# RECORD IMPOUNDED



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1972-21

A.I.S.,[1]

Plaintiff-Respondent,

v.

N.A.R.,

Defendant-Appellant.

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Submitted March 21, 2023 – Decided April 17, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FV-02-0734-22.

Law Office of Nicholas A. Moschella, Jr., LLC, attorneys for appellant (Nicholas A. Moschella, Jr., on the brief).

Melinda L. Singer, attorney for respondent.

PER CURIAM

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[1] We use initials to protect the confidentiality of the victim. R. 1:38-3(d)(10).

Defendant N.A.R. appeals from an amended final restraining order (FRO) issued in favor of plaintiff A.I.S under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. Defendant argues the trial judge denied him a full and fair hearing by: (1) failing to administer the oath to plaintiff prior to trial; (2) conducting the hearing remotely; and (3) "fail[ing] to consider and properly weigh all relevant facts in rendering [his] decision." Defendant further contends the judge improperly awarded counsel fees to plaintiff. Finding no merit in any of defendant's contention, we affirm.

I.

The facts supporting issuance of the FRO are straightforward; the procedural history is marked by several adjournments for various reasons. The parties had a dating relationship and lived together between December 2020 and October 2021. On October 3, 2021, plaintiff filed a domestic violence complaint, alleging defendant committed the predicate act of terroristic threats the prior day. She also asserted a previous history of domestic violence. Plaintiff was issued a temporary restraining order (TRO).

On October 13, 2021, the parties appeared pro se, via Zoom, before the trial judge. Both parties were placed under oath. Plaintiff confirmed she was

seeking an FRO. The hearing was adjourned to October 28, 2021 to afford the parties an opportunity to retain counsel.

On the October 28 return date, defendant was represented by counsel and plaintiff appeared pro se. The hearing was conducted via Zoom and both parties were placed under oath. The judge granted defense counsel's request to adjourn the matter in view of his recent hiring and defendant's pending criminal complaint. Trial was scheduled for November 15, 2021.

The November 15 return date was held in person. Again, defendant appeared with his attorney, plaintiff appeared pro se, and both parties were placed under oath. Over plaintiff's objection, the judge granted defense counsel's request for an adjournment based on scheduling issues and the unavailability of a witness. The judge rescheduled the matter for December 2, 2021.

In the interim, plaintiff retained counsel and filed an amended TRO (ATRO) on November 23, 2021. The ATRO alleged the occurrence of additional terroristic threats on October 2, and specified two other prior acts of domestic violence.

During the December 2, 2021 Zoom hearing, both parties were represented by counsel and placed under oath. With the consent of plaintiff's

attorney, the judge granted defense counsel's request for an adjournment in view of another scheduling conflict and because defendant was served with the ATRO only two days prior. Trial was scheduled for December 23, 2021.

The parties and their lawyers appeared via Zoom on the December 23 return date. Once again, the parties were placed under oath and the matter was adjourned. This time, plaintiff was too ill to proceed. The trial was rescheduled for January 18, 2022.

Trial was finally held on January 18 via Zoom. Plaintiff and her attorney were present in the same location; defendant and his attorney joined the proceeding from separate locations. Defense counsel told the judge defendant "consent[ed to] moving forward via Zoom." Defendant was placed under oath, but plaintiff was not.

Plaintiff testified about a prior history of domestic violence. She claimed in March 2021, just three months after the parties began cohabitating, defendant struck plaintiff with a pillow, mounted plaintiff, "straddling [her] and pinning [her] arms behind [her]." Defendant called plaintiff "an insensitive bitch." Plaintiff "urged him to get off." Defendant punched plaintiff's "legs, leaving a fist-sized bruise."

In April 2021, plaintiff questioned defendant when he failed to take her dress shopping as planned. Defendant called her "a stupid bitch" then "pushed" her into the sofa.

The parties' relationship ended following a disagreement on August 30, 2021. The parties agreed that plaintiff would move out by the end of September or early October, and defendant would assume the lease.

By October 2, 2021, plaintiff had packed most of her belongings. Around 7:00 p.m., while plaintiff was not in the home, the parties commenced a heated text-message exchange, which was admitted in evidence and read on the record by the judge. In essence, defendant accused plaintiff of stealing his belongings and demanded that she "pick this shit up or" he would "put[] it out for the trash."

Plaintiff responded that she did not take defendant's belongings, asking "What did I take that was yours?" Defendant replied: "Just come and get your stuff, [please]. That is all. I don't want to talk to you."

At 9:42 p.m., defendant texted: "Are you coming to get your shit? Yes or no?" Plaintiff responded, "Yes. Can you answer the question?" Defendant answered, "After all this time, you still don't know what 'I don't want to talk to you means.' That's why you're single." Plaintiff texted, "Fuck you. Then don't

ever call my phone and threaten to shoot me again. I will have you arrested." Defendant responded, "You have been warned."

