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R.C.,	SUPERIOR COURT OF NEW JERSEY OCEAN COUNTY
Plaintiff	CHANCERY DIVISION FAMILY PART
v.	
	DOCKET NO. FV-15-69-16
R.W.,	
	CIVIL ACTION
Defendant	OPINION

Decided: July 20, 2015

Plaintiff, pro se
Defendant, pro se

L. R. Jones, J.S.C.

This case presents the following novel issue relative to domestic violence litigation: What happens when a plaintiff seeks a final restraining order against a defendant for conduct which arises from plaintiff's own violent

provocation? For the reasons set forth in this opinion, the court holds the following:

1. A plaintiff's violent provocation is a relevant factor for the court to consider in whether to grant or deny a final restraining order against a defendant under the two-prong test of Silver v. Silver, particularly when (a) defendant's reaction to plaintiff's violent provocation was immediate, instinctive and impulsive rather than planned and premeditated; (b) defendant's reaction was proportionately no more violent than the actions of plaintiff, whose own violence toward defendant initiated and provoked the altercation; (c) there is insufficient evidence that defendant caused plaintiff substantial harm, and (d) defendant has no significant history of prior violence against plaintiff.

FACTUAL BACKGROUND

Plaintiff and defendant dated for four years, and presently have two young children. During the last two years of their relationship, they lived together in an apartment. During their cohabitation, plaintiff worked and financially supported the joint household, while defendant primarily cared for the children, and attended school to become a dental technician.

The parties had two cars in their home, a Buick and a Nissan. Although both vehicles were technically registered in plaintiff's name; defendant exclusively used the Buick while plaintiff exclusively used the Nissan. As

regarding the Buick, both parties contributed toward its purchase, with defendant utilizing her tax refund toward payment of her share.

The parties had two cell phones, which were both registered in plaintiff's name as well. By joint arrangement, each party exclusively utilized one phone and exercised possession of same during the relationship.

The parties also jointly had a Sony PlayStation, which defendant originally purchased as a birthday present for plaintiff, but which ultimately became a source of recreational activity for the children as well.

By June, 2015, the parties' relationship seriously deteriorated, to the point where plaintiff firmly wanted defendant to physically move out of the apartment. By his own admission, plaintiff set out to force defendant from the home by intentionally cutting off and terminating electrical service, essentially rendering the premises uninhabitable. Plaintiff's plan worked, as defendant could not logically keep the children living in the apartment under such conditions. With plaintiff's knowledge, defendant packed the children and her belongings into the Buick, moved out of the apartment, and relocated across town to her mother's house. When defendant left, she took the cell phone which she historically used, and some other miscellaneous items, including the PlayStation for the children's use.

Following her departure, defendant sought no formal child support from plaintiff, or took any immediate legal action to obtain an order for same. Reciprocally, plaintiff filed no legal action contesting defendant's continued care of the children, or her ongoing possession and use of the Buick, cell phone, and the PlayStation. In fact, plaintiff soon thereafter moved out of the apartment himself, and relocated to his cousin's house nearby.

By joint consent, plaintiff had parenting time with the children on specified weekends, which took place at the home of plaintiff's father. (i.e., the children's paternal grandfather). Under this schedule, plaintiff picked up and dropped off the children at defendant's home. This amicable arrangement suited both parties at the time.

On Sunday, July 12, 2015, however, matters changed drastically when plaintiff came to defendant's home to return the children to defendant at the end of his parenting weekend. After the children went inside the house, plaintiff remained at the property to speak with defendant. Specifically, plaintiff suspected that defendant had been involved with another man. Seeking evidence to confirm his suspicions, he forcibly grabbed defendant's cell phone from her hands. He then began running away with the device while rummaging through the phone's contents, implicitly asserting a right to do so because the cell phone, while exclusively used by defendant, was still

technically in plaintiff's name.[1] Defendant struggled to retrieve the phone back from plaintiff, but was unsuccessful until after plaintiff had already reviewed her information and discovered that she had, in fact, been having ongoing communications with another man.

