SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0853-20

D.A.R.,

Plaintiff-Respondent/
Cross-Appellant,

v.

E.A.R.,

Defendant-Appellant/
Cross-Respondent.

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Argued October 28, 2022 – Decided January 12, 2023

Before Judges Whipple, Mawla, and Smith.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Warren County, Docket No. FV-21-0484-20.

Damiano M. Fracasso argued the cause for appellant/cross-respondent.

John T. Knapp argued the cause for respondent/cross-appellant (Simon, O'Brien & Knapp, PC, attorneys; John T. Knapp, of counsel and on the briefs; Sarah E. Kapitko, on the briefs).

PER CURIAM

Defendant E.A.R. appeals from an August 14, 2020 final restraining order (FRO) and an October 16, 2020 order awarding fees to plaintiff pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. Plaintiff D.A.R. cross-appeals, arguing error in the amount of the fee award. We affirm.

Defendant and plaintiff were married for four years. At the time of this action, their divorce was pending. On March 18, 2020, defendant called the Washington Township Police to report an incident between himself and plaintiff. Officer John Kuligowski spoke with him on the phone. Defendant told Kuligowski that he and plaintiff had a verbal argument over his financially supporting his eighteen-year-old son, who is not plaintiff's son and did not live with them.

When Kuligowski arrived at their home, defendant was waiting outside. While Kuligowski was speaking to defendant, plaintiff stepped onto the porch and motioned to Kuligowski to come inside the house so she could talk to him. Kuligowski told defendant to wait outside while he spoke to plaintiff.

Once inside, plaintiff told Kuligowski that defendant "slammed" her to the ground in their bedroom. She told him when defendant left the room, he

closed the door over her foot, giving her a cut on her toe about a quarter of an inch long. Kuligowski testified the injury was still bleeding and skin was hanging off her toe.

Defendant entered the house, telling Kuligowski that he was packing a bag of clothes. In response to defendant's disregard of his instruction to stay outside, Kuligowski called for backup and once again told defendant to stand outside. When Kuligowski asked defendant if he pushed plaintiff to the ground, he denied it. Nevertheless, defendant was charged with simple assault, N.J.S.A. 2C:12-1(a)(1), and harassment, N.J.S.A. 2C:33-4(b).

On June 9, 2020, plaintiff applied for a temporary restraining order (TRO) against defendant, which the court granted. The TRO also listed several incidents indicating an alleged prior history of domestic violence.

Plaintiff retained private counsel and moved to amend the TRO to include three more instances of prior domestic violence before the incident on March 18. The FRO trial was held over Zoom. At trial, Kuligowski recounted his recollection of events of March 18, 2020. Plaintiff also testified, explaining how the alleged assault took place. According to her testimony, she and defendant were in the bathroom adjoining their bedroom when she asked defendant about a conversation he had with his adult son the night before. After he handed her

his phone, she left the bathroom and entered the bedroom. As she was leaving, she was "shoved forcefully to the ground and landed on [her] side." Before she could get up, defendant opened the bedroom door to exit and, as he was leaving, shoved the door "into [her] body and ran right over [her] toe[,]" which "was stuck underneath the doorway . . . ."

Plaintiff testified that while she was lying on the ground, defendant said "[t]his is all your fault," and locked himself in a different bathroom. She also said that, besides the cut on her toe the officer observed, she had a bruise on her left hip from when he pushed her to the ground.

Plaintiff testified the bail conditions imposed on defendant after his arrest, which included a thirty-day no-contact order and an order to stay away from their home, made her feel safe. She stated these conditions, plus the fact that the COVID-19 pandemic was just beginning, explained why she did not seek a restraining order right away. Once she heard the bail conditions and the stay-at-home orders put in place due to the pandemic would be lifted in June 2020, she applied for a TRO.

Plaintiff also discussed other incidents of domestic violence included in her amended TRO, as well as a longer history of incidents with defendant. When asked what relief she was seeking from the court, plaintiff stated: "[F]or lifetime

protection against my husband. I need a restraining order so that I can be the best mom I can be and not live in fear." She testified if the FRO was not granted, she would be "scared for [her] life."

