

RECORD IMPOUNDED

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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0878-16T1

E.R., JR.,

Plaintiff-Respondent,

v.

G.D.,

Defendant-Appellant.

Argued January 30, 2018 — Decided February 16, 2018

Before Judges Yannotti and Mawla.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FV-04-0250-17.

Gianna DeLizza argued the cause for appellant
(Rutgers Domestic Violence Clinic, Rutgers
Law, attorneys; Victoria Chase, of counsel;
Carly Campoli, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant G.D. appeals from a July 14, 2016 final restraining
order (FRO) entered against her in favor of E.R., Jr. pursuant to
the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17

to -35. She also appeals from an October 7, 2016 order denying her motion for reconsideration. Because the trial judge failed to elicit adequate testimony regarding the history of domestic violence, and make findings regarding that history to support his conclusions that defendant committed a predicate act of domestic violence and that an FRO was necessary to protect plaintiff E.R., Jr., we reverse and remand for further findings.

Plaintiff and defendant each obtained a temporary restraining order (TRO) against the other. The trial judge conducted a trial on July 14, 2016, during which each party was self-represented and offered testimony. Although we have not been provided with the parties' TROs, plaintiff's testimony indicates he alleged defendant had committed criminal mischief by intentionally hitting his car with hers, cracking his bumper, while he was stopped at a light near his home. Plaintiff claimed defendant then exited her car, walked to his window, and he put down the window and told defendant to meet him at home.

Plaintiff testified that the following day defendant keyed his car and slashed the tires. Although plaintiff did not see defendant deface his vehicle, he testified he received texts from her shortly afterwards bragging that she had caused him to spend money to repair his vehicle. Plaintiff also produced a text

message, allegedly from defendant, threatening to deface an Acura belonging to his female companion.

The trial judge next considered testimony from plaintiff regarding the history of domestic violence. The following colloquy ensued:

THE COURT: So . . . did you ever have any domestic violence between the two of you before in the past?

[PLAINTIFF]: Yeah, we have other restraining orders or whatever, but we settle[d] and dropped it, or whatever.

THE COURT: You've had ones that you've gotten against her and she's gotten ones against you?

[PLAINTIFF]: Yeah. Yeah.

THE COURT: And have they ever been for violence or anything like that? You know . . . you getting one against her because she struck you or something like that?

[PLAINTIFF]: No.

THE COURT: Well what has she done in the past that made you . . . [get] a [TRO]?

[PLAINTIFF]: She's always destroying my property, cars, everything.

THE COURT: Oh. Okay.

[PLAINTIFF]: It's not the first time.

THE COURT: Okay. All right. Anything else?

[PLAINTIFF]: No, sir.

Plaintiff testified the incidents in his complaint occurred because he was no longer in a relationship with defendant. When the trial judge asked plaintiff why he wanted an FRO, plaintiff testified he wanted defendant to leave him alone.

After limited cross-examination by defendant, she then testified and denied the texts plaintiff received were from her because the telephone number from which they were sent did not belong to her. She also denied following his vehicle and hitting it with hers. She claimed she was home asleep at the time.

Defendant's complaint asserted plaintiff had committed criminal mischief as well by keying her car. Defendant testified she was sleeping in her living room when she was awakened by noises outside her home. She testified she observed plaintiff damage her car and then drive away. Defendant showed the trial judge a video of the damage done to her car and a picture of her tires, which had been slashed.

When the trial judge asked defendant why plaintiff would damage her car, defendant could find no reason. Defendant denied it was due to the end of the parties' relationship, as plaintiff had claimed. Defendant noted that she filed a police report, made a claim with her insurance company, and "paid thousands of dollars" to repair her vehicle.

The judge then questioned defendant about the history of domestic violence as follows:

THE COURT: . . . oh, by the way, do you agree that in the past there have been [TROs] against—

[DEFENDANT]: Yeah.

THE COURT: —each other? And . . . has there been—

[DEFENDANT]: Physical.

THE COURT: —physical violence between the two of you?

[DEFENDANT]: Uh-huh.

The trial judge rendered an oral decision and found both parties had proved a predicate act of domestic violence, namely criminal mischief, pursuant to N.J.S.A. 2C:17-3(1). The judge did not explain why he found plaintiff had established the predicate act. With regards to defendant's complaint, the judge found she had proven the criminal mischief "base[d] . . . on the fact that you have eyewitness testimony of your own."

Regarding the history of domestic violence and the need for an FRO, the trial judge offered the following limited findings:

I find that [plaintiff] has proven, by a preponderance of the evidence, that [an FRO] is necessary to protect him from further acts of violence and abuse because there's a history of violence and abuse between the two of them. I find that [defendant] has proven, by a preponderance of the evidence, that a

[FRO] is necessary to protect her from further acts of violence and abuse.

The judge entered the FROs.

Through counsel, defendant filed a motion for reconsideration, which the trial judge considered on October 7, 2016. Defendant argued the trial judge had not made adequate findings regarding the history of domestic violence. The judge responded:

[Plaintiff] [t]estified that [defendant] had damaged his property in the past. I asked [him] . . . and he said that there were prior restraining orders entered, they were dismissed. I said do you agree with what he said regarding the past history of restraining orders and she said yes. Based on those facts, I concluded there was a prior history of domestic violence and that [an FRO] was necessary.

