

ADINOLFI & LIEBERMAN, P.A.  
4 Kings Highway East  
Haddonfield, New Jersey 08033  
Telephone No.: (856) 428-8334  
Facsimile No.: (856) 428-8779  
Attorneys for Defendant-Appellant

---

KENNETH C. MORETZ, JR.,	)	SUPERIOR COURT OF NEW JERSEY
	)	APPELLATE DIVISION
Plaintiff-Respondent,	)	
	)	DOCKET NO.: A-003022-11T3
vs.	)	
	)	CIVIL ACTION
DEBRA NOVAK,	)	
	)	ON APPEAL FROM:
Defendant-Appellant,	)	SUPERIOR COURT OF NEW JERSEY
	)	CHANCERY DIVISION-FAMILY PART
	)	COUNTY OF BURLINGTON
	)	
	)	SAT BELOW:
	)	Marie White Bell, J.S.C.
	)	DOCKET NO: FV-03-864-12

---

BRIEF AND APPENDIX  
OF DEFENDANT/APPELLANT

---

Adinolfi and Lieberman, PA  
Attorneys at Law  
4 Kings Highway East  
Haddonfield, New Jersey 08033  
(856) 428-8334  
FAX # (856) 428-8779  
Attorneys for Defendant/Appellant

Ronald G. Lieberman, Esquire  
OF COUNSEL AND ON THE BRIEF

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii-iv

INDEX TO APPENDIX . . . . . v

STATEMENT OF FACTS AND PROCEDURAL STATEMENT . . . . . 1

    LEGAL ARGUMENT . . . . . 12

    STANDARD OF REVIEW . . . . . 12

    I. THE TRIAL COURT COMMITTED AN ERROR OF LAW BY FAILING TO PROPERLY CONSIDER THE TWO PRONGS OF SILVER V. SILVER . . . . . 14

    II. THE TRIAL COURT'S "PRONG ONE" FINDING THAT DEFENDANT'S ALLEGED CONDUCT CONSTITUTED AN ACT OF DOMESTIC VIOLENCE INSTEAD OF DOMESTIC CONTRETEMPS WAS NOT SUPPORTED BY THE RECORD AND WAS AN ABUSE OF DISCRETION . . . . . 15

    III. THE TRIAL COURT COMMITTED ERRORS OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND THAT PLAINTIFF SATISFIED "PRONG TWO" OF THE SILVER ANALYSIS . . . . . 20

    IV. THE FINAL RESTRAINING ORDER SHOULD BE REVERSED AND REMANDED TO THE TRIAL COURT BECAUSE DEFENDANT WAS CLEARLY UNABLE TO BE EFFECTIVE IN THE HEARING AND SUPPLY EVIDENCE THAT WOULD LIKELY HAVE CHANGED THE OUTCOME OF THE PROCEEDINGS . . . . . 23

        A. This Court Should Recognize A Right To Counsel For Defendants In Domestic Violence Proceedings . . . . . 24

        B. But For Defendant's Inability To Participate In The Hearing, The Final Restraining Order Likely Would Not Have Been Entered . . . . . 28

