

RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the 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-0791-21

N.Z.,

Plaintiff-Appellant,

v.

F.Q.,

Defendant-Respondent.

Submitted October 12, 2022 – Decided November 1, 2022

Before Judges Accurso and Vernoia.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex County,
Docket No. FV-12-0492-22.

Lowenstein Sandler LLP, attorneys for appellant (Michael
A. Kaplan, Stephanie Ashley and Lauren E. Van Driesen,
on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff N.Z. appeals from the denial of her application for a final restraining order against her husband defendant F.Q. pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, and the dismissal of the temporary restraining order against him.¹ Although the judge found an "extensive" prior history of domestic violence between the parties and that plaintiff credibly testified defendant came at her in the course of a heated argument, as he had "undoubtedly . . . done in the past," the judge did not find defendant committed the predicate act of assault, N.J.S.A. 2C:12-1(a). The judge interpreted the assault statute to require bodily injury, which plaintiff testified did not occur because defendant's sister prevented him from making contact with plaintiff. Because the judge determined he could not find the predicate act of assault, which "would then trigger, almost automatically in [his] mind, the issuance of a final restraining order because of defendant's past history," the judge denied plaintiff the final restraining order and dismissed the temporary order.

We reverse. The judge erred in his analysis of the assault statute. A person is guilty of simple assault if he "[a]ttempts to cause . . . bodily injury to

¹ As discussed *infra*, the judge stayed dismissal of the temporary restraining order on plaintiff's motion pending appeal.

another" or "[a]ttempts by physical menace to put another in fear of imminent serious bodily injury." N.J.S.A. 2C:12-1(a)(1) and (3). Because we are satisfied, based on the judge's careful factual findings, that plaintiff proved the predicate act of assault, notwithstanding the absence of bodily injury to her, and a final restraining order was necessary to protect her from an immediate danger or to prevent further abuse, Silver v. Silver, 387 N.J. Super. 112, 127 (App. Div. 2006), we reverse and remand for entry of a final restraining order.

Both parties, each represented by counsel, testified at the hearing through an interpreter. The parties married in Pakistan nine years ago. Plaintiff was twenty-two years old and defendant forty-one. They now have three children and have lived in the United States since 2016. Plaintiff's entire family lives in Pakistan, and she testified she has been unemployed since the pandemic, leaving her isolated. Defendant works an early shift, returning home at 2:30 in the afternoon, but plaintiff claimed he'd installed six cameras, four inside and two outside their home, which are monitored by defendant, as well as his sister and nephew, when he is not present.

Plaintiff testified her husband had beaten her for many years and had twice threatened her with a knife. She testified he'd hit her in front of their children, three boys ranging in ages from seven to three, and once, when she

was pregnant with their youngest child, strangled her to the point of leaving the imprint of all ten of his fingers on her neck and making it difficult for her to swallow for two weeks.

With regard to the predicate acts of assault and harassment, plaintiff testified that what started as an argument between plaintiff and defendant's sister led to an angry argument between plaintiff and defendant, during which he yelled at her and tried to strike her, only being prevented from contact by his sister. He afterwards pronounced them divorced. Plaintiff testified she fled the home and called the police because she was frightened.

Defendant told the police nothing had happened. The officers offered to take her to a hotel, which she declined because she didn't have any money to pay for a hotel room, as defendant controlled all their finances. Plaintiff thereafter isolated herself in her room, but fled to a domestic violence shelter a few days later after she overheard defendant telling someone on the phone "to prepare[] all her documents and take her out from here otherwise I'll kill her."

Defendant denied he'd raised his voice or tried to strike plaintiff in the argument leading to her calling the police and claimed not one of her allegations about past abuse was true. He admitted installing cameras in their home and that plaintiff couldn't view them from her phone as he, his sister and

his nephew could, but claimed that was because she'd broken her phone or had problems with the wifi.

In a brief but comprehensive opinion on the record delivered a few days after the hearing, the court found plaintiff to be a credible witness who described "a number of really harrowing types of past incidences of domestic violence." Based on plaintiff's testimony, the court found prior incidents of domestic violence, "including beatings occurring in January of 2016 where she was kicked, punched, dragged, slapped." The judge also found credible that defendant had pulled plaintiff's hair and "strangled [her] two or three times in the past," and that "in 2017 the defendant put his hands on her neck and she almost passed out." The judge found defendant decidedly not credible, finding his "rambling, unresponsive" answers and "universal denial of doing anything whatsoever to . . . plaintiff certainly did not ring true."