Angry at defendant, plaintiff called her a whore. As he still had a key to the Buick, he went over to the car, opened the trunk, and saw that the PlayStation was still inside. Plaintiff announced that he no longer consented to defendant keeping the PlayStation for the children. When defendant objected to returning the PlayStation, plaintiff responded that he no longer wanted defendant to drive the Buick either, which was defendant's only present source of transportation for herself and the children. Noticing several large cinderblock bricks on the ground, plaintiff then picked up one brick and, right before defendant's eyes, intentionally threw it straight through the Buick's rear windshield, shattering the entire glass window into pieces.

In response, defendant impulsively picked up a smaller brick and threw it, along with the PlayStation, against the Nissan, causing damage to the body of the car. In reply, plaintiff then picked up more bricks and threw them through the Buick's closed side window and the front windshield, rendering the car

[1] The court notes from observation in court that plaintiff is physically larger than defendant.

non-drivable. In reply, defendant started yelling frantically at plaintiff: "Look what you did to my windows! I have no car now!"

Notwithstanding the fact that he was the one who had initiated the brick-throwing, plaintiff proceeded to file a domestic violence complaint against defendant for criminal mischief in damaging his Nissan. Specifically, he sought a restraining order against defendant, pursuant to N.J.S.A 2C:17-3 and N.J.S.A. 2C:25-19. Plaintiff's apparent position was that his action toward the Buick was legally permissible, because he was the owner of the car, while defendant's responsive action toward the Nissan was impermissible, because that vehicle was in his name as well. Further, in addition to seeking a restraining order against defendant, plaintiff now also sought custody of the children under N.J.S.A. 2C:25-29 ,which provides that a court may grant presumptive temporary child custody to a victim of domestic violence.

In his complaint, plaintiff stated that defendant had no prior history of physical violence towards him, and that in fact their only history involved "verbal arguments throughout the dating relationship." Further, at the final hearing, plaintiff testified that other than some alleged "wrestling" with each other, there was no real history of physical violence by defendant. Plaintiff further testified that presently, he is not in fear of defendant. Nonetheless, he

has continued to pursue his request for a final restraining order and custody of the children under the Act.

Once plaintiff completed his testimony, defendant testified in her own defense. She admitted to throwing a brick and the PlayStation against the Nissan and causing damage, but urged that she did so only as an immediate and impulsive reaction to plaintiff's own violent provocation at her own home, and to the damage he caused to the Buick. Defendant's position was that while her own conduct may have been inappropriate, she is not a violent person and has no history of prior violence toward plaintiff. Most critically, she objected to plaintiff taking custody of the children from her under the Domestic Violence Act, given the factual circumstances of the case. Defendant's testimony was accentuated with apparent remorse over her own actions.

LEGAL ANALYSIS

This case presents a classic example of exactly why a domestic violence case can never be appropriately adjudicated in a vacuum without thorough consideration of the context and surrounding circumstances. Such an approach is what fundamentally separates a court of equity from a rubber stamp, and what in this case ultimately results in a denial of plaintiff's complaint for a final restraining order against defendant.

Whether an act does or does not constitute domestic violence requires a fact-sensitive analysis. See State v. Hoffman, 149 N.J. 564, 580-81(1997). A court may glean intentional domestic violence from attendant circumstances, See C.M.F. v. R.G.F., 418 N.J. Super 396, 404-405 (App. Div. 2011) and may consider the totality of such circumstances in determining whether an applicable statute has been violated. H.E.S. v. J.C.S., 175 N.J. 309, 326 (2011); Cesare v. Cesare, 154 N.J. 394, 404 (1998); State v. Hoffman, 149 N.J. 564, 585 (1997). A finding of defendant's purpose to commit domestic violence may be inferred from the evidence presented, and from common sense and experience. See H.E.S., supra, 175 N.J. at 327 (addressing intent to harass); State v. Hoffman, supra, 149 N.J. at 577. Further, a court may consider demeanor character of witnesses in the overall analysis as well. See State v. Locruto, 157 N.J. 463, 475 (1999).

Pursuant to N.J.S.A. 2C:25-19, there are multiple acts which may constitute domestic violence. One such act is criminal mischief, N.J.S.A.2C:17-3, which occurs when a defendant " purposely or knowingly damages tangible property of another . . . ." It is on this basis that plaintiff seeks a restraining order against defendant.

