

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0908-21

L.R.,¹

Plaintiff-Appellant,

V.

F.C.G.,

Defendant-Respondent.

Argued January 11, 2023 – Decided February 27, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Union County, Docket
No. FV-20-1463-21.

Craig L. Dashiell argued the cause for appellant
(Lowenstein Sandler LLP, attorneys; Michael T.G.
Long and Craig Dashiell, of counsel and on the briefs).

Jerry Eisdorfer argued the cause for respondent
(Eisdorfer, Eisdorfer & Eisdorfer, LLC, attorneys; Jeff
Thakker, of counsel; Jerry Eisdorfer, on the brief).

¹ We use initials in accordance with Rule 1:38-3(d)(10).

PER CURIAM

Plaintiff L.R. appeals from an October 14, 2021 order dismissing her domestic violence complaint, vacating her temporary restraining order (TRO), and denying her application for a final restraining order (FRO) against her former boyfriend, defendant F.C.G., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. Because the trial judge made insufficient credibility findings as required under Rule 1:7-4 and failed to properly evaluate the proofs under the standard enunciated in Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006), we vacate the dismissal order, reinstate the complaint and the TRO, and remand the matter so that the trial court can make the requisite findings and conduct the appropriate analysis.

We glean these facts from the record. From 2016 to 2021, plaintiff and defendant were in a dating relationship. However, on May 22, 2021, plaintiff obtained a TRO based on a domestic violence complaint she filed against defendant, alleging assault. In the complaint, plaintiff alleged that at 11:17 p.m. on May 21, 2021, after she "attempt[ed] to end the relationship," defendant "struck" her in the "head and arms" and "pulled her hair," causing her "pain."

On August 10, 2021, plaintiff amended the complaint by adding the predicate act of harassment. In the amended complaint, plaintiff added that

during the May 21 argument, "[d]efendant grabbed [her] by the hair," "pushed her down," and "covered her nose and mouth with his hands" "[w]hile she was on the floor." Plaintiff also alleged that there had been an unreported history of domestic violence involving verbal and physical abuse. Specifically, in addition to continuously insulting plaintiff, "[i]n the winter of 2019," defendant had allegedly "assaulted [p]laintiff after [she] refused to give him her phone" by "grabb[ing p]laintiff's finger and ben[ding] it, causing bruising." Additionally, "[a]s [p]laintiff was leaving the home," defendant allegedly "followed her and pushed her," causing her to fall. Other allegations included in the amended complaint are not germane to this appeal.

During a two-day Zoom hearing conducted on October 5 and 14, 2021, both parties were represented by counsel and both parties testified through an interpreter, providing conflicting accounts of the incidents. According to plaintiff's testimony, on the evening of May 21, 2021, she and defendant had been drinking at defendant's home. Although plaintiff spent a great deal of time at defendant's home, the parties did not live together. Plaintiff explained that at some point during the evening, they got into an argument related to COVID and defendant "grabbed [her] by the hair," "threw [her] against the floor," "got on top of [her]," and "cover[ed her] mouth." Plaintiff tried unsuccessfully "to get

[defendant] off of [her]," but he held her hands. She stated he looked at her "with a lot of anger" and she "thought [she] was going to die." Eventually, she was "able to yell [for] help," and defendant let her off the floor when the police "knocked on the door." The record is unclear regarding who called the police, but it was presumably a neighbor.

Plaintiff testified that after the police arrived, "[o]ne officer took [defendant] outside and another officer stayed inside with [her]." The officer encouraged her to file a report but she was hesitant because "[she] was afraid." After the police arrested defendant, plaintiff accompanied the officers to the police station where the officers took photographs of plaintiff's injuries. The photographs, which were admitted into evidence, depicted "marks on [plaintiff's] arm" and "bruises." Plaintiff filed a complaint and obtained a restraining order against defendant that same evening "[b]ecause [she was] afraid of him."

Plaintiff also testified about a history of verbal and physical abuse. According to plaintiff, after the first year of their relationship, defendant became controlling and began berating her, telling her that she did not "have a right to anything," that she was a "nobody," a "nothing," and that she "had to do whatever he told [her] or ordered [her] to do." Plaintiff testified that in 2019,

the abuse escalated to physical abuse, recounting an incident during which defendant "twisted [plaintiff's] finger because he wanted to take away the cell phone that he had bought for [her]." Plaintiff stated that defendant twisted her "right [ring] finger" so hard that she "couldn't move it anymore," and, that same day, as she was leaving, he "pushed [her] down the stairs." Plaintiff said that after she fell, defendant immediately "started to cry and . . . begged for forgiveness." The following day, he continued to "ask[] for forgiveness and [she] forgave him."

