

C.J. v. S.D., No. A-0419-09T3 (App. Div. August 9, 2010).



1 of 1 DOCUMENT

C.J., Plaintiff-Respondent, v. S.D., Defendant-Appellant.

DOCKET NO. A-0419-09T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 1924

**July 6, 2010, Submitted
August 9, 2010, Decided**

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PRIOR HISTORY: [*1]

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County, Docket No. FV-01-000216-10-C.

COUNSEL: Reynolds & Scheffler, attorneys for appellant (Steven P. Scheffler, on the brief).

Mark E. Roddy, attorney for respondent.

JUDGES: Before Judges Skillman and Wefing.

OPINION

PER CURIAM

This is an appeal from a final restraining order, entered on August 26, 2009, in an action brought under the Prevention of Domestic Violence Law, *N.J.S.A. 2C:25-17* to -35.

The parties had a dating relationship. At the time, plaintiff was nineteen years old and defendant was a sixty-year-old married man. Defendant was, or had been, plaintiff's taekwondo instructor.

Defendant's wife became aware of the relationship sometime in 2009, and plaintiff told her parents about the relationship on or about June 21, 2009. Two days later, on or about June 23, 2009, defendant and his wife and plaintiff and her parents had a conference telephone call. At the end of this conversation, the parties agreed that they would not have any further communication or contact with each other.

On June 25, 2009, defendant's wife called plaintiff's mother. After that conversation, defendant's wife told defendant plaintiff's mother said [*2] to her that defendant was "still professing [his] love for [plaintiff]." This made defendant extremely agitated because he was attempting to reconcile with his wife.

Defendant then placed five calls to plaintiff's mother and plaintiff. When those calls were not answered, defendant left a series of nasty messages, directed primarily at plaintiff's mother. In one of the messages left on the Blackberry of plaintiff's mother, defendant stated:

You can't hide from me you bitch. I told you I want to know word for word what lies you told my wife. And you can call me back and you can say that to me and we can put [an] end to [this]. Or you can keep hiding from me and one picture a day will go out to the RST group and I will put up a nice web site so everybody can see all about your daughter. There's nothing left to the imagination, sweetheart. Now don't fuck with me.

Defendant's last nasty message was left on plaintiff's telephone. This message, which was the basis of the trial court's finding that defendant had committed an act of domestic violence, stated:

I betcha none of you are taking my calls. None of you have the goddam guts to speak to me after your goddam stupid piece of shit mother called [*3] my wife telling her a bunch of bullshit. Just trying to fuck me up. I mean I don't know what your goddam game is. But stay the fuck out of my life. Every goddam one of you stay the fuck out of my life. Do you understand?

Defendant also sent a series of emails to plaintiff's mother on June 25th. One of those emails, a copy of which was sent to plaintiff, stated:

You slimy piece of shit get the fuck out of my life and stay out. How dare you call my wife and tell her whatever bullshit you told her! You will regret fucking with me. What [I]nternet site do you want the naked pictures of your daughter posted on????????? Back the fuck off if you're at all concerned about her reputation cause I going to make life an embarrassing hell for all three of you. You can start by changing all of your phone numbers cause I'm not going to leave you alone until you do the same. FUCK YOU!!!!!!!!!!

Another one of defendant's emails to plaintiff's mother was accompanied by a photograph of plaintiff in her underwear.

After these communications by defendant to plaintiff's mother and plaintiff, plaintiff's mother called defendant. As a result of that conversation, plaintiff's mother called defendant's wife and told [*4] her that what she had said in their conversation earlier that day was "not true, he didn't profess his love" for plaintiff.

On July 13, 2009, defendant left an apology on the Blackberry of plaintiff's mother which stated:

This is [S.D.] calling you again. I just hope this -- I left a message with [your husband] yesterday. And the purpose of my call was simply to apologize to both you and [your husband] and I would like to do that in person but if you choose not to talk to me I understand. But at least if you don't talk to me you understand the purpose of my call. Thank you.

Defendant did not have any further communication with plaintiff's mother until August.

Following the flurry of nasty telephone and email messages from defendant to plaintiff's mother and plaintiff on June 25th, the only communications between defendant and plaintiff occurred a few weeks later, around the same time defendant apologized to plaintiff's mother. Plaintiff gave the following account of that communication, which was conducted by text message:

. . . [H]e apologized to me, which was pretty much the important thing he had to tell me. And I kept saying, you know, you broke my heart, you hurt me, I don't want to,

[*5] I just can't be with you anymore. And then he kept saying stuff like, kind of bringing back feelings like, so you really want to throw this all away. You're just going to give up like that. Stuff like that. And then at the end of the conversation I said I guess I have a lot to think about. And then he told me he loved me and I didn't say anything back. I just said, 'K. Bye. And that's how that conversation ended. And then my mom took my computer, took my phone, took anything that he would be able to contact me through to keep me safe. And I used my boyfriend's computer to tell him don't contact me, my mom has my stuff. And I told him myself don't contact me, through Game Battles again because I knew he would check it. So that was the last time that I said anything to him.