Initially, a surface analysis and overly technical approach to this case might lead one to conclude that since defendant intentionally threw a brick at

plaintiff's Nissan and caused damage to property in plaintiff's name, such conduct literally violates N.J.S.A 2C:17-3 and therefore justifies the issuance of a domestic violence restraining order under N.J.S.A. 2C:25-19 and N.J.S.A. 2C:25-29. However, after thorough consideration of the circumstances in this case, as well as the spirit and public policy reasons underlying the Prevention of Domestic Violence Act itself, the court concludes that a granting of plaintiff's application for a final restraining order against defendant would not only be unnecessary and inequitable, but would constitute a fundamental miscarriage of justice by turning the entire purpose and logic of the Domestic Violence Act upside down.

PLAINTIFF'S VIOLENT PROVOCATION: RELATIONSHIP TO TWO-PRONGED TEST

In Corrente v. Corrente, 281 N.J. Super 243, 248 (App. Div. 1995), the appellate court established that an act of alleged violence does not necessarily and automatically mandate the entry of a final restraining order in every case. Rather, in order to enter a final restraining order, the court must not only find that defendant committed an act of domestic violence, but also that a restraining order is necessary to protect the plaintiff from the likelihood of ongoing violence. Specifically, the Corrente court stated the following:

> It is clear that the drafters of the Prevention of Domestic Violence Act did not intend that the commission of any of the enumerated acts automatically warrants the issuance of a domestic violence order. The law mandates that acts claimed to be domestic violence must be evaluated in light of the previous history of domestic violence, and in light of whether immediate danger to the person or property is present. Id.

The burden of proof upon plaintiff is the civil standard of preponderance of the evidence. See N.J.S.A. 2C:25-29.

The logic of Corrente was subsequently adopted and incorporated by the appellate court into the dual-step approach set forth in the landmark case of Silver v. Silver, 387 N.J. Super 112 (App. Div. 2006). In Silver, the Honorable Judge Robert Fall set forth a two-pronged test for trial courts to utilize in determining whether to enter a final restraining order against a defendant. Under the first prong, the trial judge must first determine whether plaintiff has proven, by a preponderance of the evidence, that a predicate act of domestic violence has occurred, with the action evaluated in light of the previous history of violence between the parties. Id. at 125-26. Under the second prong of Silver, even if a predicate act of violence has occurred, the court must then decide whether there is an immediate danger to person or property warranting entry of a final restraining order. Id. at 126. While this determination may in some instances be self-evident, a guiding standard is whether a restraining order is necessary to protect the victim from "immediate danger" or to prevent further

violence. Id. (quoting N.J.S.A 2C:25-29(b), authorizing the court to grant any relief necessary to prevent further abuse).

Applying Silver in the present case, the court finds that even if defendant (a) did in fact throw a brick at plaintiff's Nissan and damage the car, and (b) may be financially responsible for the resulting property damage, such conclusion does not also automatically mean that the court must now robotically enter a restraining order without equitable consideration of the surrounding circumstances which led up to defendant's actions. Rather, as a matter of law and basic fairness, the court must consider whether, under both prongs of Silver and the totality of the factual circumstances, a domestic violence final restraining order is in fact appropriate and necessary in order protect plaintiff from ongoing violence by defendant.

Regarding each of the two prongs in Silver, it is relevant to consider the clear factual evidence that plaintiff violently provoked defendant into her responsive actions which are at the heart of his legal action against her. While non-violent provocation is generally not an acceptable defense to, or justification for, domestic violence, plaintiff's violent provocation of defendant is an entirely different matter altogether, and such violent provocation is in fact a relevant, logical, fair and equitable consideration by this court. Perhaps the largest reason for this conclusion is that such violence, when perpetrated by

the plaintiff seeking relief under the Act for the direct consequences of his actions, stands in pure and complete denigration of the very principles and protective policies that the Domestic Violence Act was designed and enacted to support.

