RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3165-15T1

V.W.,

Plaintiff-Respondent,

v.

R.M.B.,

Defendant-Appellant.

Submitted May 10, 2017 – Decided August 1, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FV-20-1028-16.

Law Offices of Jef Henninger, attorneys for appellant (Brent DiMarco, on the brief).

Weiseman DiGioia, P.A., attorneys for respondent (Michael T. Simon, of counsel and on the brief).

PER CURIAM

Defendant R.M.B. appeals from a February 11, 2016 final restraining order (FRO) entered in favor of plaintiff V.W., pursuant to the New Jersey Prevention of Domestic Violence Act,

N.J.S.A. 2C:25-17 to -35 (the Act).[1] Because we conclude defendant did not harass plaintiff, we reverse and vacate the FRO.

I.

We discern these facts from the record. When the parties divorced, they entered into a marital settlement agreement (MSA), establishing shared legal and residential custody of their daughter and son. Plaintiff testified a doctor diagnosed her daughter with "autism and ADHD" two to three years ago, but defendant never told her this. Plaintiff only learned about her daughter's diagnosis when another doctor informed her in November 2015. Defendant testified she did not know about the diagnosis until plaintiff knew. Defendant explained the second doctor told them that the first doctor's nurse's notes "mention[ed] autism," but defendant never saw those notes. Immediately after this revelation, plaintiff started "badgering" defendant "via text" that she was "a horrible mother" and tried "to jump ship on the divorce because [she] knew things were going to get worse." Defendant claimed she received "a whole bunch of harassment e-mails . . . as a result of that."

[1] Two months earlier, on December 9, 2015, the court issued an FRO in favor of R.M.B. against V.W. Because this appeal concerns the February 2016 FRO, we refer to V.W. as plaintiff and R.M.B. as defendant.

Defendant consequently went to speak with the first doctor, who apologized and said the nurse probably hit the wrong button by accident when she was "charting" the visit because the system was new at that time. Defendant explained, "They amended the notes from three years ago to say that the diagnosis of [autism spectrum disorder] was placed in [their daughter's] record by mistake." At defendant's request, the first doctor's hospital also agreed to have "a full study team" evaluate their daughter.

On December 9, 2015, the Family Part issued an FRO prohibiting plaintiff from having any contact with defendant unless it concerned "the health, safety, and welfare of [their] children." On January 18, 2016, the parties' daughter had an appointment with a team of autism professionals who planned to decide whether the daughter had autism. Plaintiff had physical custody of the daughter on this date. Plaintiff testified defendant always scheduled their daughter's appointments, but plaintiff always either attended or "participated by telephone" when the appointments were important. Plaintiff admitted defendant "was in control" during the appointments.

Defendant testified she had "always taken the kids to doctors' appointments. In [their] nine years of having kids together, [plaintiff] probably took the kids to the doctor maybe two, three times." Defendant consequently believed she was going to take

their daughter to the January 18 appointment "as usual." She added that she remembered the judge told them during the December 9, 2015 FRO hearing, namely, to do what they had "always . . . done." Defendant was also concerned plaintiff "exaggerated" their daughter's symptoms and was "really hoping and dying to have a major diagnosis," explaining "[i]t fulfills her emotional needs for attention." She added, "We're still actually in debate on whether she had autism or not because the psychologist administered two instruments that showed no evidence of autism," but "[t]he neurologist decided, yes, let's just call [it] autism, but it's mild, high functioning autism."

On January 11, 2016, plaintiff sent defendant a text message, "So I will be taking [our daughter] on the 18th . . . correct. When did u plan on telling me that given u knew I had the kids that day?" Defendant replied, "I sent you all the appointments. I even explained to you why the neurologist had to be on a different day . . . . [sic] if you want to [I] can take [our daughter] on Monday[.]" Plaintiff wrote back, "No u never told me about the 18th and I will take her[.]" Defendant texted, "The neurologist that was supposed to examine [our daughter] on 1/11 . . . is no longer with them. That's why I have to take [her] for an additional appointment on [empty space] for the new neurologists . . . to examine her[.]" Plaintiff replied, "I am still their mother and

have a right to know. I only know when I looked at the portal. I wish u would just stop this. It's all just gonna hurt OUR children. Please let's work together for their sake[.]" Defendant texted back, "Don't text me. I gave you all the information[.]" Plaintiff responded, "Fine but u will take her. Stress takes a toll[.]" Plaintiff sent another text: "I will take her I meant[.]" She added, "Yes, please don't text me ever again except where it concerns our children[.]"

