

RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1269-21

J.D.,

Plaintiff-Appellant,

v.

A.M.W.,

Defendant-Respondent.

APPROVED FOR PUBLICATION

April 6, 2023

APPELLATE DIVISION

Submitted March 27, 2023 – Decided April 6, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FV-04-0695-22.

David S. Rochman, attorney for appellant.

Lance Brown and Associates, LLC, attorneys for
respondent (Lance D. Brown and Alyssa N. Smisek,
on the brief).

The opinion of the court was delivered by

SMITH, J.A.D.

Plaintiff appeals the trial court's denial of her application for a Final
Restraining Order (FRO) under the Prevention of Domestic Violence Act (the

Act), N.J.S.A. 2C:25-17 to -35. Plaintiff argues the trial court erred in finding she did not meet her burden under the second prong of Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006). We agree and reverse and remand for entry of an FRO.

I.

Plaintiff J.D. and defendant A.M.W. had a non-marital romantic relationship and have a child in common (M.W., born in 2011). The parties lived together with their son for a year, then shared custody of him until December 8, 2015, when he came home from a visit with defendant with a black eye and cut above his eye. Following a hearing, the Family Part granted plaintiff sole custody of M.W. in June 2018. During this period the parties agreed upon certain civil restraints which, among other things, limited contact between plaintiff and defendant exclusively to child related matters.

Plaintiff's application stems from an August 29, 2021 incident. Plaintiff and defendant were at a soccer field attending their son's game. It was defendant's day to have supervised parenting time with M.W., then ten years old. At some point during the day, plaintiff realized defendant had gone through her stroller to find and remove their son's sneakers. She asked for the sneakers back and instructed defendant not to touch her belongings. Defendant refused and began to argue with her. He chest-bumped her, causing

her to stumble backwards. M.W. witnessed the incident while standing behind his mother, holding on to her shirt. Defendant attempted to grab M.W., but plaintiff blocked him, telling defendant to "back off" and to stop acting like "an animal." Plaintiff beckoned defendant's father, who supervised defendant's parenting time, to help calm the situation. At the FRO hearing, plaintiff testified that she was fearful of defendant during this incident.

Plaintiff testified to a history of domestic violence in her relationship with defendant, which began in 2009. During the relationship, they often broke up because he would "get in [her] face, shove [her] or hit [her,]" but the break ups were brief. Plaintiff testified to several specific acts of domestic violence which occurred during the relationship. Plaintiff testified that the violence began with him aggressively walking into her and then escalated over time. Plaintiff also testified to a 2010 event which occurred while she was pregnant with M.W.:

I received a text message group chat and he got really upset. He was drunk. He had driven us home[.] I hadn't been drinking because we just found out I was pregnant. He took my phone, he broke it in half, so I jumped out of his car. I was attempting to go to my apartment, into the front of the building. I tried leaving. He chased after me and followed.

. . . .

He shoved me into the wall so the back of my body and head hit it, and then I fell down, because there

was also ice underneath me because it was, had been snowing[,] I guess.

And I got back up and at that point I had a cut on the side, I don't know, the back or the side, somewhere on my head because I felt the blood. And I pleaded with him to just please let me go in my apartment building. I reminded him that I was pregnant. He shoved me down again. He was yelling at me still. At this point other neighbors started looking out the window[.]

. . . .

I finally got into my house and tried to shut the door. He shoved it open. He came inside, and he's still yelling at me. He tossed, I guess, my coffee table and my couch, everything in the kitchen, he was tossing all my furniture around. He was throwing dishes on the floor.

I ran into my bedroom[,] . . . locked the door and I hid in there. This was after he had been walking into me and shoving me, that I ran into my room, and I told him I was calling the police. And he said, "Go ahead and call the police, you know, I know all the police, my dad's a cop," et cetera.

Plaintiff next testified to another incident which occurred when M.W. was three weeks old:

Our son . . . was [three] weeks old. . . . he was yelling at me . . . but the baby started crying. I picked the baby up. I darted off to the bedroom, he followed me. He was still yelling, and I tried telling him to please calm down, the baby is scared. And he kept saying, "Do you hear me, tell me that you hear me, tell me that I'm right."