Shortly thereafter, plaintiff received roses from defendant, which plaintiff viewed as an effort by defendant to resume their relationship.

Sometime later in July, plaintiff sent defendant a text message saying "don't try to contact me, my mom has all my shit." Defendant never communicated with plaintiff again.

At some point, apparently in late July, plaintiff's mother sent a letter to the CEO of USA Taekwondo informing [*6] him of defendant's inappropriate relationship with her daughter and his threats. Afterwards, according to plaintiff's mother, defendant called her at least ten more times. According to plaintiff's mother, in those conversations, "[defendant] would threaten [plaintiff], and then he would apologize. Then he would be mean again, then he would be nice again." There was no communication between defendant and plaintiff at this time.

On August 4, 2009, plaintiff filed this action against defendant. The case was heard in a one-day bench trial at which plaintiff's mother, plaintiff, and defendant were the primary witnesses.

Based on the previously described evidence, the trial court concluded that defendant had violated the Prevention of Domestic Violence Act by committing an act of harassment, in violation of N.J.S.A. 2C:33-4(a), and that the issuance of a final domestic violence order was warranted.

In my judgment as a judge of the Superior Court the defendant's actions are morally reprehensible. There is no justification for his actions. It is absolutely outrageous that he would engage in this conduct. I understand that

under law that the age of [C.J.] is such that there cannot be a criminal [*7] charge filed against the defendant because she is over the age of consent. That having been said, she was only barely over the age of consent. And although he did not cross the line of criminal conduct in that sense, he certainly crossed the line in every sense imaginable for morally reprehensible conduct. It's outrageous in my opinion, what I have heard in this case. The issue, however, that I have to address as a judge is whether or not a predicate act has been established. . . . I am satisfied that the evidence clearly establishes that the one telephone call alone, leaving aside the other telephone calls and whether or not the other telephone calls were directed towards the plaintiff or whether they were directed towards the plaintiff's mother, but that one telephone call that I heard from a 60 year old to a 19 year old with that type of language on June 25, 2009 constitutes offensively coarse language. It was clearly designed to annoy or alarm the recipient. And it was made with purpose in my opinion to harass the plaintiff. Without getting into any of the other factors that I have heard in this case I find that the evidence clearly establishes a predicate act in violation of 2C:33-4(a). [*8] I'm more concerned with . . . whether or not there is a threat of imminent harm to the plaintiff that continues. I interpret the language of the law and the use of the word harm broadly. And I believe that under the circumstances of this case harm can include an explicit threat by the defendant to publish the photographs, the naked photographs of the plaintiff on the [I]nternet. I am convinced that the statute and the law does not limit harm to a fear of actual physical harm which I'm convinced does not apply in this particular situation. There's no evidence of any physical abuse here. But there is certainly evidence that harm in the sense that can be more serious psychologically than the physical harm here with the threat of publishing the photographs on the [I]nternet is something that satisfies the statute. Therefore I am satisfied as a judge of the Superior Court that the plaintiff has established that there has been a predicate act of domestic violence, specifically a violation of 2C:33-4(a), and that there is, has been a threat of imminent physical harm with respect to the publication of the photographs on the [I]nternet in the future.

We reverse.

In enacting the Prevention of Domestic [*9] Violence Act, the Legislature found that "there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants." *N.J.S.A.* 2C:25-18. The Legislature also found that "battered adults presently experience substantial difficulty in gaining access to protection from the judicial system, particularly due to that system's inability to generate a prompt response in an emergency situation." *Ibid.* "These findings indicate that the focus of the Legislature [in enacting the Prevention of Domestic Violence Act] was regular serious abuse between spouses." *Corrente v. Corrente*, 281 N.J. Super. 243, 247, 657 A.2d 440 (App. Div. 1995).

The Prevention of Domestic Violence Act incorporates fourteen criminal statutes into its definition of domestic violence. See *N.J.S.A.* 2C:25-19. These offenses range from homicide and kidnapping to criminal mischief, and include harassment, as defined by *N.J.S.A.* 2C:33-4. *N.J.S.A.* 2C:25-19. Thus, "the Legislature did not create a new class of offenses or interdict acts which otherwise were not addressed by the criminal law, but ensured that spouses who were subjected to criminal conduct by their mates had full [*10] access to the protections of the legal system." *Corrente, supra*, 281 N.J. Super. at 248.