Notwithstanding, the judge found plaintiff did not establish any of the four predicate acts she alleged — assault, terroristic threats, harassment and stalking. As earlier indicated, the judge believed defendant had attempted to strike plaintiff in the midst of their angry argument, but was prevented from doing so by his sister, leading the judge to reject plaintiff's claim defendant committed the predicate act of assault. The judge also rejected the claim of

terroristic threats because defendant's threat he would "kill her" was only conditional and was not made to plaintiff; she only overheard defendant talking on the phone to someone else.

As to harassment, the judge dismissed the angry argument in which defendant tried unsuccessfully to strike plaintiff as "in the nature of domestic contretemps, which doesn't give rise to the level of harassment." Finally, although acknowledging defendant's admission that he'd installed six cameras at his home that plaintiff could not monitor as he and his family could, the judge found the evidence inadequate to establish the predicate offense of stalking.

The judge found "plaintiff has certainly proven that she is in an absolute horrible marriage and is being treated unfairly, both as a wife and as a human being by the defendant." He found, however, "she has not proven that there is a predicate act that I can find that would then trigger, almost automatically in my mind, the issuance of a final restraining order because of the defendant's past history." The judge concluded that "absent a predicate act," he couldn't "get to the second step of Silver" and thus denied plaintiff's request for a final restraining order and dismissed the temporary order.

Plaintiff appeals, contending she established both a predicate act and the need for a final restraining order to protect her from immediate danger of harm and to prevent future abuse. We agree.

A final restraining order may issue only if the judge finds that the parties have a relationship bringing the complained of conduct within the Act, N.J.S.A. 2C:25-19(d); the defendant committed an act designated as domestic violence, N.J.S.A. 2C:25-19(a); and the "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 125-27.

Whether the court has entered a final restraining order or declined to do so, our review of its factual findings is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). "[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12. "[D]eference is especially appropriate" in a case, such as this one, in which "the evidence is largely testimonial and involves questions of credibility" because the trial court's ability to see and hear the witnesses provides it a better perspective than a reviewing court to judge their veracity. Id. at 412.

Notwithstanding, our scope of review is expanded where the focus of the dispute is on "the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting In re J.T., 269 N.J. Super. 172, 188-89 (App. Div. 1993)). We do not, of course, accord any special deference to the trial court's interpretation of a statute, which is where the error lies in this case. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

As we noted at the beginning of this opinion, a person is guilty of simple assault if he "[a]ttempts to cause . . . bodily injury to another" or "[a]ttempts by physical menace to put another in fear of imminent serious bodily injury." N.J.S.A. 2C:12-1(a)(1) and (3). Thus, the judge erred in concluding "the assault statute requires bodily injury" and, because "plaintiff testified candidly that there was no bodily injury," declining to find the predicate act of assault. We are satisfied the judge's finding that defendant came toward plaintiff in the midst of a heated argument, "as undoubtedly he has done in the past, but that

defendant's sister stopped any contact," supports the predicate act of assault under N.J.S.A. 2C:12-1(a)(1) or (a)(3).²

We are likely not alone in that assessment. After she filed her notice of appeal, plaintiff moved before the trial judge to stay dismissal of the temporary restraining order pending our disposition of her appeal. The trial judge granted the stay, explaining that "what really [gave him] pause for concern is in

² Although not necessary for our disposition, we also find it possible defendant's actions would support the predicate act of harassment on the facts the judge found credible. A person commits the predicate act of harassment

if, with purpose to harass another, he:

- a. Makes, 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. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
- c. Engages 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).]

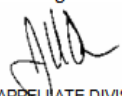
Because the judge did not make a finding as to whether defendant acted with a purpose to harass, however, and resolution of the issue would not change the outcome of the appeal, we do not consider the question further.

addition to what [he] found to be extensive prior domestic violence between these parties, is the possibility [he'd erred] with regard to the application of the law on the issue of assault." Determining that were we to decide his application of the assault statute was not well-founded, that plaintiff "would be probably successful on the appeal," the judge stayed dismissal of the temporary order, thus continuing for plaintiff the protections afforded by the Act.³

Because the record reveals the court was clearly convinced that had plaintiff been able to establish a predicate act, she would be entitled to a final restraining order under the second prong of Silver, a conclusion with which we agree, we reverse the order on appeal and remand for entry of a final restraining order. We do not retain jurisdiction.

Reversed and remanded for entry of a final restraining order.

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


CLERK OF THE APPELLATE DIVISION

³ We commend the judge for acknowledging the potential for legal error and acting on his fact findings to maintain the status quo pending appeal, leaving in place his temporary restraining order.