And I sat on the bed with the baby in my arms,
and he was shoving my head

I kept asking him to just please get out of the
room and leave me alone and go away and just cool
off. I was trying to calm the baby.

. . . .

I was crying, and I was pleading with him to
please leave me alone and [h]e kept shoving my
head.

Plaintiff testified that she feared defendant throughout this incident.

On direct, plaintiff testified about her reason for seeking a restraining
order against defendant:

[PLAINTIFF:] Because he seems bolder. I don't
know, he's doing things in public which isn't that
common with him. I just feel like he's going to do
something worse.

[COUNSEL:] Do you fear the defendant?

[PLAINTIFF:] Absolutely.

[COUNSEL:] Did you fear the defendant on [August
29, 2021]?

[PLAINTIFF:] Yes.

[COUNSEL:] How about as of today, do you fear the
defendant?

[PLAINTIFF:] Yes.

. . . .

[COUNSEL:] Have you formulated an opinion as to future occurrences, if you are not granted a restraining order?

[PLAINTIFF:] I'm afraid he's . . . not following the civil restraints. He's getting physical again. I'm just afraid he's going to hurt me again. I don't know what else to do. So I'm here. I don't want to be here, but I'm here.

During a lunch break on the second day of trial, a new incident took place between the parties in the courthouse. Plaintiff's counsel went on the record:

Judge, I would ask that the matter be continued in light of what transpired over lunch. We've asked that the [c]ounty [p]olice [d]epartment become involved. My client believes that the defendant had purposeful contact with her during lunch, and I'd ask that that matter be allowed to be adjudicated.

My client left lunch hysterical in tears. I brought it to the Sheriff's Department's attention; they asked me to contact [the police]. I contacted [the police] and [the police] indicated that they were on their way over.

The defendant came within two feet of my client during lunch. And I'd ask that the Camden County Prosecutor's Office be allowed to come over in conjunction with the [police].

My client is hysterical. My client was crying on the way over. My client is completely fearful . . . of the defendant[,] and I would ask that . . . Your Honor defer and delay the proceeding until such time as [law enforcement] can deal with what we consider to be a violation. Thank you.

Despite counsel's request for an adjournment, the trial court resumed the hearing and made findings. It concluded plaintiff's testimony was credible. Defendant did not testify.

The court next found plaintiff presented sufficient evidence to prove the predicate act of harassment, N.J.S.A. 2C:33-4, concluding the first prong of Silver had been met.

Analyzing prong two of Silver, the court concluded plaintiff did not need an FRO, stating:

I do not find . . . that you are in immediate danger from this particular defendant, because you . . . really [have] safeguards in place from a difficult situation through the litigation with [another Family Part in a different county] and through the prior order that you signed in regards to civil restraints.

. . . .

[W]hat I'm going to do in the dismissal order is place the following language [M]y goal is to make sure you're safe, ma'am. But in regards to the proof, I felt you proved the predicate act, but I don't think there's immediate danger because I think that we have [defendant's father] there; he seems to be safeguarding it. I also think that your husband there appeared to me to be very levelheaded. And while I did not hear from [defendant], it's my impression that I think he now gets it, and I also think that he realizes from there.

So what I'm going to indicate [is] this, that the parties will maintain at least [twenty] yards distance

between each other at [their son's] sporting events. The supervising grandfather . . . will handle all necessary communication between the plaintiff and defendant, and I think that will prevent any further dustups like that.

The trial court did not consider the lunch break incident that occurred during the day of the FRO hearing, stating:

I make no decision on . . . the conduct at lunch [T]hat's not before me. If that's filed and if it[] . . . becomes [an FRO] matter because of TR[O], whatever, that's fine. I just heard that from an officer and it was my decision to just keep going with the trial and make a decision today.

This appeal followed.

II.