On January 16, 2016, defendant sent plaintiff a text, "I . . . want to take [our daughter] to [her appointment] on monday[.]" Plaintiff texted back, "I will take our [daughter to her appointment.]" Defendant replied, "I want to take [our daughter] to [her appointment]. It is an important appointment. And as always, I take care of the significant appointments. Just like the judge said. I will pick her up at 8:15 and I will call you when the appointment begins[.]" Plaintiff responded, "No the judge didn't say that[,] u did[,] and we both know u did so because of your job flexibility. It's my time with her and I will take her[.] I will call u when appointment starts. Please don't text me again about this issue[.]"

On January 17, 2016, defendant sent plaintiff a text, "I will pick [our daughter] up at 8:15am[.]" She repeated this text two minutes later, "I will take [our daughter] to the doctor[.]"

Plaintiff replied, "I asked you to please not text me about this anymore. It's my parenting time and I will take her." Defendant texted back, "Then I will be at [the appointment] with a copy of the FRO[.]" Plaintiff replied, "And I will be there with the MSA showing you are impending [sic] upon my parenting time[.]" Plaintiff explained, "The custody and agreements in such have not be[en] changed by a judge[.]"

After this exchange, plaintiff testified she was "[s]cared stiff" because she was "afraid" defendant "was trying to get [her] arrested in front of" their children, and she "would never want [their] children to see anything like that." Plaintiff consequently asked a friend to accompany her and the children to the appointment. The friend knew both parties because they had lived as neighbors before they divorced.

When plaintiff arrived at the appointment with the children and friend, she told the registrar "about the situation with the restraining order" and showed her the MSA. The registrar took her back to a supervisor. While they were waiting "near the front entrance of the hospital," defendant entered.

Defendant first started screaming at the friend, saying "you don't belong here, what are you doing here[?]" Defendant then tried to grab the parties' son away from the friend. Defendant also started screaming her daughter's name, trying to get her to

come to her. Plaintiff said the friend "put her arms out like she was trying to . . . block everything from happening." Defendant then "knock[ed]" into the friend, and when defendant tried to "get over" plaintiff's back, defendant also "knocked" plaintiff. Plaintiff consequently called the police. A manager eventually got in between plaintiff and defendant, raising her arms sideways to keep them separate. Some hospital staff then "took" defendant "into a room."

Plaintiff introduced the results of that day's subsequent medical exam. The neurologist concluded, "Based on many of the above criteria and after extensive conversation with her parents, [the parties' daughter] does meet criteria for an autism spectrum disorder."

Defendant disputed much of plaintiff's testimony. Defendant said that when she entered the lobby, hospital staff "were already between" her and plaintiff, their children, and the friend. She could not "get anywhere close to them." She did not "remember" her "hands touching anything — anybody's shoulder or hands." She nevertheless admitted she raised her arm for their daughter and asked her to come to her. Defendant "was upset" and said the friend "should not be here." Defendant said she had the FRO; she "made the appointment;" and she "usually . . . accompanies the kids for all of their medical appointments." Plaintiff then "all

of a sudden, was in [her] face." "She said, recording, recording, recording. She was videotaping, and there was nothing to videotape." Defendant testified she felt like she had been "set up." Before anything more occurred, plaintiff walked away with their children and friend, and hospital staff asked defendant to go to another room; she complied.

When the police arrived, they told defendant that she could only join their daughter's appointment by telephone because plaintiff had shown them the MSA, which stated she had physical custody of their daughter that day. The hospital staff arranged for defendant to use a telephone in one of its conference rooms.

The same day, plaintiff filed a domestic violence complaint seeking a restraining order against defendant. After hearing the testimony of plaintiff, defendant, and their friend at the February 11, 2016 FRO hearing, the court made the following credibility finding:

> The [c]ourt has observed both the parties testifying, has observed the witness, and finds them all to have a certain degree of credibility. There are some differences in the testimony among the parties. The differences are — when looked at, are really not greatly significant. There's an agreement on most aspects of what's going on, at least factually. So, all the parties are found to be credible, and the witness is found to be credible.

The court then noted that the first FRO "did not change anything other than the pick up and drop off." The court said, "The question for this [c]ourt is whether what occurred is harassment . . . . [I]t doesn't take a lot in this type of case to demonstrate that." The court then observed when plaintiff's text said she was going to take the daughter to the appointment, defendant "persisted on taking her and — texting."