Plaintiff testified further that she was "very afraid" of defendant "[b]ecause he's a very vengeful person," and he had told her "[t]hat since he didn't have anything left to do in his life[,] he was capable of killing [her] and then killing himself." Plaintiff also expressed concern because she and defendant worked for "[t]he same company" at the "same location" and, in the past, she "ha[d] seen [defendant]" at work.

Defendant's testimony presented a markedly different version of events. Defendant denied ever twisting plaintiff's finger or pushing her down the stairs in 2019, and he denied getting into an argument with plaintiff on May 21, 2021. Defendant acknowledged that on May 21, he and plaintiff were at his home drinking. He stated that plaintiff had planned to stay at defendant's home that

night and he would drive her to work the next day. Defendant testified that at some point in the evening, he "went to bed." According to defendant, plaintiff later entered his bedroom, climbed "on top of [him] and told [him] to make love." When he rebuffed her advances so that he could sleep, plaintiff "got off [the] bed," "pulled [down] the window curtain[s]," and "threw" them onto defendant. Then, plaintiff "started pulling her hairs from her head," "hitting [her head] against the floor and saying help, this guy is going to kill me." Defendant explained that as he "stood up" and asked her "what's going on," the police arrived and he was "taken to the police station."

At the conclusion of the hearing, in an oral opinion, although the judge found jurisdiction under the PDVA predicated on the parties' dating relationship, see N.J.S.A. 2C:25-19(d), the judge determined an FRO was not justified. After delineating the elements of harassment and simple assault, the judge addressed credibility and found that while plaintiff's testimony was "somewhat convincing," there were "some holes in . . . plaintiff's case . . . that would cause some doubt." In support, the judge compared plaintiff's testimony to the initial complaint, observing that while plaintiff testified to an argument about COVID, in her complaint, plaintiff claimed that "the argument was because she wanted to break up with . . . defendant." Further, while plaintiff "testified that

[defendant] grabbed her hair, threw her to the floor, . . . got on top of her and covered her mouth," the judge noted that in the initial complaint, "she said . . . defendant struck her in the head."

Furthermore, although the judge acknowledged the photos depicting "[s]cratches" and "[b]ruises" on plaintiff's body, without further explanation, he found that they "[did not] match up with her testimony in court." Additionally, the judge recounted plaintiff's testimony regarding the "history" of domestic violence between the parties, acknowledging plaintiff's testimony "[t]hat in 2019[, defendant] injured her finger . . . trying to take her cell phone" and then "pushed her down" the stairs. However, the judge apparently rejected plaintiff's testimony on the subject based solely on the fact that "defendant denie[d] the allegations" and "denie[d] ever putting his hands on . . . plaintiff."

As a result, the judge determined plaintiff failed to meet her burden of proof to establish an act of domestic violence or the need for a restraining order. The judge acknowledged plaintiff "must prove by a preponderance of the credible evidence . . . that . . . defendant committed either assault or harassment." Further, the judge stated that he must find "independently . . . that . . . plaintiff is in danger" to establish the need for an FRO "to protect [plaintiff] from immediate danger . . . or prevent further abuse." However, the judge concluded

"there [was] no proof by a preponderance of the credible evidence to establish domestic violence" and "there [was] insufficient evidence . . . to establish that [plaintiff was] in immediate danger."

The judge explained:

[Plaintiff's] stated history of domestic violence . . . is refuted by . . . defendant. . . . [P]laintiff on her own accord continued a relationship with him[,] . . . [w]hich would demonstrate she had no fear, . . . nothing compelling her to stay. . . . The parties were not married . . . and not living together. . . . No apparent relationship that she was dependent upon . . . that would call into question a victim who stays and dates the defendant.

The judge entered a conforming order dismissing plaintiff's complaint and vacating the TRO. This appeal followed.