CONCLUSION . . . . . 35

TABLE OF AUTHORITIES

NEW JERSEY CASES CITED

<u>Brennan v. Orban</u> , 145 N.J. 282 (1996)	26
<u>Cesare v. Cesare</u> , 154 N.J. 394 (1998)	12, 15, 22
<u>Chernesky v. Fedorczyk</u> , 346 N.J. Super. 34 (App. Div. 2001)	16
<u>Corrente v. Corrente</u> , 281 N.J. Super. 243 (App. Div. 1995)	18, 21
<u>Crespo v. Crespo</u> , 408 N.J. Super. 25 (App. Div. 2009)	23
<u>Dolson v. Anastasia</u> , 55 N.J. 2 (1969)	12
<u>Greenberg v. Kimmelman</u> , 99 N.J. 552 (1985)	30
<u>H.E.S. v. J.C.S.</u> , 175 N.J. 309 (2003)	30, 33
<u>J.D. v. M.D.F.</u> , 207 N.J. 458 (2011)	25, 29, 32
<u>J.K. v. B.K.</u> , 308 N.J. Super. 387 (App. Div. 1998)	33
<u>L.D. v. W.D., Jr.</u> , 327 N.J. Super. 1 (App. Div. 1999)	16
<u>Manalapan Realty, L.P. v. Twp. Comm. of Manalapan</u> , 140 N.J. 366, (1995)	12
<u>Matthews v. Nelson</u> , 57 N.J. Super. 515 (App. Div. 1959)	35
<u>Pasqua v. Council</u> , 186 N.J. 127 (2006)	25, 26, 27, 28
<u>Peterson v. Peterson</u> , 374 N.J. Super. 116 (App. Div. 2005)	24, 29
<u>Rova Farms Resort v. Investors Ins. Co.</u> , 65 N.J. 474 (1974)	12
<u>Silver v. Silver</u> , 378 N.J. Super. 112 (App. Div. 2006)	14, 20, 21, 22, 23
<u>State v. Benitez</u> , 360 N.J. Super. 101 (App. Div. 2003)	34
<u>State v. Brown</u> , 118 N.J. 595 (1990)	12
<u>State v. Crisafi</u> , 128 N.J. 499 (1992)	31, 32
<u>State v. Feaster</u> , 184 N.J. 235 (2005)	30

<u>State v. Gallagher</u> , 274 N.J. Super. 285 (App. Div. 1994)	32
<u>State v. L.C.</u> , 283 N.J. Super. 441 (App. Div. 1995)	16
<u>State v. McNeil</u> , 405 N.J. Super. 39 (App. Div. 2009)	31
<u>State v. Wilmouth</u> , 302 N.J. Super. 20 (App. Div. 1997)	19

**NEW JERSEY STATUTES CITED**

<u>N.J.S.A. 2C:33-4</u>	16, 20
<u>N.J.S.A. 2C:25-17 to -35</u>	14
<u>N.J.S.A. 2C:25-18</u>	24, 27
<u>N.J.S.A. 2C:25-19a</u>	14, 20
<u>N.J.S.A. 2C:25-27</u>	26
<u>N.J.S.A. 2C:25-29(a)</u>	14, 15, 20, 22, 23, 30
<u>N.J.S.A. 2C:25-30</u>	26
<u>N.J.S.A. 2C:25-31</u>	26
<u>N.J.S.A. 2C:29-9(b)</u>	26

**OTHER SOURCES CITED**

<u>Article I, Paragraph 1 of the New Jersey Constitution</u>	30
<u>Berger v. California</u> , 393 U.S. 314 (1969)	34
<u>California v. Green</u> , 399 U.S. 149 (1970)	34
<u>Davis v. Alaska</u> , 415 U.S. 308 (1974)	34
<u>N.J.R.E. 102</u>	34
<u>N.J.R.E. 403</u>	34
<u>N.J.R.E. 608a</u>	33
<u>N.J.R.E. 611a</u>	34
<u>N.J.R.E. 611c</u>	34

<u>N.J.R.E.</u> 801 . . . . .	17
<u>N.J.R.E.</u> 802 . . . . .	17
<u>RPC</u> 3.4e . . . . .	35

INDEX TO APPENDIX

New Jersey Domestic Violence Civil Complaint and  
Temporary Restraining Order . . . . . Da 1-5

Final Restraining Order dated December 22, 2011 . . . . . Da 6

Consent Order dated October 25, 2011 . . . . . Da 10-11

STATEMENT OF FACTS AND PROCEDURAL STATEMENT

Defendant/Appellant, Debra Novak, and Plaintiff/Respondent, Kenneth Moretz, were an unmarried couple who lived together for years, had a 13-year relationship (T. 36:1-11), and had a child together, Alayna, age 12 (Da1). A custody order was entered on October 25, 2011 (Da10-11) awarding joint legal custody of Alayna and directing Plaintiff to be the parent of primary residence with no set parenting time for Defendant pending counseling between Alayna and Defendant (T. 8:6-22; 54:17 to 55:18) and mediation was to occur the following month, January, 2012, with a court staffer (T. 67:12-19).

On December 7, 2011, Plaintiff filed a Domestic Violence Civil Complaint and Temporary Restraining Order against Defendant on the grounds of assault and harassment (Da1). In the present case, there was no mention made by Plaintiff in his Civil Complaint and Temporary Restraining Order (Da1) of prior acts of domestic violence by Defendant.