When defendant's counsel pointed out that an analysis of the history of domestic violence would have demonstrated that defendant was the victim and plaintiff the aggressor, the judge responded: "It wasn't presented." The judge denied defendant's motion for reconsideration and this appeal followed.¹

On appeal, defendant argues the trial judge failed to make a proper inquiry into the facts. She also argues the judge failed to make adequate findings of fact and conclusions of law regarding

¹ Plaintiff did not appeal from the FRO entered against him.

the predicate acts of domestic violence and the history of domestic violence. Defendant also argues the judge failed to analyze whether an FRO was necessary to protect plaintiff from defendant.

In Cesare v. Cesare, 154 N.J. 394 (1998), the Supreme Court addressed the standard of review we apply to domestic violence matters. The Court stated:

The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility."

Because a trial court "'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Therefore, an appellate court should not disturb the "factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice."

[Id. at 411-12 (citations omitted)
(alterations in original).]

"On the other hand, where our review addresses questions of law, a 'trial judge's findings are not entitled to the same degree of deference if they are based upon a misunderstanding of the applicable legal principles.'" N.T.B. v. D.D.B., 442 N.J. Super. 205, 215 (App. Div. 2015) (quoting N.J. Div. of Youth & Family

Servs. v. Z.P.R., 351 N.J. Super. 427, 434 (App. Div. 2002)). The appropriate standard of review for conclusions of law is de novo. S.D. v. M.J.R., 415 N.J. Super. 417, 430 (App. Div. 2010) (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

On appeal, defendant argues the trial judge erred by failing to undertake the required inquiry into the parties' past history of domestic violence. She contends the failure to elicit facts relevant to that history requires a remand and reconsideration of the court's findings on whether she committed a predicate act of domestic violence, and if so, whether an FRO was required to protect plaintiff from future harm.

The parties' complaints made competing claims of criminal mischief. Pursuant to N.J.S.A. 2C:17-3(a)(1), criminal mischief is defined as "[p]urposely or knowingly damag[ing] tangible property of another. . . ." Here the limited testimony elicited by the trial judge demonstrated that each party had engaged in criminal mischief. As the judge noted, the credible evidence in the record could support a finding that plaintiff had defaced defendant's car because defendant was an eyewitness. Likewise, the credible evidence demonstrated defendant hit plaintiff's car because plaintiff was in his automobile at the time, and spoke with defendant who had exited her vehicle. Also, the trial judge

rejected defendant's testimony in which she denied striking plaintiff's car, finding it not credible.

Although a finding of domestic violence was possible on these predicate acts alone, the trial judge was obligated to address the history of domestic violence to determine whether the predicate acts were colorable as domestic violence. "Domestic violence is a term of art which defines a pattern of abusive and controlling behavior injurious to its victims." Peranio v. Peranio, 280 N.J. Super. 47, 52 (App. Div. 1995). Thus, the history of domestic violence is an essential inquiry.

Indeed, in Cesare, 154 N.J. at 402, the Supreme Court held the PDVA:

require[s] that "acts claimed by a plaintiff to be domestic violence . . . be evaluated in light of the previous history of violence between the parties." Although 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. Therefore, not only may one sufficiently egregious action constitute domestic violence under the Act, even with no history of abuse between the parties, but a court may also determine that an ambiguous incident qualifies as prohibited conduct, based on a finding of violence in the parties' past.

[(quoting Peranio, 280 N.J. Super. at 54) (citations omitted) (emphasis omitted).]

Here, beyond the limited testimony we have recited above, the record is devoid of what exactly the history of domestic violence was other than a vague statement by the parties that each had obtained prior TROs against one another. A more searching inquiry and findings by the judge regarding the history of domestic violence was necessary given that the judge stated he determined to enter the FROs based, in part, on the parties' history.

We also disagree with the trial judge's suggestion in adjudicating defendant's motion for reconsideration that his inquiry into the history of domestic violence was limited because the parties did not present it to the judge. The Supreme Court has stated "trial courts should use the allegations set forth in the complaint to guide their questioning of [litigants]" J.D. v. M.D.F., 207 N.J. 458, 479 (2011). Here, the record demonstrates the judge had an indication of a history of domestic violence and began to question the parties regarding it. However, the questioning was cursory and does not demonstrate how the predicate acts were a continuation of the parties' history of domestic violence as opposed to separate conflagration.

Finally, we agree the trial judge failed to make adequate findings regarding the second prong of Silver v. Silver, 387 N.J. Super. 112, 126 (App. Div. 2006), which requires the court to

determine whether restraints are necessary to protect a plaintiff from harm. As the Court stated in J.D.,

[t]hat inquiry serves to ensure that the protective purposes of the Act are served, while limiting the possibility that the Act, or the courts, will become inappropriate weapons in domestic warfare. Although, as our Appellate Division noted, there will be cases in which the risk of harm is so great that the inquiry can be perfunctory, in others, . . . it is not. In those cases, overlooking that important step in the analysis poses the risk of unfairness and error.

[207 N.J. at 488.]

N.J.S.A. 2C:25-29(a) states:


The court shall consider but not be limited to the following factors:

- (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.

In this case the judge failed to make the necessary statutory findings. Also, the record does not support the trial judge's conclusion it was necessary for plaintiff to have FRO restraints against defendant. For example, plaintiff testified defendant hit his car, yet he offered testimony indicating he instructed defendant to return to his home afterwards. These facts do not demonstrate the objective evidence of fear required by Silver, 387 N.J. Super. at 126.

For these reasons, the FRO entered against defendant is vacated and the TRO is reinstated. The matter is remanded for a new FRO hearing. On remand, the trial court shall reconsider its decision and make appropriate findings of fact and conclusions of law as to whether defendant committed a predicate act of domestic violence, and if so, whether an FRO is required to protect plaintiff from harm. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION