021—officially released March 1, 2022

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* In accordance with federal law; 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

Procedural History

Application for relief from abuse, brought to the Superior Court in the judicial district of Litchfield, where the court, *Wu*, *J.*, granted the application and issued an order of protection, and the defendant appealed to this court. *Reversed*; *judgment directed.*

Robert A. Salerno, for the appellant (defendant).

Opinion

EVELEIGH, J. The defendant, G. T., appeals from the judgment of the trial court granting the application of the plaintiff, L. D.,[1] for relief from abuse and issuing a domestic violence order of protection pursuant to General Statutes (Rev. to 2019) § 46b-15.[2] On appeal, the defendant argues, inter alia, that the court abused its discretion by precluding him from cross-examining the plaintiff during the hearing on the plaintiff's application for relief from abuse.[3] We agree and, accordingly, reverse the judgment of the trial court.

[1] The plaintiff represented herself before the trial court and did not participate in the present appeal. We, therefore, decide the appeal on the basis of the defendant's brief, the record, and the defendant's oral argument before this court.

[2] Hereinafter, unless otherwise indicated, all references to § 46b-15 in this opinion are to the 2019 revision of the statute.

General Statutes (Rev. to 2019) § 46b-15 (a) provides in relevant part: "Any family or household member . . . who has been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening, including, but not limited to, a pattern of threatening . . . by another family or household member may make an application to the Superior Court for relief under this section. . . ."

[3] On appeal, the defendant also claims that the court improperly denied his motion for reconsideration and violated his first, second, fourth, and fourteenth amendment rights under the United States constitution and his rights under article first, §§ 3, 7, 9, 10, and 15, of the Connecticut constitution by improperly depriving him of his right to cross-examine the plaintiff during the hearing on the plaintiff's application for relief from abuse and during the hearing on the defendant's motions for reconsideration and for modification. We need not address these bases for reversal because we reverse on other grounds.

The following facts and procedural history are relevant to this appeal. The plaintiff and the defendant are the parents of a minor child, who, at the time of the application, was about three months old. On September 14, 2020, the plaintiff filed an application for relief from abuse on behalf of herself and the child against the defendant pursuant to § 46b-15. In her application, the plaintiff averred under oath to the following facts. From June 11, 2020, to September 10, 2020, the parties and the child were residing in the home of the defendant's parents. From September, 2019, to September, 2020, the defendant threatened her life, intimidated her with guns, blackmailed her, and tracked the location of her phone without her knowledge or consent, often showing up to her location uninvited.

The plaintiff further averred that from June 11, 2020, to September 10, 2020, when the plaintiff, the defendant, and their child were residing in the home of the defendant's parents, the defendant was forceful with their child. Specifically, according to the plaintiff, the defendant force-fed the child, yelled in the child's face while the child was sleeping, shook the child, and threw objects onto the child. Additionally, the defendant allegedly surveilled the plaintiff's actions and prevented her from turning off a baby monitor during therapy sessions. The plaintiff also claimed that the defendant threatened to find a way to take their minor child away from her and told her that, if she tried to leave with the child or protect herself from him, she would be unsuccessful because he had connections to law enforcement. The plaintiff further alleged that the defendant had sexually assaulted her on numerous occasions, and that there was a police investigation pending as a result of an incident that took place on September 4, 2020. On September 10, 2020, four days prior to filing the application for relief from abuse, the plaintiff and the child moved out of the residence of the defendant's parents and relocated

to a new residence. The plaintiff's application stated that the defendant knew where the plaintiff and the child were residing.

On September 14, 2020, the court issued an ex parte domestic violence order of protection against the defendant, effective until September 21, 2020. The court set a hearing date of September 21, 2020, to determine whether to extend the order. At the time of the hearing, the Department of Children and Families (department) was investigating the defendant on the basis of allegations of physical neglect of the parties' minor child. In addition, there was an ongoing custody action with respect to the child.