At the conclusion of plaintiff's case on July 30, defendant moved to dismiss for failure to state a cause of action and argued the alleged predicate act—the push to the floor and toe injury—was not included in the TRO complaint. The court denied the motion:

> This is all . . . factual dispute, closing argument fodder. I'm going to deny the motion at this point as I just indicated . . . plaintiff in resisting the motion is entitled to the benefit of all of her favorable evidence and all reasonable [inferences] which may be drawn therefrom.
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> Applying that standard, the complaint alleges that she was assaulted by . . . defendant and if we believe her testimony and give her the benefit of all reasonable inferences therefrom, she's made out a case[,] which is legally cognizable under the [PDVA] and under R[ule] 4:6-2(e) the motion should be and shall be denied.

Defendant also testified. He denied pushing plaintiff and said, if the door did hit her toe when he opened it, he did not know it. He said he first tried to call a family counselor while in the bathroom, but that the counselor was unavailable, and someone directed him to the police. As for the other incidents

about which plaintiff testified, he denied them or offered differing versions of them.

On August 14, 2020, the judge delivered an oral opinion in which he made careful and deliberate findings. In assessing the prior history of domestic violence between the parties, the court did not consider the incidents post-dating March 18, 2020, the date the TRO alleged the predicate act of assault. Instead, it considered these events merely a violation of the TRO. The court did consider other allegations in the amended complaint from 2015, 2017, and 2019.

Addressing the first prong of Silver v. Silver,[1] the court said it could not "conclude based upon a preponderance of the credible evidence that . . . defendant engaged in conduct[,] which constituted harassment as a predicate act."

However, the court found defendant pushed plaintiff to the ground, and this constituted a predicate act of assault, even if it did suspect that plaintiff's bruises did not result from the push. It found the injury to her toe did not constitute assault: "[the toe injury] was more likely accidental than purposeful, and . . . there is insufficient evidence for the [c]ourt to conclude that it was done

[1] 387 N.J. Super. 112, 125 (App. Div. 2006).

in a reckless manner so as to satisfy the criteria for a finding of assault as to that conduct under the [PDVA]."

The court then considered the second prong of Silver, "whether [an FRO] is necessary to protect the plaintiff from immediate danger to her person and whether that immediate danger is present and can be anticipated in the future." The court found:

> [B]ased upon the observation of . . . defendant's testimony; the means and manner in which he testified and all of the other criteria to judge a witness' credibility that . . . to a serious and substantial degree his testimony is not credible in terms of getting this [c]ourt to the point where it can conclude that if a[n FRO] was not issued, that the defendant returning [to] the house would not present a clear and present danger of future domestic violence to . . . plaintiff.

Thus, the court issued the FRO ordering defendant was prohibited from "returning to the scene of violence," except to "exercise parenting time with his son." He was also barred from plaintiff's home and place of employment and prohibited from having any contact with plaintiff. As for parenting time and other relief, the court decided that the earlier terms would stay in place while the case before the matrimonial court was pending, and it would defer to the matrimonial court. The trial court specified the parties would only be allowed

to communicate about parenting time and other matters concerning their son through text.

The court denied defendant's motion to reconsider, but granted plaintiff's request to submit a certification of services under N.J.S.A. 2C:25-29 to obtain $15,013. in counsel fees.

The court held a hearing on the fee application and awarded plaintiff fees under N.J.S.A. 2C:25-29(b)(4) because she was successful in prosecuting a restraining order. Grandovic v. Labrie, 348 N.J. Super. 193, 197 (App. Div. 2002). However, because plaintiff was unsuccessful in showing defendant harassed her, the bruise on her thigh was from defendant's push, and defendant's hitting her toe with the door was an act of assault, the court concluded it "must narrow those fees to the domestic violence that the [c]ourt found the defendant engaged in and . . . then convert that to a determination as to the reasonableness of fees associated with the prosecution of that portion of the case."

The court's calculations were as follows:

> [T]aking into account that the total of . . . 33.4 hours has to be reduced, the [c]ourt does parenthetically find that $395 an hour is consistent with fees charged in the area; although [plaintiff's counsel] is in Morristown, that's not so physically distant or substantively isolated from Warren County.

> And then there is seven hours of [plaintiff's counsel's associate]. The services were required. The fees are consistent with fees customarily charged in the area, and . . . the [c]ourt takes into account the adjournments at the outset, the necessity to amend the complaint, the delayed occasion to no fault of either of the parties by reason of technical difficulties, and the fact that the trial was expanded to permit the assertion and defense against what the [c]ourt characterized as plaintiff's embellished assertions.
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> [T]he parties appeared on June 25, 29, July 2, July 24, July 30 and August 14 when the FRO was finally ordered. The . . . [c]ourt reduces the hours requested by [plaintiff's counsel] . . . to [eighteen] hours at $395[,] an hour[,] which comes to $7,110 and reducing [the associate's] hours at $260 an hour to five hours from seven, bringing it down to $1,300, results in an award of counsel fees in favor of plaintiff and payable by defendant in the amount of $8,410.