A Final Restraining Order hearing was held on December 22, 2011.<sup>1</sup> During that hearing, Defendant was pro se while Plaintiff

---

<sup>1</sup> The hearing was consolidated for both parties' cross-restraints under FV-03-864-12 and FV-03-876-12.

was represented by counsel (T. 3:8-10). Defendant informed the trial court during testimony that she did not work (T. 50:15); and went to low income housing (T. 38:12-13).

The trial judge asked few questions of Defendant about whether she wanted an attorney (T. 3:11-22) and focused almost exclusively on the consequences of being found guilty of domestic violence (T. 3:23 to 4:25). The first time the trial judge asked Defendant about the consequences of being found to have committed an act of domestic violence Defendant told the court of the fact that two matters were pending and she was unable to answer the question (T. 4:3-6). The second time Defendant was asked the question, Defendant stated that she would not be found guilty and still could not answer the question (T. 4:15-19).

At no point did the trial judge inform Defendant of the consequences of her Temporary Restraining Order against Plaintiff being dissolved if the court did not find that an act of domestic violence occurred or that no protection was warranted. What transpired during the hearing on December 22, 2011, made it clear that Defendant had not knowingly and intelligently waived her right to counsel, had no ability to act pro se, and that the hearing should have been recessed to allow her to obtain counsel.



The resulting transcript is a product of the failure of the trial court to recess that hearing to protect Defendant facing the serious consequences of the entry of a Final Restraining Order once it was clear that Defendant could not act pro se. The proceedings were permeated with the flaws and inadequacies.

Plaintiff's counsel conducted a direct examination of Plaintiff that was replete with leading questions that Defendant did not know whether or how to object. The trial court did not interrupt, either.

A document identified as P-2 was discussed on Plaintiff's direct examination (T. 10:14-16). Without basis in fact his attorney provided a leading question to Plaintiff seeking to establish that Defendant received that document, P-2, during a particular month (T. 11: 17-19) and that Defendant understood it and read it (T. 12: 22-24).

The trial court permitted Plaintiff's attorney herself to answer a question about the custodial arrangement between Defendant and Plaintiff although the question was posed to Plaintiff (T. 15:8-25).

Without interruption from the trial court, and after prompting by his counsel, Plaintiff supplied hearsay testimony about what he said the police not only said to him but were or were not able to do regarding contacting Defendant (T. 17:15-

20). No police officers were called to testify during that hearing about what they said or did not say to Plaintiff or what they did or did not try to do to contact Defendant.

Without interruption from the trial court, Plaintiff supplied hearsay testimony about what he said the parties' daughter said to Defendant (T. 18:22-25).

When Plaintiff's attorney tried to mark police reports for identification, Defendant raised an objection (T. 19:12-23). The court then inquired of Defendant about the objection, at which point Defendant stated "I don't understand. Do - what? I could say you don't have to look at them? No. It's - it's---" (T. 20:6-8). Defendant pressed that " I don't understand. I don't understand." (T. 20:12-13). The trial court stated the following after Defendant twice stated she did not understand:

THE COURT: You have a right to object based upon hearsay. I'm not going to give you any further information on that because you're not represented and I'm not - - (T. 20:14-17)

The trial court asked Defendant if she wanted to see the police reports (T. 21: 3-4) to which Defendant responded she thought she could "refuse you to see them if I want." (T. 21:5-6). Defendant then stated that "She [the trial court] don't need to see them" (T. 21:11) and that she thought the trial court was "saying you don't have to look at them." (T. 21:14-16).

The trial court told Defendant she could object to the

court reading the police reports because the drafter was not present in court (T. 22:7-11), and Defendant then parroted back to the trial court that she objected to them "Because, like, they're not here to say what happened." (T. 22:19-20) After Defendant objected again to the trial court because the police reports were "just hearsay--- like you said," (T. 23:1-3), the trial court allowed Plaintiff's attorney to mark them for identification (T. 22:24-25; 23:13-15).