Both the defendant and the self-represented plaintiff appeared at the hearing on the plaintiff's application for relief from abuse. During the hearing, the plaintiff's testimony largely mirrored the statements she set forth in her application. After the completion of the plaintiff's testimony, counsel for the defendant sought to cross-examine the plaintiff. The court, however, stated that it was not going to permit the defendant to cross-examine the plaintiff. The following exchange occurred between the court and the defendant's counsel:

"The Court: . . . I'm assuming you're going to have your client testify . . . .

"[The Defendant's Counsel]: . . . I was going to do cross-examination first. . . . I'm assuming that I'm permitted to cross-examine the plaintiff.

"The Court: No. I'm not going to allow cross-examination. This is [an order of protection] hearing. The court hears the statement of the [plaintiff] and then hears the response from the [defendant].

"[The Defendant's Counsel]: My understanding, Your Honor, [is] that through the testimony that I can elicit from the opposing side, that I'm going to be able to ask

her questions with regard to these allegations. These are allegations that involve sexual assault in the second degree, which she has admitted to bringing this to the police department at this point. I think that it is best to have testimony that is scrutinized, would be appropriate.

"The Court: Again, the court feels comfortable taking testimony from your client. If the court feels that it needs any further information from the [plaintiff], I'll ask the question.

"[The Defendant's Counsel]: If I may have a moment, please, Your Honor.

"The Court: Yes, you may.

"[The Defendant's Counsel]: With respect, Your Honor, at this point in time, my client is not going to elect to testify as a result of his fifth amendment privileges. We are going to seek to enter into this [order of protection] without prejudice to be able to revisit it at a later point in time. Should there be some sort of application or motion for modification, I'm hopeful, at that point, I'll be able to admit exhibits through the opposing applicant, because I have a voluminous amount of information that I would like to present, but without being able to cross-examine at this point, I'm hamstrung, Your Honor, with respect to Your Honor.

"The Court: Okay. All right. Well, very good. So the court is going to enter a protective order. Again, any protective order the [defendant] has an ability to file a motion to ask the court to reconsider it so I don't believe that we're actually doing anything different from the standard but, under this protective order the court is ordering today, the [defendant] is to surrender or transfer all firearms and ammunition that he has or has access to. He is not to assault, threaten, abuse, harass, follow, interfere with or stalk the protected party. He

is to stay away from the home of the protected person, wherever the protected person shall reside. He is not to contact the protected person in any manner, whether it be in writing, electronically, telephonically, social media. He's not to contact the protected person's home, workplace . . . or have others contact the protected party in any way that would likely cause annoyance or alarm to the protected person. This protective order does protect the minor child . . . . And the period of this protective order is going to be six months. . . ."

In accordance with its oral ruling, the court issued a written domestic violence order of protection against the defendant, effective for six months, to expire on March 21, 2021.[4] On October 7, 2020, the defendant filed a motion for reconsideration in which he requested the court to reconsider its order of protection against him or, in the alternative, to modify the order of protection to allow contact with the minor child. On October 22, 2021, the defendant filed a motion for modification requesting that the court permit the parties to communicate for the sole purpose of arranging parenting time for the defendant, on the basis of the department's request to observe the defendant and the minor child together for purposes of resolving the open department investigation.

A hearing on the defendant's motions was held on November 6, 2020. At the commencement of the hearing, the defendant's counsel stated that there were two motions before the court—the motion for reconsideration and the motion for modification. With regard to

[4] Despite the expiration of the domestic violence order of protection on March 21, 2021, the defendant's appeal is not moot. See *C. A.* v. *G. L.*, 201 Conn. App. 734, 736 n.4, 243 A.3d 807 (2020) (applying to order of civil protection under General Statutes § 46b-16a principle that "expiration of a six month domestic violence restraining order issued pursuant to . . . § 46b-15 does not render an appeal from that order moot due to adverse collateral consequences" (internal quotation marks omitted)).

the motion for reconsideration, the following colloquy occurred between the court and the defendant's counsel:

"The Court: Okay. And counsel, it's your motion.