A plaintiff's violent provocation of a defendant is logically relevant under Silver when, as here, the evidence reflects that (a) defendant's reaction was immediate, instinctive and impulsive rather than planned and premeditated; (b) defendant's responsive actions were objectively no more violent than plaintiff's own violence toward defendant which instigated defendant's response in the first place; (c) plaintiff suffered no substantial harm, and (d) defendant has no history of prior violence against plaintiff. These considerations may be highly material in fact-sensitive circumstances, where the nature of a plaintiff's violent provocation legitimately helps explain why a traditionally non-violent defendant acted in a particular manner. Such factors can, in some cases, potentially mitigate against a finding or conclusion under Silver that both prongs have been met, and that defendant poses such an ongoing threat to plaintiff that the issuance of a final restraining order against defendant is necessary.

In considering the impact of a plaintiff's violent provocation in a domestic violence case, a court of equity may consider multiple factors, including but not limited to the following:

A) What was the specific nature and degree of the plaintiff's violent provocation?

B) Does the evidence reflect that defendant's response premeditated, calculated and sustained, or rather, an instinctive and impulsive reaction to plaintiff's violence with little or no time for reasonable thought and contemplation?

C) Was defendant's response out of proportion to plaintiff's initial violent provocation, i.e., significantly greater than plaintiff's own actions toward defendant?

D) Did defendant's action result in substantial harm to plaintiff?

E) Is there any significant prior history of violence by defendant towards plaintiff?

In the present case, the answers to all of these questions support a denial, rather than granting, of plaintiff's application for a final restraining order against defendant. First, plaintiff's violent provocation of defendant was stark and graphic, in that he viciously rendered her sole source of transportation unsafe and non-drivable in a very sudden and violent manner. Second, defendant's response was not premeditated or calculated, but rather a knee-jerk reply to what she had just witnessed plaintiff suddenly do to the Buick. Third, defendant's actions, even if ill-advised, were proportionately no more wrongful than plaintiff's own

aggressive actions towards defendant, which in fact were worse as he not only initiated the violence, but continued same after the fact by throwing more bricks through other glass windows of the same vehicle.

Fourth, while defendant's action resulted in body damage to the Nissan, the situation can be repaired and she caused no other injury, substantial or otherwise, to plaintiff in the process

Fifth, under Cesare v. Cesare, 154 N.J. 394, (1998) a history of violence is relevant. Id. at 401-02. Also relevant, however, is a history of non-violence. In this case, defendant spent four years in a relationship with plaintiff, with no prior restraining orders or convincing evidence of physical violence on her part. While not dispositive, defendant's track record of non-violence is certainly at least material in terms of considering her actions, and in determining whether she does or does not pose a present ongoing risk of danger to plaintiff necessitating the entry of a final restraining order against her. While it is true that under Cesare, a restraining order may be entered following a single egregious act of violence even when there is no prior history, Id. at 402, plaintiff's outrageous provocation of defendant significantly mitigates the alleged "egregiousness" of her own act, and shines a light on same in this case as an aberration rather than part of an ongoing course of conduct.

Against this backdrop, the evidence reflects that under the circumstances, such conduct is highly unlikely to repeat itself so long as plaintiff, the alleged "victim," keeps his hands to himself, respects defendant's right to privacy in her own home, and simply leaves her alone. The basic protection which the law seeks to assure victims is the right to be left alone. See State v. Hoffman, 149 N.J. 564, 584-85 (1997). This right, however, belongs just as much to a defendant as a plaintiff. In this case, it was only after plaintiff completely violated defendant's equal right to be left alone that the entire situation spun completely out of control.

These points, when weighed independently or together in the aggregate, support a denial rather than granting of plaintiff's application for a domestic violence final restraining order against defendant in this case. In particular, the court must consider matters with a realistic rather than fantasy-based approach to human nature and emotions. While it is true that all acts of domestic violence are serious, see Brennan v. Orban, 145 N.J. 281, 298 (1996), it is equally true that every request for a restraining order case must be considered on its own facts. People are not pre-programmed machines, but are human beings. Even the most non-violent, docile and peace loving of individuals may sometimes be provoked into acting impulsively, immaturely and regrettably, in direct and immediate response to such instigation. When

such a situation occurs, same does not automatically mean that in each and every case, the provoked person suddenly poses an unreasonable risk of ongoing violence necessitating the mandatory issuance of a final restraining order, along with its many serious and potentially life-altering attendant legal consequences such as possible loss of child custody or impairment of future employment and career opportunities.