Thereafter, Plaintiff's attorney asked Plaintiff about a police report marked as P-4 and he testified about what the police said (T. 24:19-23), told the trial court "...it's all right here in the report," (T. 24:21-22), and he alleged that the police told Defendant that she could not be at Plaintiff's residence (T. 24:22-23). The trial court then asked Plaintiff what the police said to Defendant even though none of the officers involved was called as a witness (T. 25:3-4). Plaintiff then told the police what he said they allegedly said to Defendant (T. 25:5-8).

Plaintiff's attorney asked Plaintiff about another police report, this one marked as P-5 (T. 26:9). Without interruption by the trial court, the attorney then asked leading questions of Plaintiff about Defendant's location at his property (T. 26:15-17). Without interruption by the trial court, Plaintiff's

attorney then asked Plaintiff in a leading question about what the police allegedly said to Defendant (T. 27:4-9).

Plaintiff's attorney asked Plaintiff about a third police report, this one marked P-6 (T. 27:12-16). Still without interruption by the trial court, Plaintiff offered hearsay testimony about what his daughter allegedly said to him about Defendant allegedly being present at his home (T. 28:6-9). His attorney asked leading questions of Plaintiff about Defendant allegedly being present in his home (T. 29:7-9).

Without interruption by the trial court, Plaintiff testified as to what he said the police thought about Defendant's alleged location at his home (T. 29:24-25), about what the police allegedly said to Defendant about being at his home (T. 30:1-3), and testified about the police allegedly having taken pictures of his home (T. 30:13).

Without interruption by the trial court, Plaintiff testified about what he said his daughter said to him about Defendant being present at his home (T. 30:14-16).

Without interruption by the trial court, Plaintiff testified about what the police allegedly said they were or were not able to do regarding Defendant (T. 31:4-10) and what the police allegedly said to him (T. 31:11-16).

Without interruption by the trial court, Plaintiff

testified about what a Division of Youth and Family Service worker allegedly told him about parenting time between Defendant and the parties' daughter (T. 31:20-23).

Plaintiff's attorney then asked Plaintiff a compound question about Defendant's mental health and did so without any foundation, as follows:

Q Over the course of that time did Ms. Novak have any kind of incidents with mental health or was she hospitalized or was she diagnosed with anything that you are aware of? (T. 32:19-22).

The trial court permitted that question to be answered without any interruption. Without any foundation, Plaintiff was allowed to testify that Defendant was "diagnosed with being - bipolar disorder." (T. 33:3-2). He was then permitted to testify again without foundation that Defendant was "on three different types of medication for psychotic behavior..." (T. 33:6-8).

Some of Plaintiff's reasons for seeking the entry of a Final Restraining Order against Defendant were that "She's - she's been on medication. She's been hospitalized four different times." (T. 33:21-23).

At the conclusion of Plaintiff's direct examination, his counsel sought to introduce into evidence the various exhibits previously marked for identification (T. 34:21-24). Defendant's response to whether she objected was to state "I don't understand" (T. 35:3) and asked the trial court "And, what - and

what are you asking?" (T. 35:8-9).

The trial court told Defendant she could ask cross examination questions of Plaintiff (T. 35:14-15). The very first question from Defendant was rephrased by the trial court (T. 35:18-24). After Plaintiff answered, Defendant offered comment and was admonished by the trial court (T. 36:12-15). The second question from Defendant was rephrased by the trial court (T. 36-19 to 37:22). The third question from Defendant was objected to by Plaintiff's attorney on hearsay grounds (T. 37:4-16) and although the trial court did not rule on the objection the trial court told Defendant it was hearsay (T. 37:8-9).

Defendant sought to ask another question of Plaintiff which then drew an objection from Plaintiff's attorney (T. 38:8-19). Defendant and the attorney began discussing the question and the trial court stated "... I mean, I don't know where she's going with this..." (T. 38:12-25).

After receiving information from the trial court to "calm down" (T. 39:5-6) and not to "over-talk" the trial court (T. 39:8), Defendant sought to ask an additional question of Plaintiff that the trial court then stated was an example of Defendant "making a comment." (T. 39:22-24).

When Defendant then asked a question of Plaintiff immediately after that admonishment from the trial court,

Plaintiff's attorney objected on relevancy grounds and stopped the question from being answered (T. 40:4-10). Defendant then moved on from that question without any ruling by the trial court about its relevance, and Defendant's next question to Plaintiff was met with the trial court's asking of Defendant to supply more information about it (T. 40:19-21).