"[The Defendant's Counsel]: Why, I believe two motions [are] before the court today. I have the motion for reconsideration. And then we have the motion for modification of the [order of protection] here.

"The Court: Okay. I'm hearing the motion for modification.

"[The Defendant's Counsel]: All right. Your Honor, with respect, I do not know if we could address the motion for reconsideration first, as I believe that it, obviously, impacts any motions that I make with regard to the motion for modification, because the ability to cross-examine, I think, would be of great import to the court. But at the same time, if the court decides that that is not a motion that we're going to hear, then that is, obviously, the court's prerogative and position to take.

"The Court: And . . . as you have correctly stated, it is the court's prerogative in a [order of protection] application—this is not a trial—this is a [order of protection] application, and the court is not inclined to allow cross-examination. So the—

"[The Defendant's Counsel]: Understood . . . .

"The Court: —the motion for reconsideration is denied."

The court then heard testimony on the motion for modification. Contrary to the plaintiff's assertions, the defendant testified that he had never screamed at or shook the minor child. The defendant further testified that the domestic violence order of protection, preclud-

ing him from seeing his child, would affect his relationship with the child. The defendant testified that he would be willing to be supervised during visits with the child should he be permitted to see his child. Additionally, the defendant testified that the department had found that the allegations of physical neglect of the minor child against him were unsubstantiated and, as a result, closed its investigation. Finally, the defendant's counsel informed the court that the custody action concerning the minor child was ongoing.

The plaintiff also testified, in opposition to the motion for modification, stating that, without the domestic violence order of protection in place, there was nothing ensuring her or the minor child's safety. The plaintiff testified that she believed that a modification of the domestic violence order of protection would be premature.

The court denied the defendant's motion for modification, stating that no testimony was provided concerning what constituted a significant change in circumstances, nor had enough time passed since the court's order for it to find that there had been a significant change in circumstances to warrant a modification. This appeal followed.

On appeal, the defendant claims, inter alia, that the court abused its discretion by not affording him any opportunity to cross-examine the plaintiff during the hearing on the plaintiff's application for relief from abuse. We agree.

We begin by setting forth the standard of review and the law that governs our analysis of the defendant's claim on appeal. "Our standard of review of a claim that the court improperly limited the cross-examination of a witness is one of abuse of discretion. . . . [I]n . . . matters pertaining to control over cross-examination, a considerable latitude of discretion is allowed. . . .

The determination of whether a matter is relevant or collateral, and the scope and extent of cross-examination of a witness, generally rests within the sound discretion of the trial court." (Citation omitted; internal quotation marks omitted.) *Dubreuil* v. *Witt*, 65 Conn. App. 35, 41, 781 A.2d 503 (2001), aff'd, 271 Conn. 782, 860 A.2d 698 (2004).

"Cross-examination is an indispensable means of eliciting facts that may raise questions about the credibility of witnesses and, as a substantial legal right, it may not be abrogated or abridged at the discretion of the court to the prejudice of the party conducting that cross-examination." *Hayes* v. *Manchester Memorial Hospital*, 38 Conn. App. 471, 474, 661 A.2d 123, cert. denied, 235 Conn. 922, 666 A.2d 1185 (1995). "When a party has been deprived of a fair and full cross-examination of a witness upon the subjects of his examination in chief . . . [the] denial of this right is . . . prejudicial and requires reversal by this court." (Internal quotation marks omitted.) *Dubreuil* v. *Witt*, supra, 65 Conn. App. 45.

"In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial. . . . Although it is axiomatic that the scope of cross-examination generally rests within the discretion of the trial court, [t]he denial of all meaningful cross-examination into a legitimate inquiry constitutes an abuse of discretion." (Internal quotation marks omitted.) *Rousseau* v. *Perricone*, 148 Conn. App. 837, 844, 88 A.3d 559 (2014). "Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse

of discretion." (Internal quotation marks omitted.) *State* v. *Bova*, 240 Conn. 210, 219, 690 A.2d 1370 (1997).