In this case, plaintiff has provided insufficient persuasive evidence that defendant poses any genuine ongoing risk of violence to him at all. It appeared from plaintiff's trial testimony and demeanor that his greatest concerns had little to do with any actual fear of ongoing violence, but rather, that (a) defendant had allegedly been involved with another man, and (b) she had damaged his Nissan, and plaintiff wanted her held responsible. While plaintiff, like any other litigant alleging property damage, has the right to bring an action in civil court, and while defendant may ultimately be civilly responsible to pay for the damage caused to the Nissan, such responsibility does not mean that her conduct also automatically requires the entry of a domestic violence final restraining order for a momentary emotional lapse in judgment following violent provocation by the alleged "victim". To the contrary, defendant arguably could have filed her own domestic violence complaint against plaintiff,

on grounds of harassment and criminal mischief. The fact that she chose not to do so, for whatever personal reasons, was her own decision. Her choice, however, does not in any way mitigate the seriousness of plaintiff's own actions against her, or otherwise dilute the factual relevancy of same in this matter under both prongs of the Silver analysis.

Before concluding this matter, the court finds that that there are two additional issues in this case which warrant comment: (1) physical struggles over cell phones; (2) damaging property in one's own name.

(1) PHYSICAL STRUGGLES OVER CELL PHONES

With disturbingly increasing frequency, otherwise responsible and law abiding adults seem to constantly end up in court after physically grabbing, pushing, shoving, wrestling, punching, and even biting each other over possession of a cell phone. Generally, the struggle is not over the physical phone itself, but rather over access to the information and data stored on the phone. As exemplified in the present case, one suspicious party may simply decide that he or she "must" see who the other party is calling or contacting, while the other party wants to keep such information confidential as a matter of personal privacy. Sometimes, a person may sneakily pursue the cell phone while the other party is sleeping, or using the bathroom, or watching television. Other

times, the plan is more aggressive, with the "curious" party using blunt physical force to grab the cell phone out of the other party's pocket or hands, in violation of the other party's privacy.

In the present case, plaintiff apparently believed that because defendant's cell phone technically remained in his name, he was somehow entitled to come to defendant's home, physically grab the phone against defendant's will, and satisfy his own personal curiosity by searching through the phone's contents, over defendant' s objection, for evidence of a boyfriend. Regardless of the fact that the phone was still in his name, plaintiff had no equitable right to act in such fashion. Indeed, if such conduct was somehow considered acceptable merely because the cell phone was technically still in his name , then every overly-dominating and controlling person could deliberately keep a cell phone in his or her name, even after separation or divorce, specifically to insure that on any future "as-needed" basis, he/she could physically grab the phone back from the other party at any time and pour through all of the other party's personal contents, with the full legal right to do so.[2]

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[2] Notably, under New Jersey's anti-wiretapping statute, N.J.S.A. 2A:156A-4(d), the fact that a person is the subscriber to a particular telephone does not constitute consent effective to authorize interception of communications among parties not including such person on that telephone.

A person who lets another person borrow a suitcase does not suddenly have the right to show up at the borrower's house, grab the suitcase, pry it open and sift through the borrower's contents. Similarly, a landlord who owns a mailbox does not have the right to open envelopes addressed to his or her tenants. In the present case, plaintiff's actions in grabbing and searching defendant's private information on the cell phone was particularly inappropriate, since the parties were already separated and defendant had the right to see or talk to anyone she wanted without plaintiff's permission.

The court understands and appreciates the reality that when someone uses a cell phone in another party's name, there is inherently a lower reasonable expectation of privacy regarding some basic information. For example, the named owner will likely receive bills and may be able request or review certain data directly from the provider. Without specifically addressing the legal issues arising from this scenario, and the collateral issue of whether same is or is not a legal or illegal invasion of privacy, such circumstance is simply not what occurred in this case. Here, plaintiff went to defendant's home after the separation and over defendant's explicit objection, physically grabbed the phone away from her to improperly access her personal information. From an equitable standpoint, such actions by plaintiff were overreaching, overbearing, and improper under the circumstances.