Four questions later the trial court without any pending objection from Plaintiff's attorney asked Defendant "what are these comments you're making?" (T. 41:23-24) Defendant's response to the trial court was striking:

Questions. It's hard to make them into questions. I'm trying. (T. 42:1-2).

Right afterward, Plaintiff's attorney stated that Defendant was testifying after a question was posed to Plaintiff (T. 42:9-12). Even after Plaintiff answered a question from Defendant about whether he physically abused her, and she had moved on to another question to him, the trial court interrupted questions from Defendant to allow him to further explain his answer to the already-answered abuse question (T. 42:15 to 43:43:6).

The follow-up question from Defendant was disallowed by the trial court (T. 43:8 to 22) and the trial court then reformulated the very next question from Defendant to Plaintiff (T. 43:24 to 44:3). After a few more questions from Defendant, Plaintiff's attorney objected again (T. 45:16-22). The trial

court's response was that Plaintiff "...can answer the question if he wants." (T. 45:24-25) (Emphasis added.) The trial court then rephrased Defendant's question to Plaintiff (T. 46:2-7).

In the middle of an answer from Plaintiff, the trial court then stopped Defendant's cross-examination without Defendant stating she was finished, or the trial court asking if she was finished, or even providing advance notice to Defendant of the cessation of questioning (T. 47:20-21).

When the trial court questioned Defendant about her defense to Plaintiff's domestic violence complaint, Plaintiff's attorney interrupted the trial court's questioning of Defendant to supply the attorney's own testimony regarding the custody and parenting time arrangement (T. 54:6 to 55:16); the timing of such matters (T. 56:9-24); and to state what the attorney believed Defendant believed about the parenting time arrangements between the parties (T. 57:1 to 19). Plaintiff and his attorney together supplied testimony during the trial court's direct questioning of Defendant (T. 58:6-13).

The trial court admonished Defendant for interrupting the trial court (T. 60:1) yet Plaintiff and his attorney then interrupted Defendant's testimony to supply their own testimony about a different subject matter upon which Defendant was being questioned by the trial court (T. 60:19 to 61:23). Plaintiff and



his attorney became involved again during the questioning of Defendant without any request by the trial court for their intervention (T. 62:14 to 63:16).

Remarkably, Plaintiff testified that he filed his restraining order after he learned from a court staffer that Defendant went to the courthouse to seek mediation with Alayna "or whatever to get this - to get this Court order [of October 25, 2011] dropped." (T. 61:12-18)

Moreover, Plaintiff testified that mediation was scheduled for the following month, January, 2012, because the prior mediation session was canceled "because [he] came here to file papers for a restraining order again." (T. 63:9-11).

In response to a question from the trial court, Defendant sought to explain the incident underlying Plaintiff's domestic violence complaint only to be scolded by the trial court for not volunteering information not even asked of her by the trial court (T. 64:22 to 65:5).

Thereafter, the trial court entered a final restraining order against Defendant and in favor of Plaintiff (T. 99:18 to 100:15) based upon his testimony (T. 99:20-21) on harassment grounds for being hit by Defendant (T. 99:25). A Final Restraining Order was entered that date (Da6-9).

## LEGAL ARGUMENT

### STANDARD OF REVIEW

This Court's scope of review of a final restraining order issued by a trial court involves a determination of whether, giving due regard to the trial judge's credibility determinations and "feel for the case," sufficient evidence to support the factual findings exist. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Where sufficient credible evidence was presented at the hearing to support the trial court's decision, the factual findings of the court are to be affirmed. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974). Where, however, there is an insufficiency of the evidence, the decision should be reversed. Id.

It is well-established that this Court's review of a trial judge's conclusions of law is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 278 (1995). When the decision of the trial court is made upon an interpretation of the law that is inconsistent with well-established law, the decision must be reversed. State v. Brown, 118 N.J. 595, 604 (1990); Dolson v. Anastasia, 55 N.J. 2, 7 (1969).