On appeal, plaintiff raises the following points for our consideration:

I. THE TRIAL COURT ERRED BY MAKING DEFENDANT'S HISTORY OF VIOLENCE AGAINST [PLAINTIFF] INTO A FACTOR THAT UNDERMINED HER RIGHT TO RELIEF.

II. THE TRIAL COURT DID NOT MAKE THE FINDINGS REQUIRED UNDER [SILVER] AND [RULE] 1:7-4 TO EVALUATE WHETHER [PLAINTIFF] ESTABLISHED A PREDICATE ACT OF DOMESTIC VIOLENCE.

III. THE TRIAL COURT IMPROPERLY GAVE DISPOSITIVE WEIGHT TO WHETHER [PLAINTIFF] "FEAR[ED]" DEFENDANT WHEN

EVALUATING WHETHER [PLAINTIFF] NEEDED
A[N FRO], AND FAILED TO CONSIDER ALL
GROUNDS FOR ISSUING FINAL RESTRAINTS.

Our scope of review in these matters is well-established. "We accord substantial deference to Family Part judges, who routinely hear domestic violence cases and are 'specially trained to detect the difference between domestic violence and more ordinary differences that arise between couples.'" C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020) (quoting J.D. v. M.D.F., 207 N.J. 458, 482 (2011)). "[D]eference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" MacKinnon v. MacKinnon, 191 N.J. 240, 254 (2007) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)).

Generally, "findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015). Thus, we will not disturb a trial court's factual findings unless "'they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, we do not accord such deference to the trial court's

purely legal conclusions, which we review de novo. Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016).

The entry of an FRO under the PDVA requires the trial court to make certain findings pursuant to a two-step analysis delineated in Silver, 387 N.J. Super. at 125-27. First, the court "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 (citing N.J.S.A. 2C:25-29(a)). Harassment and assault are among the predicate acts that constitute domestic violence. N.J.S.A. 2C:25-19(a)(2), (13).

A person commits harassment "if, with purpose to harass another," he or she:

- (a) [m]akes, or causes to be made, one or more communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;
- (b) [s]ubjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
- (c) [e]ngages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

[N.J.S.A. 2C:33-4(a) to (c).]

Conduct will only qualify as harassment if the "defendant's purpose . . . was to harass" or "'to alarm or seriously annoy' the intended victim." J.D., 207 N.J. at 478. "A finding of a purpose to harass may be inferred from the evidence presented," and a judge may use "[c]ommon sense and experience" when determining a defendant's intent. State v. Hoffman, 149 N.J. 564, 577 (1997).

A person commits simple assault if he or she "[a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another." N.J.S.A. 2C:12-1(a)(1); see also State v. Stull, 403 N.J. Super. 501, 505 (App. Div. 2008) (quoting N.J.S.A. 2C:12-1a(1)). "Bodily injury" is defined as "physical pain, illness or any impairment of physical condition." N.J.S.A. 2C:11-1(a).

Under the second Silver prong, if the court finds that the defendant committed a predicate act of domestic violence, the court must then determine whether it "should enter a restraining order that provides protection for the victim." Silver, 387 N.J. Super. at 126. In those cases where "the risk of harm is . . . great," J.D. 207 N.J. at 488, the second inquiry "is . . . often perfunctory and self-evident," Silver, 387 N.J. Super. at 127. See A.M.C. v. P.B., 447 N.J. Super. 402, 417 (App. Div. 2016) ("When the predicate act is an offense that inherently involves the use of physical force and violence, the decision to issue an FRO 'is most often perfunctory and self-evident.'" (quoting Silver, 387 N.J.

Super. at 127)). However, in all cases, "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 -29(a)(6), to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127.

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

[t]he court shall consider but not be limited to the following factors:

- (1) [t]he previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
- (2) [t]he existence of immediate danger to person or property;
- (3) [t]he financial circumstances of the plaintiff and defendant;
- (4) [t]he best interests of the victim and any child;
- (5) [i]n determining custody and parenting time the protection of the victim's safety; and
- (6) [t]he existence of a verifiable order of protection from another jurisdiction.