1) DAMAGING PROPERTY IN ONE'S OWN NAME

A major part of plaintiff's position focused heavily on the technicality that both parties' vehicles, the Buick and the Nissan, were solely in his name. Plaintiff focused upon this point to (a) attempt to legally justify his own violent actions of throwing bricks at the Buick and destroying "his" property, and (b) simultaneously claim that defendant committed criminal mischief and domestic violence against him by reciprocally throwing a brick and PlayStation back at the Nissan in response.

The biggest flaw in plaintiff's legal position, however, is that in a court of equity, he is clearly attempting to elevate form over substance. Regardless of whose name was on the title to the Buick, the car was clearly in defendant's long term possession. Plaintiff's action of coming to defendant's home, grabbing the cell phone, and violently throwing bricks through the windshields of the car which defendant historically and exclusively used and relied upon, could have arguably itself constituted harassment on plaintiff's part as an act designed to alarm, upset and harass defendant, in violation of N.J.S.A. 2A:33-4(a). A harassing communication does not have to be verbal, but can take place through actions as well. The technical fact that plaintiff's name was on the Buick did not somehow

give him the legal or equitable right to harass defendant by damaging or destroying the car's functional use in such a deliberate and objectively violent manner.[3]

Moreover, defendant utilized the Buick not only as her source of transportation to and from school, but to drive the children in her care as well. While plaintiff, like any other litigant in his position, could have filed a court application if he was seeking to regain possession of the vehicle, he did not have the right to simply destroy the windshield of car in front of her for the purpose of crippling her ability to drive and transport herself and the children as necessary.

CONCLUSION

For the foregoing reasons, defendant's impulsive response of throwing a brick and PlayStation at plaintiff's Nissan, while itself wrongful, and does not rise to a level of violence equitably requiring the entry of a final restraining order against her in this particular case. To the contrary, the granting of a restraining order in favor of plaintiff and against defendant would arguably violate basic fairness and justice under these circumstances. The Domestic Act must not be distorted or trivialized by misuse. See N.B. v. T.B. 297 N.J. Super 35 (App. Div. 1997).

[3] See also N.T.B. v. D.D.B., ___ N.J. Super ___ (App. Div. 2015), published after the decision in this matter, which held that in certain domestic circumstances, one may commit criminal mischief under N.J.S.A 2C:17-3, and N.J.S.A. 2C:20-1(H), and hence domestic violence under N.J.S.A. 2C:25-19, by intentionally destroying one's own property.

The court's decision herein should not be misconstrued to mean that in every case, a plaintiff's violent provocation of defendant provides an absolute defense to entry of a domestic violence final restraining order. Rather, each case must rise and fall on its own facts. By way of hypothetical example, if a plaintiff slightly pushes a defendant, and defendant responds by punching plaintiff in the face five times, such a response would arguably be so objectively and egregiously out of proportion to plaintiff's action as to require a restraining order, notwithstanding any alleged "violent initiation" or "provocation" argument by plaintiff. The facts in this case, however, are highly distinguishable from this hypothetical scenario, and do not in any way reflect such egregious circumstances in the part of defendant.

While plaintiff's request for "custody" of the children under the Domestic Violence Act is extinguished by denial of his request for a final restraining order, the court further notes that an award of custody to plaintiff under the Act may potentially have been contrary to the children's best interests at this time, as (a) defendant had been the children's primary caretaker; (b) the children were already living with defendant, with plaintiff's prior consent; (c) plaintiff is the one who initiated the violence provoking her response, with the children home, and (d) plaintiff recently demonstrated a less than child–appropriate philosophy and conduct in his own home by turning off the utilities in the children's home on purpose, constructively forcing defendant and the children to evacuate.

The court dismisses plaintiff's domestic violence complaint against defendant. To the extent that either party asserts any further claims for possession of, or damage to, personal property such as cars, cell phones, or video games, such party may file a claim for civil relief in a court of appropriate jurisdiction. To the extent either party seeks any further rulings on child support, custody or parenting time, either party may file an appropriate application in the domestic relations branch of the court, subject to the right of the other party to respond in accordance with the Court Rules.