In the present case, Defendant submits that the trial court erred as a matter of law in the following respect: (a) finding that Plaintiff proved a predicate act of harassment by a

(11) Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	Marie White Bell, J.S.C.	February 22, 2012
Trial Court Division Manager	Barbara Sopronyi	February 22, 2012
Tax Court Administrator State Agency Attorney General or Attorney for other Governmental body pursuant to <u>R. 2:5-1(a), (e) or (h)</u> Other parties in this action:		

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
Kenneth Moretz, Plaintiff/Defendant	D. Ryan Nussey, 38 Haddon Avenue, Haddonfield, NJ 08033 (856) 428-7469	February 22, 2012

(12) Attached transcript request form has been served where applicable on the following:

	Name	Date of Service	Amount of Deposit
Trial Court Transcript Office Court Reporter (if applicable) Supervisor of Court Reporters Clerk of the Tax Court State Agency	Diana Doman Transcribing	2/2/2012	\$500


(13) Exempt from submitting the transcript request form due to the following:

- No verbatim record.
- Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy).  
List the date(s) of the trial or hearing:
- Motion for abbreviation of transcript filed with the court or agency below. Attach copy.
- Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief.  
I also certify that, unless exempt, the filing fee required by N.J.S.A. 22A:2 has been paid.

(14) February 22, 2012  
DATE

(15)

  
SIGNATURE OF ATTORNEY OR PRO SE LITIGANT



New Jersey Judiciary  
Superior Court - Appellate Division  
CIVIL CASE INFORMATION STATEMENT

Please type or clearly print all information.

TITLE IN FULL (1)

Kenneth Moretz v. Debra Novak

TRIAL COURT OR AGENCY DOCKET NUMBER (2)

FV-03-864-12

FILED  
APPELLATE DIVISION  
FEB 02 2012

■ Attach additional sheets as necessary for any information below.

(3) APPELLANT'S ATTORNEY EMAIL ADDRESS: rlieberman@sjfamilylawyers.com

PLAINTIFF  DEFENDANT  OTHER (SPECIFY)

NAME

Ronald Lieberman, Esquire

CLIENT

Debra Novak

STREET ADDRESS

4 Kings Highway East

CITY

Haddonfield

STATE

NJ

ZIP

08033

TELEPHONE NUMBER

856-428-8334

(4) RESPONDENT'S ATTORNEY \* EMAIL ADDRESS: drn@klineburgerandnussey.com

NAME

D. Ryan Nussey, Esquire

CLIENT

Kenneth Moretz

STREET ADDRESS

38 Haddon Avenue

CITY

Haddonfield

STATE

NJ

ZIP

08033

TELEPHONE NUMBER

856-428-7469

\* Indicate which parties, if any, did not participate below or were no longer parties to the action at the time of entry of the judgment or decision being appealed.

(5) GIVE DATE AND SUMMARY OF JUDGMENT, ORDER, OR DECISION BEING APPEALED AND ATTACH A COPY:

December 22, 2011, Order: FV-03-864-12 granted final restraining order in favor of Kenneth Moretz against Debra Novak.

(6) Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees?  YES  NO

If so, has the order been properly certified as final pursuant to R. 4:42-2? (If not, leave to appeal must be sought. R. 2:2-4,2:5-6)  YES  NO

(If the order has been certified, attach, together with a copy of the order, a copy of the complaint or any other relevant pleadings and a brief explanation as to why the order qualified for certification pursuant to R. 4:42-2.)

Were any claims dismissed without prejudice?  YES  NO

If so, explain and indicate any agreement between the parties concerning future disposition of those claims.

(7) Is the validity of a statute, regulation, executive order, franchise or constitutional provision of this State being questioned? (R. 2:5-1(h))  YES  NO

(8) GIVE A BRIEF STATEMENT OF THE FACTS AND PROCEDURAL HISTORY:

See Attached Sheet

(9)

TO THE EXTENT POSSIBLE, LIST THE PROPOSED ISSUES TO BE RAISED ON THE APPEAL AS THEY WILL BE DESCRIBED IN APPROPRIATE POINT HEADINGS PURSUANT TO R. 2:6-2(a)(5). (Appellant or cross-appellant only.):

Whether the trial court erred in granting a final restraining order in favor of Kenneth Moretz against Debra Novak on December 22, 2011.