Plaintiff testified she arrived at the apartment around 10:00 p.m. and "began moving the rest of [her] items into the car." Defendant arrived about fifteen minutes later. When plaintiff refused defendant's request for her apartment key, he "took a knife out" of his sweater pocket. Plaintiff left the apartment; defendant followed and pointed the knife at plaintiff. Defendant pushed past plaintiff and walked toward her car. Defendant said "he would pop [her] tires and that [she] was not leaving" because she would not return the key. Plaintiff returned to the house to retrieve her cell phone from the charger; defendant followed. Plaintiff left the home; defendant followed her to her car and she "pulled off immediately."

Moments later, defendant called plaintiff and said: "The next time I see you . . . on the property, I will shoot you." Plaintiff asked whether defendant was serious, and he hung up. Plaintiff feared for her life. She believed "he owned a gun." Plaintiff pulled over and "texted . . . defendant to never threaten [her] again." Defendant replied: "You have been warned." Plaintiff inferred that defendant meant he would shoot her. The following day, plaintiff reported the incident to the police and was issued the TRO.

When asked whether she feared defendant, plaintiff replied: "[H]e's unpredictable." Referencing the parties "several interactions that led to [her] harm," plaintiff believed defendant's threats and sought an FRO to "ensure [her] safety." After the October 2 incident, plaintiff took safety measures including weekly wellness checks from family members. She said loud noises triggered panic attacks. Plaintiff incurred counsel fees in connection with her FRO application.

Defendant's testimony was terse. He acknowledged texting plaintiff, "[y]ou have been warned," but denied he intended to "threaten to shoot or harm her." Instead, defendant claimed he sent the message after he told plaintiff, "if she were to come back," he "could call the police to have her exited off the property." Defendant also acknowledged "a knife [was] recovered from [him] in connection with this matter," but he did not own any firearms.

After all evidence was submitted, the judge rendered a cogent oral decision, granting plaintiff's application. The judge summarized the parties' testimony regarding their relationship, past interactions, and the events that occurred on October 2, 2021, and made detailed findings as to the parties' credibility. In assessing defendant's credibility, the judge "had some difficulty with the reasonableness of [his] testimony," noting defendant neither denied he

told plaintiff, "You have been warned," nor that plaintiff said, "Don't ever threaten to shoot me again." Conversely, the judge credited plaintiff's unrefuted testimony that defendant committed the predicate act of terroristic threats on October 2, 2021, by threatening her with a knife and threatening to shoot her if he saw her on the property again. Addressing whether plaintiff established the need for an FRO pursuant to the factors set forth in N.J.S.A. 2C:25-29(a), the judge was persuaded plaintiff demonstrated an FRO was necessary for her protection.

Thereafter, plaintiff moved for counsel fees. Following oral argument on March 4, 2022, the judge granted plaintiff's application. Citing N.J.S.A. 2C:25-29(b)(4), the judge found domestic violence victims "are entitled to reasonable attorney's fees as a form of compensatory damages." Analyzing plaintiff's application pursuant to the factors set forth in Rule 4:42-9 and RPC 1.5(a), the judge was satisfied the $5,197 fee sought by plaintiff was reasonable.

II.

Our limited scope of review of a trial court's findings is well established. See Cesare v. Cesare, 154 N.J. 394, 411 (1998). "[W]e grant substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div. 2013).

We will not disturb the court's factual findings and legal conclusions "unless [we are] 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." Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

Deference is particularly appropriate here, where the evidence is largely testimonial and hinges on a court's ability to make credibility assessments. Cesare, 154 N.J. at 412. It is axiomatic that the judge who observes the witnesses and hears their testimony has a perspective the reviewing court simply does not enjoy. See Pascale v. Pascale, 113 N.J. 20, 33 (1988). We also accord deference to the factual findings of Family Part judges because that court has "special jurisdiction and expertise in family matters." Cesare, 154 N.J. at 413. Conversely, a trial judge's decision on a purely legal issue is subject to de novo review on appeal. Crespo v. Crespo, 395 N.J. Super. 190, 194 (App. Div. 2007).

The entry of an FRO under the PDVA requires the trial court make certain findings, pursuant to a two-step analysis. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). Initially, 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. The trial court should make this determination "in light of the previous history of violence between the parties." Ibid. (quoting Cesare, 154 N.J. at 402).

Secondly, the court must determine "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; see also J.D. v. M.D.F., 207 N.J. 458, 475-76 (2011) (noting the importance of the second Silver prong). Pertinent to this appeal, these factors include, but are not limited to: "The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse." N.J.S.A. 2C:25-29(a)(1). In those cases where "the risk of harm is so great," J.D. 207 N.J. at 488, the second inquiry "is most often perfunctory and self-evident." Silver, 387 N.J. Super. at 127.

A terroristic threat, N.J.S.A. 2C:12-3, is a predicate act of domestic violence under the PDVA, N.J.S.A. 2C:25-19(a)(3). Relevant here, a person commits a terroristic threat:

> if he threatens to commit any crime of violence with the purpose to terrorize another or . . . threatens to kill another with the purpose to put [that person] in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.
>
> [N.J.S.A. 2C:12-3(a) and (b).]