This appeal followed.

Our scope of review of Family Part judges' fact-findings is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We owe substantial deference to the Family Part judge's findings of fact because of his or her special expertise in family matters. Id. at 413. "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). A judge's fact-finding is "binding on appeal when supported by adequate, substantial, credible

evidence." Ibid. (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, we owe no special deference to the trial judge's "interpretation of the law and the legal consequences that flow from established facts . . . ." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citing State v. Brown, 118 N.J. 595, 604 (1990)).

Since this case turned almost exclusively on the testimony of the witnesses, we defer to the Family Part judge's credibility findings, as he had the opportunity to listen to the witnesses and observe their demeanor. See Gnall v. Gnall, 222 N.J. 414, 428 (2015). We discern no basis on this record to question the judge's credibility determinations.

As a matter of legal analysis, when determining whether to grant an FRO under the PDVA, a judge must undertake a two-part inquiry. Silver, 387 N.J. Super. at 125-27. "First, the judge must 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." Id. at 125. Second, the judge must determine whether a restraining order is necessary to protect the plaintiff from future acts or threats of violence. Id. at 126-27.

Defendant now argues the trial court violated his right to due process when it found a predicate act of assault that was not raised in the original or amended TRO. We disagree because we find the issue was properly raised.

Plaintiff's TRO complaint alleged assault. The trial court found defendant's conduct—shoving—on March 18, 2020, for which he was arrested and charged with simple assault, constituted the predicate act of assault under PDVA. Plaintiff additionally checked the "assault" box on the complaint. The reference in the complaint to an assault on March 18 provides sufficient notice to defendant.

Defendant next argues the trial court erred in finding a predicate act of assault to have occurred at all. Defendant bases this argument on the fact the judge found the bruise on plaintiff's hip was not from the push, as she claimed it was. Defendant suggests, though not explicitly, that because the bruises did not result from the push, there was no bodily injury, and thus no assault.

The court found defendant pushed plaintiff to the floor. Even if the bruise pictured did not result from the push, there is evidence plaintiff was in physical pain. The push constitutes bodily injury because of the "physical discomfort" or "sensation" of being pushed to the floor. State ex rel. S.B., 333 N.J. Super. 236, 244 (App. Div. 2000).

We next consider defendant's claim the judge erred in finding plaintiff required an FRO to protect her from future acts of domestic violence. In determining whether a restraining order is necessary, the judge must evaluate the factors set forth in N.J.S.A. 2C:25-29(a)(1) to -29(a)(6) and, applying those factors, decide whether an FRO is required "to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127. Whether a restraining order should be issued depends on the seriousness of the predicate offense, "the previous history of domestic violence between the plaintiff and defendant including previous threats[, and] harassment[,]" and "whether immediate danger to the person or property is present." Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995) (citing N.J.S.A. 2C:25-29(a)(1), (2)).

Here, based on the credible testimony, the court found assault, a predicate act which "inherently involves the use of physical force and violence" that makes the decision to issue a FRO "self-evident." A.M.C. v. P.B., 447 N.J. Super. 402, 417 (App. Div. 2016) (quoting Silver, 387 N.J. Super. at 127). Additionally, it considered the danger to plaintiff in light of the history of alleged domestic violence. Thus, the trial court did not err in finding the FRO was necessary to prevent further abuse.

Both parties appeal the award of fees. Compensatory damages and reasonable fees may be awarded in domestic violence cases. McGowan v. O'Rourke, 391 N.J. Super. 502, 507-08 (App. Div. 2007). "The reasonableness of attorney's fees is determined by the court considering the factors enumerated in R[ule] 4:42-9(b)." Id. at 508. An award of attorney's fees is "within the discretion of the trial judge" and should be "disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Ibid. (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443-44 (2001)).

We discern no abuse of discretion in the amount of counsel fees awarded by the court. The judge reviewed the factors set forth in N.J.S.A. 2C:25-29(b)(4) and Rule 4:42-9(b) in determining the award of counsel fees. He explained the basis for reducing the requested legal fees and set forth the specific sums deducted from the amount sought in counsel's affidavit of legal services.

To the extent we have not addressed the parties' remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.