(10)

IF YOU ARE APPEALING FROM A JUDGMENT ENTERED BY A TRIAL JUDGE SITTING WITHOUT A JURY OR FROM AN ORDER OF THE TRIAL COURT, COMPLETE THE FOLLOWING:

- 1. Did the trial judge issue oral findings or an opinion? If so, on what date? 12/22/2011  YES  NO
- 2. Did the trial judge issue written findings or an opinion? If so, on what date? \_\_\_\_\_  YES  NO
- 3. Will the trial judge be filing a statement or an opinion pursuant to R. 2:5-1(b)?  YES  NO

Caution: Before you indicate that there was neither findings nor an opinion, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to R. 2:5-1(b).

DATE OF YOUR INQUIRY: 2/2/2012

(11)

1. IS THERE ANY APPEAL NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT WHICH:

(A) Arises from substantially the same case or controversy as this appeal?  YES  NO

(12)

(B) Involves an issue that is substantially the same, similar or related to an issue in this appeal?  YES  NO

(13)

2. WAS THERE ANY PRIOR APPEAL INVOLVING THIS CASE OR CONTROVERSY?  YES  NO

(14)

IF THE ANSWER TO EITHER 1 OR 2 ABOVE IS YES, STATE:

Case Name:

Appellate Division Docket Number:

(15)

Civil appeals are screened for submission to the Civil Appeals Settlement Program (CASP) to determine their potential for settlement or, in the alternative, a simplification of the issues and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question. A negative response will not necessarily rule out the scheduling of a preargument conference.

State whether you think this case may benefit from a CASP conference.  YES  NO

Explain your answer:

This is a domestic violence matter so settlement is unlikely.


(16)

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

(17) Debra Novak  
Name of Appellant or Respondent

(18) Ronald G. Lieberman, Esquire  
Name of Counsel of Record  
(or your name if not represented by counsel)

(19) February 22, 2012  
Date

(20)   
Signature of Counsel of Record  
(or your signature if not represented by counsel)

ISSUES ON APPEAL

1. The Trial Court below erred in granting a Final Restraining Order dated December 22, 2011 under Docket Number FV-03-864-12 against Ms. Novak and in favor of Mr. Moretz when there was no finding of intent to commit an assault or purpose to harassment and no appropriate finding was made of a need for the entry of a Final Restraining Order based either upon fear by Mr. Moretz of Ms. Novak or to protect against further acts of abuse.

STATEMENT OF PROCEDURAL HISTORY

On December 7, 2011, Plaintiff, Kenneth Moretz, filed a Domestic Violence Complaint against Defendant, Debra Novak, under Docket Number FV-03-864-12 and a Temporary Restraining Order was entered against her on that date. He alleged both harassment and assault.

On December 8, 2011, Ms. Novak filed a Domestic Violence Complaint against Mr. Moretz under Docket Number FV-03-876-12 and a Temporary Restraining Order was entered against him on that date. She alleged assault.

A hearing was held before the Honorable Marie White Bell, J.S.C. (on recall) in the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, on December 22, 2011 that consolidated both Temporary Restraining Orders.

Following that consolidated hearing, Judge Bell entered two Orders dated December 22, 2011. The first Order issued a final restraining order against Ms. Novak (FV-03-864-12) and the other Order dismissed the temporary restraining order against Mr. Moretz (FV-03-876-12).

It is from the Orders dated December 22, 2011, entered by Judge Bell that Ms. Novak appeals.

STATEMENT OF FACTS

The parties had a dating relationship commencing in or about 1999 and have a daughter in common, Alayna Moretz, now age 12. The parties resided together with their daughter for almost that entire time period but never married.

Prior temporary restraining orders between the parties were dismissed and the parties would then resume their relationship until they finally ended their relationship and separated. Custody and parenting time matters were defined by way of a consent order dated October 3, 2011, filed under Docket Number FD-03-485-09.

On December 7, 2011, Mr. Moretz filed a Domestic Violence Complaint against Ms. Novak, alleging harassment and assault. He alleged that she was at his residence, peered through a window, and punched and smacked him.