Proof of terroristic threats must be assessed by an objective standard. State v. Smith, 262 N.J. Super. 487, 515 (App. Div. 1993). "The pertinent requirements are whether: (1) the defendant in fact threatened the plaintiff; (2) the defendant intended to so threaten the plaintiff; and (3) a reasonable person would have believed the threat." Cesare, 154 N.J. at 402.

A. Defendant's Claims of Trial Error

In the present matter, defendant challenges the trial judge's factual findings under the first Silver prong, contending the judge failed to consider he "denied ever threatening . . . [p]laintiff in any way." As such, he asserts plaintiff failed to satisfy the predicate act of terroristic threats.

Having considered defendant's contentions in view of the applicable law and our discretionary standard of review, we conclude they lack sufficient merit to warrant extended discussion in our written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons expressed by the trial judge in his well-reasoned decision, which is amply supported by the record. See Cesare, 154 N.J. at 411-12.

Similarly, we reject defendant's belated due process argument that he was denied a full and fair hearing because plaintiff was not administered the oath

just prior to her trial testimony and the trial was conducted remotely via Zoom. Ibid. We add only the following brief remarks.

Citing our decision in Chernesky v. Fedorczyk, 346 N.J. Super. 34 (App. Div. 2001), defendant claims because plaintiff was not placed under oath, he is entitled to a new trial. In Chernesky, we stated: "Given the consequences of an order entered under the [PDVA], the parties should be sworn before any action is taken on the complaint, particularly when either one or both of the parties appears pro se." Id. at 40-41. Notably, the FRO was held at the initial hearing following issuance of the TRO. Id. at 38.

Conversely, the FRO trial in the present matter was held on the sixth return date and – prior to all five previous prior hearings – plaintiff was placed under oath. We recognize N.J.R.E. 603 requires the administration of an oath before a witness testifies, but the spirit of the Rule was not compromised here, where on five prior occasions plaintiff was repeatedly advised of her duty "to tell the truth under the penalty provided by law." We glean from the record the failure to administer the oath was an oversight, which was not noted by any of the parties or court staff at the time of trial. Moreover, defense counsel did not object and cross-examined plaintiff. We conclude the error did not deprive defendant of a fair trial.

Nor are we persuaded that the Zoom format of the trial violated his right to due process. Defendant expressly consented to the format, and we discern no "irregularities" that warrant a new trial. See D.M.R. v. M.K.G., 467 N.J. Super. 308, 322 (App. Div. 2021) (concluding the defendant was deprived of her right to due process in view of several "irregularities," including the judge's lack of impartiality where both parties were unrepresented).

B. Defendant's Challenges to the Fee Award

A trial judge is authorized by the PDVA to award as damages the reasonable counsel fees and costs incurred by a victim of domestic violence. N.J.S.A. 2C:25-29(b)(4). Under the PDVA, a judge may enter an order "requiring the defendant to pay to the victim monetary compensation for losses suffered as a direct result of the act of domestic violence[,]" which includes "reasonable attorney's fees [and] court costs." Ibid. The award is designed "to make the victim whole." Wine v. Quezada, 379 N.J. Super. 287, 293 (Ch. Div. 2005). Because fees and costs in a domestic violence action are awarded as damages, an award is "not subject to the traditional analysis" for an award of fees in family-type claims pursuant to N.J.S.A. 2A:34-23, and the court is not obliged to consider the parties' financial circumstances. McGowan v. O'Rourke, 391 N.J. Super. 502, 507 (App. Div. 2007) (quoting Schmidt v. Schmidt, 262

N.J. Super. 451, 453 (Ch. Div. 1992)). "To hold otherwise could create a chilling effect on claims made by bona fide victims who might have the ability to pay." Wine, 379 N.J. Super. at 293.

Accordingly, the only three requirements for an award of counsel fees under the PDVA are that the fees are the "direct result of . . . domestic violence," they are reasonable, and that they are presented by way of affidavit pursuant to Rule 4:42-9(b). McGowan, 391 N.J. Super. at 507 (quoting Schmidt, 262 N.J. Super. at 454); Wine, 379 N.J. Super. at 291. If after considering the factors in Rule 4:42-9(b), which incorporate the factors stated in RPC 1.5(a), the court finds the plaintiff's legal fees are reasonable and incurred directly from the domestic violence, the court may exercise its discretion in awarding attorney's fees. McGowan, 391 N.J. Super. at 507. We accord significant deference to that determination. Id. at 508.

Defendant summarily argues the trial judge failed to address his arguments in analyzing the applicable factors, contending the case was adjourned several times in view of the court's "heavy calendar and the like." Unpersuaded, we affirm for the thoughtful reasons stated by the trial judge, which warrant our deference. See ibid.

Affirmed.