"In [appellate] review of a trial court's order entered following trial in a domestic violence matter, we grant substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." N.T.B v. D.D.B., 442 N.J. Super. 205, 215 (App. Div. 2015) (quoting D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div. 2013)). "We defer to the credibility determinations made by the trial court because the trial judge 'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). We also recognize because of "the family courts' special

jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Cesare, 154 N.J. at 413. However, we do not defer to the judge's legal conclusions if "based upon a misunderstanding of . . . applicable legal principles." T.M.S. v. W.C.P., 450 N.J. Super. 499, 502 (App. Div. 2017) (quoting N.T.B., 442 N.J. Super. at 215).

In adjudicating a domestic violence case, the trial judge has a "two-fold" task. Silver, 387 N.J. Super. at 125. The judge must first determine whether the plaintiff has proven, by a preponderance of the evidence, that the defendant committed one of the predicate acts referenced in N.J.S.A. 2C:25-19(a). If a predicate offense is proven, the judge must then assess "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." J.D. v. M.D.F., 207 N.J. 458, 475-76 (quoting Silver, 387 N.J. Super. at 126-27). The factors which the court should consider include, but are not limited to:

- (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).]

III.

On appeal, plaintiff contends the trial court erred when it concluded plaintiff failed to satisfy her burden under the second prong of Silver. Plaintiff submits the trial court should not have relied on factors such as "safeguards" provided by plaintiff's new husband and defendant's father, and any protections plaintiff may have had under prior civil restraints. Plaintiff further argues the court erred when it stated defendant "now gets it," making assumptions about defendant's state of mind at the hearing despite having no basis to make such an assessment. Finally, plaintiff posits the FRO hearing testimony about the predicate act, combined with her fear of defendant and the prior history of domestic violence, is enough to satisfy both prongs under Silver. We agree.

After a court finds a predicate act of domestic violence under Silver, the second inquiry "is whether the court should enter a restraining order that provides protection for the victim." Silver, 387 N.J. Super. at 126. The second inquiry "is most often perfunctory and self-evident," and "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." Id. at 127. "[I]n a domestic violence context, a court should regard any past history of abuse by a defendant as part of a plaintiff's individual circumstances and, in turn, factor that history into its reasonable person determination." Cesare, 154 N.J. at 403.

The trial court found no need for protection under the second prong of Silver because plaintiff has "safeguards in place from . . . the prior order that [she] signed in regards to civil restraints" and that "there's [no] immediate danger because . . . we have [defendant's father] there; he seems to be safeguarding it [and plaintiff's] husband . . . appeared to me to be very levelheaded."

The trial court's prong two findings raise several concerns. Its finding that plaintiff's husband and defendant's father can protect her from defendant is troubling, and ironically implies plaintiff has a need for protection. We note plaintiff's husband and defendant's father were unable to prevent defendant's acts of domestic violence on August 29. Given that reality, we fail to understand what in the record caused the trial court to speculate that these individuals would successfully protect plaintiff in the future. We also note the

court's finding that the 2017 civil restraints still represented a "safeguard" for plaintiff is unsupported by the record.

Finally, after it denied the FRO, the court sought to impose a minimum distance requirement between the parties during their son's sporting events and designate defendant's father as the primary point of contact for the parties' future communication. The court took these steps, in its words, to "prevent future dustups."

In assessing plaintiff's need for a restraining order under Silver's "second inquiry," our courts conduct an evaluation of the statutory factors. 387 N.J. Super. at 127. A trial court must evaluate N.J.S.A. 2C:25-29(a)(1) to- 29(a)(6) in the context of whether the defendant is likely to continue his course of abusive behavior, not whether external factors might thwart his attempts. A court conducting an FRO hearing should not consider the capacity of third parties to protect a domestic violence victim from their abuser when assessing the need for protection under Silver's "second inquiry."

There is ample evidence in the record to show plaintiff requires an FRO to prevent further abuse by defendant. The predicate act of harassment, the history of domestic violence in the record, and defendant's violations of the civil restraints lead us to conclude the trial court misapplied the law, and erred

when it denied the FRO on this record. T.M.S. v. W.C.P., 450 N.J. Super. at 502.

Reversed and remanded for entry of an FRO. 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