The predicate act of domestic violence found by the trial court in this case was harassment, in violation of *N.J.S.A.* 2C:33-4(a), which provides:

[A] person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm.

We have no doubt that the telephone message defendant left on plaintiff's answering machine was "a communication . . . in offensively coarse language" within the intent of this section. However, the evidence did not support the trial court's finding that defendant's purpose in making the communication was to harass plaintiff. Rather, considered in the context of the prior four telephone messages defendant left on the Blackberry of plaintiff's mother, it is clear defendant's immediate purpose in leaving the message was to get plaintiff's mother to return his telephone calls and his ultimate purpose was to persuade plaintiff's mother

to call back his wife and retract [*11] her earlier statement that defendant was "still professing [his] love" for plaintiff.

We also note that defendant did not threaten to disclose nude photographs of plaintiff in this telephone message. Those threats were all made in the messages left on the Blackberry of and the emails sent to plaintiff's mother. Moreover, those threats were made only on June 25th and were not repeated after plaintiff's mother called defendant's wife and retracted her earlier statement that defendant was still professing his love for plaintiff.

Furthermore, even if the record could support a finding that defendant's purpose in leaving the message on plaintiff's answering machine was to harass her, this finding would not support the issuance of a final domestic violence restraining order against defendant.

It is now firmly established that the commission of one of the predicate acts of domestic violence set forth in *N.J.S.A. 2C:25-19* does not "automatically . . . warrant the issuance of a domestic violence [restraining] order." *Corrente, supra*, 281 N.J. Super. at 248. The determination whether such an order should be issued must be made "in light of the previous history of domestic violence between the plaintiff [*12] and defendant including threats, harassment and physical abuse and in light of whether immediate danger to the person or property is present." *Id.* at 248. This does not mean that a court must invariably find a prior history of domestic violence to enter a domestic violence restraining order. "[O]ne sufficiently egregious action [may] constitute domestic violence under the Act, even with no history of abuse between the parties[.]" *Cesare v. Cesare*, 154 N.J. 394, 402, 713 A.2d 390 (1998). But even though "a court is *not obligated to find* a past history of abuse before determining that an act of domestic violence has been committed in a particular situation, a court must at least *consider* that factor in the course of its analysis." *Ibid.*

Thus, the decision whether to issue a final domestic violence restraining order involves a two-step analysis. First, the court must determine whether the defendant committed one of the predicate acts set forth in *N.J.S.A. 2C:25-19* against a person protected by the Act. Second, the court must determine whether in light of all the circumstances, including the nature of the predicate act, any past history of domestic violence, and the entire relationship between the parties, [*13] "a domestic violence restraining order is necessary to protect plaintiff from immediate danger or further acts of domestic violence." *Silver v. Silver*, 387 N.J. Super. 112, 128, 903 A.2d 446 (App. Div. 2006); see also *Cesare, supra*, 154 N.J. at 402-05.

In this case, there was admittedly no history of domestic violence by defendant against plaintiff before June 25, 2009. Moreover, there was no allegation of any act of domestic violence after that date. The only subsequent communications between the parties were defendant text messaging an apology to plaintiff, plaintiff text messaging to defendant not to communicate with her anymore, and defendant sending roses to plaintiff, which plaintiff herself interpreted as an effort by defendant to resume their relationship rather than to harass or threaten her. We also note that the filing of plaintiff's domestic violence complaint on August 4, 2009 appears to have been triggered by a series of telephone calls defendant made to plaintiff's mother after she sent a letter to the CEO of USA Taekwondo informing him of defendant's inappropriate relationship with her daughter and his threats, rather than by the telephone message that defendant left on plaintiff's [*14] answering machine forty days earlier. Therefore, even if defendant's communications on June 25, 2009 could be found to constitute the predicate act of harassment, they constituted an isolated one-day occurrence precipitated by what defendant viewed as a malicious attempt by plaintiff's mother to interfere with his efforts to reconcile with his wife, which were not preceded or followed by any other act of domestic violence. Therefore, there is no basis on this record for concluding that "a domestic violence restraining order is necessary to protect plaintiff from immediate danger or further acts of domestic violence." *Silver, supra*, 387 N.J. Super. at 128.

Accordingly, the final domestic violence restraining order entered on August 26, 2009 is reversed.