We have little difficulty concluding that the court abused its discretion in prohibiting the defendant from cross-examining the plaintiff during the hearing on the plaintiff's application for relief from abuse. As previously described, during the hearing, the plaintiff testified as to the defendant's allegedly abusive conduct toward her and their child. When the plaintiff's testimony concluded, counsel for the defendant sought to cross-examine the plaintiff. The court, however, stated: "No. I'm not going to allow cross-examination. This is a [order of protection] hearing. The court hears the statement of the [plaintiff] and then hears the response from the [defendant]." Such a complete denial of the right to cross-examination is clearly an abuse of discretion.

In explaining its decision to preclude the defendant from cross-examining the plaintiff, it appears that the trial court distinguished the hearing on the plaintiff's application from a trial. We disagree, however, with the trial court's reasoning that the posture as a *hearing* affecting significant interests, as opposed to a *trial* doing such, obviates the need to provide an opportunity for cross-examination. The United States Supreme Court has held that, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). This court has also explained that "[a] fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which

an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Citation omitted; internal quotation marks omitted.) *Szot* v. *Szot*, 41 Conn. App. 238, 241, 674 A.2d 1384 (1996).

In the present case, in which the plaintiff had already testified, cross-examination would have aided the court in assessing credibility, including any "bias, motive, interest and prejudice" of the plaintiff; *State* v. *Milum*, 197 Conn. 602, 609, 500 A.2d 555 (1985); would have provided defendant's counsel with the opportunity to admit exhibits through the plaintiff, and could have affected its decision to issue the order of protection against the defendant.

In denying the defendant the opportunity to cross-examine the plaintiff during the hearing, the court denied the defendant "of all meaningful cross-examination into a legitimate inquiry"; (internal quotation marks omitted) *Rousseau* v. *Perricone*, supra, 148 Conn. App. 844; and, thus, clearly abused its discretion.[5]

[5] Our conclusion is also supported by an interpretation of the statute, § 46b-15. Although § 46b-15 does not explicitly provide a right to cross-examine witnesses during a hearing on an application for relief from abuse, General Statutes (Rev. to 2019) § 46b-15c (b) implies that one does in fact exist by providing that "[n]othing in this section shall be construed to limit any party's right to cross-examine a witness whose testimony is taken in a room other than the courtroom pursuant to an order under this section." (Emphasis added.) Construing title 46b of the General Statutes as a whole; see *Cunningham* v. *Planning & Zoning Commission*, 90 Conn. App. 273, 285, 876 A.2d 1257 ("[a] court must interpret a statute as written . . . and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation" (internal quotation marks omitted)), cert. denied, 276 Conn. 915, 888 A.2d 83 (2005); by explicitly preserving a party's right to cross-examine witnesses *outside* of the courtroom, § 46b-15c implies that a party has a right to cross-examine witnesses *within* the courtroom during a hearing on a domestic violence order of protection pursuant to § 46b-15.

A review of our case law also supports this conclusion. In cases involving § 46b-15 order of protection hearings, cross-examination took place. See, e.g., *D. S.* v. *R. S.*, 199 Conn. App. 11, 23, 234 A.3d 1150 (2020); *Tala E. H.* v. *Syed I.*, 183 Conn. App. 224, 230, 192 A.3d 494 (2018), cert. denied, 330 Conn. 959, 199 A.3d 19 (2019); *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 363,

The judgment is reversed and the case is remanded with direction to vacate the domestic violence order of protection.

In this opinion the other judges concurred.

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190 A.3d 68 (2018); *Krystyna W.* v. *Janusz W.*, 127 Conn. App. 586, 589, 14 A.3d 483 (2011).