> Then, when [she] finally realizes that she's not going to get anywhere with that, she folds up the FRO as a sword — not as a shield, as a sword. Because when you say I'm coming to the hospital on your visitation day, when you've told me you're taking the child to see the doctor on your day and I don't have to, and I say, well, I'm going to be there anyway, I'm going to bring the FRO and show up to the hospital, there's no other purpose in saying that other than to alarm somebody.

The court therefore concluded, "[P]laintiff has proved by a preponderance that a predicate act under the . . . Act has been committed, specifically in this case harassment." The court consequently entered the FRO under review.

II.

We exercise a limited scope of review over a trial judge's findings of fact. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974). We give due regard to the trial judge's credibility determinations based upon the opportunity of

the trial judge to see and hear the witnesses. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998).

The Act defines domestic violence by a list of predicate offenses found within the New Jersey Criminal Code. J.D. v. M.D.F., 207 N.J. 458, 473 (2011). We have held the commission of any one of the predicate offenses does not automatically mandate entry of a domestic violence restraining order. Kamen v. Egan, 322 N.J. Super. 222, 227 (App. Div. 1999).

A judge's review of a domestic violence complaint is two-fold. Silver v. Silver, 387 N.J. Super. 112, 125 (App. Div. 2006). The first step is to "determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in N.J.S.A. 2C:25-19(a) has occurred." Ibid. The acts claimed by "plaintiff to be domestic violence must be evaluated in light of the previous history of domestic violence between the plaintiff and defendant including previous threats, harassment, and physical abuse and in light of whether immediate danger to the person or property is present." Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995). The second step asks whether, after finding the commission of a predicate offense for domestic violence, "the court should enter a restraining order that provides protection for the victim." Silver, supra, 387 N.J. Super. at 126. Therefore, "the guiding

standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. [2C:25-29(a)(1) to -(6)], to protect the victim from an immediate danger or to prevent further abuse." Id. at 127. Those factors include:

> (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
>
> (2) The existence of immediate danger to person or property;
>
> (3) The financial circumstances of the plaintiff and defendant;
>
> (4) The best interests of the victim and any child;
>
> (5) In determining custody and parenting time the protection of the victim's safety; and
>
> (6) The existence of a verifiable order of protection from another jurisdiction.
>
> [N.J.S.A. 2C:25-29(a).]

Here, the judge concluded defendant committed harassment, N.J.S.A. 2C:25-19(a)(13). A person commits the petty disorderly persons offense of harassment, pursuant to N.J.S.A. 2C:33-4, if, with purpose to harass another, he or she:

> (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;
>
> (b) subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

> (c) engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

For a finding of harassment under N.J.S.A. 2C:33-4, the actor must have the purpose to harass. Corrente, supra, 281 N.J. Super. at 249. Finding a party had the purpose to harass must be supported by evidence the party's "conscious object was to alarm or annoy; mere awareness that someone might be alarmed or annoyed is insufficient." J.D., supra, 207 N.J. at 487. Additionally, our courts must be mindful of cases involving "the interactions of a couple in the midst of a breakup of a relationship." Ibid.

The evidence in the record does not establish defendant harassed plaintiff pursuant to N.J.S.A. 2C:33-4. The trial court relied on defendant's texts to conclude she harassed plaintiff. Defendant simply said, "Then I will be at [the appointment] with a copy of the FRO[.]" Defendant obviously believed, mistakenly, the FRO gave her the exclusive right to bring their daughter to the appointment. Plaintiff responded, "And I will be there with the MSA showing you are impending [sic] upon my parenting time[.]" Plaintiff even explained, "The custody and agreements in such have not be[en] changed by a judge[.]" Plaintiff clearly understood she was not going to violate the FRO when she brought their daughter to the appointment. The record does not support a finding

that defendant intended to harass plaintiff, N.J.S.A. 2C:33-4; Corrente, supra, 281 N.J. Super at 249; rather, defendant simply communicated her intention to enforce what she mistakenly believed the December 2015 FRO granted her the right to do. "[M]ere awareness that someone might be alarmed or annoyed is insufficient." J.D., supra, 207 N.J. at 487. We therefore vacate the February 11, 2016 FRO and remand to the trial court for the entry of a confirming order.

Vacated and remanded. We do not retain jurisdiction.