In rendering a decision, a judge is required to make specific findings of fact and state his or her conclusions of law. R. 1:7-4(a); see also Elrom v. Elrom,

439 N.J. Super. 424, 443 (App. Div. 2015) (requiring an adequate explanation for the basis of a court's action). "Failure to make explicit findings and clear statements of reasoning "constitutes a disservice to the litigants, the attorneys, and the appellate court."" Gnall, 222 N.J. at 428 (quoting Curtis v. Finneran, 83 N.J. 563, 569-70 (1980)). Moreover, "[m]eaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." N.J. Div. of Child Prot. & Permanency v. T.S., 463 N.J. Super. 142, 168 (App. Div. 2020) (quoting Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990)). Thus, although our standard of review is generally limited in this area, where inadequate fact findings are made or where issues are not addressed, we are constrained to remand for further proceedings. See Gormley v. Gormley, 462 N.J. Super. 433, 449 (App. Div. 2019) ("The omission of critical factual findings . . . requires a remand limited to this issue." (quoting Elrom, 439 N.J. Super. at 443)).

Applying these principles, we conclude the judge failed to make specific credibility findings in accordance with Rule 1:7-4 to properly conduct the requisite Silver analysis. See Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:7-4 (2023) (noting Rule 1:7-4(a) "requires specific findings of fact and conclusions of law"). Although the judge found plaintiff's testimony

"somewhat convincing," he concluded there were "some holes . . . that would cause some doubt." In support, the judge relied in part on inconsistencies between plaintiff's trial testimony and her initial complaint. However, the judge failed to reconcile those purported inconsistencies with her amended complaint, which more closely mirrored her trial testimony.

Furthermore, without any elaboration, the judge found that the photos depicting "[s]cratches" and "[b]ruises" on plaintiff's body did not "match" her trial testimony notwithstanding the fact that plaintiff referenced the photographs during her testimony and testified about injuries consistent with scratches and bruises that she had sustained as a result of defendant's alleged physical abuse. Additionally, the judge seemingly rejected plaintiff's entire testimony regarding the parties' history of domestic violence based solely on defendant's denials. However, the judge made no express finding that defendant was credible, nor did the judge otherwise explain why he did not consider the parties' prior history in analyzing defendant's alleged actions. See J.D., 207 N.J. at 483 ("A history of domestic violence may serve to give content to otherwise ambiguous behavior and support entry of a restraining order."); see also N.J.S.A. 2C:25-29(a)(1) (requiring the court to consider "[t]he previous history of domestic violence between the plaintiff and defendant").

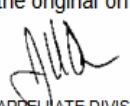
We are also convinced that the judge's conclusion that plaintiff did not require an FRO because she was not in "immediate danger" reflected a cabined view of the second step of the Silver analysis. The second step requires a finding, based "upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29(a)(1) to -29(a)(6)," that a restraining order is necessary "to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127 (emphasis added). "That inquiry serves to ensure that the protective purposes of the [PDVA] are served, while limiting the possibility that the [PDVA], or the courts, will become inappropriate weapons in domestic warfare." J.D., 207 N.J. at 488.

However, a complete inquiry did not occur here, and "overlooking that important step in the analysis poses the risk of unfairness and error." Ibid. The judge's conclusion was apparently predicated on the premise that, because plaintiff remained in the relationship after "[h]er stated history of domestic violence" when there was "nothing compelling her to stay," plaintiff was not in "immediate danger." However, such an approach deprecates the cycle of domestic violence. See State v. Kelly, 97 N.J. 178, 190-96 (1984) (discussing the psychological and social reasons that often keep battered women from leaving abusive relationships).

Because our review is hampered by the judge's failure to make sufficient credibility findings as required by Rule 1:7-4 as well as the judge's incomplete evaluation of the second step of the Silver analysis, we are constrained to vacate the October 14, 2021 dismissal order, reinstate the complaint and the TRO, and remand the matter for new findings of fact and conclusions of law based on the existing record. Because the judge who heard the matter may have a commitment to the limited findings in the record, the rehearing should be conducted by a different judge. See N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 617 (1986) ("Because the trial judge has heard this evidence and may have a commitment to its findings, we believe it is best that the case be reconsidered by a new fact-finder."); see also R. 1:12-1(d); Pressler & Verniero, Current N.J. Court Rules, cmt. 4 on R. 1:12-1 (2023) (stating "the appellate court has the authority to direct that a different judge consider the matter on remand in order to preserve the appearance of a fair and unprejudiced hearing").

Vacated and remanded for further proceedings consistent with this opinion. 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