On December 8, 2011, Ms. Novak filed a Domestic Violence Complaint against Mr. Moretz, alleging assault. She alleged that he accused her of stealing a phone and they argued. She and he then left in separate vehicles but followed each other and after driving a distance, the two parties pulled their vehicles into a parking lot where the parties continued their argument. After further argument, Mr. Moretz then entered his truck and pulled away while Ms. Novak was standing on the edge of his truck, causing her to hit his side mirror and fall off his truck.

The hearing on cross-complaints was held on December 22,



2011, before the Honorable Marie White Bell, J.S.C. Following the hearing held on that day, Judge Bell entered two Orders. One Order issued a Final Restraining Order against Ms. Novak (FV-03-864-12) and the other Order dismissed the Temporary Restraining Order against Mr. Moretz (FV-03-876-12).

It is from the Order dated December 22, 2011, entered by Judge Bell that Ms. Novak appeals.

BRIEF EXPLANATION AS TO WHY THE ORDERS QUALIFIED FOR  
CERTIFICATION PURSUANT TO R. 4:42-2

The Court's Orders dated December 22, 2011, acted to determine the issues of cross final restraining orders. Such rulings were the cornerstones of claims raised by Mr. Moretz against Ms. Novak and by Ms. Novak against Mr. Moretz.

So, both Orders, from which Ms. Novak takes this appeal, constitute final dispositions of her requests for the issuance of a final restraining order against Mr. Moretz and for a dismissal of the temporary restraining order against her.

hearing on December 7, 2011 did not afford Defendant the opportunity to receive "notice defining the issues and an adequate opportunity to prepare and respond." H.E.S., supra, 175 N.J. at 321. In point of fact, by permitting Plaintiff to so testify, the trial court converted that December 7, 2011; hearing alleging one act of domestic violence into a hearing on other acts of domestic violence not alleged in his complaint, thereby further violating Defendant's due process rights. See J.K. v. B.K., 308 N.J. Super. 387, 391-392 (App. Div. 1998) (finding that it was improper to convert a hearing on a complaint alleging one act of domestic violence into a hearing on acts not set forth in the complaint).

The trial court permitted Plaintiff's counsel to bolster Plaintiff's credibility on direct examination through the reference to numerous police reports. Such actions constituted inappropriate bolstering of credibility on direct examination in contravention of N.J.R.E. 608a which allows the admission of evidence of truthful character "only after the character of the witness for truthfulness has been attacked..."

The trial court permitted Plaintiff's counsel to question Plaintiff in a leading fashion on direct examination. "Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony."

N.J.R.E. 611c.

The trial court permitted Plaintiff's counsel to question both parties using compound questions in violation of N.J.R.E. 102 regarding the development of "evidence to the end that the truth may be ascertained and proceedings justly determined," N.J.R.E. 403 causing "undue prejudice [or] confusion of issues," and N.J.R.E. 611a regarding "presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth...and (3) protect witnesses from harassment or undue embarrassment."

The trial court ended Defendant's cross-examination of Plaintiff literally in the middle of a sentence from Defendant and did so without any warning to her (T. 47:18-21). The trial court's action of terminating Defendant's cross-examination of Plaintiff was a violation of Defendant's fundamental due process rights. Cross-examination is "the greatest legal engine ever invented for the discovery of truth." State v. Benitez, 360 N.J. Super. 101, 125 (App. Div. 2003) (dissent), quoting California v. Green, 399 U.S. 149, 158 (1970). The integrity of an adversarial proceeding is called into question when the right to confrontation is denied. Davis v. Alaska, 415 U.S. 308, 316 (1974); Berger v. California, 393 U.S. 314 (1969).

The trial court permitted Plaintiff's counsel to question

Defendant with misstatements of the evidence or distortion of the facts, which clearly are impermissible. Matthews v. Nelson, 57 N.J. Super. 515, 521 (App. Div. 1959), certif. den. 31 N.J. 296 (1960). It is arguable that counsel's action ran afoul of R.P.C. 3.4(e) regarding fairness during litigation.


Had an attorney be appointed on Defendant's behalf, the problems presented in this matter, both procedurally and substantively, would have been avoided.

#### CONCLUSION

For the reasons set forth herein, this Court should Respectfully reverse and vacate the entry of a Final Restraining Order against Defendant.

Respectfully submitted,  
ADINOLEFI & LIEBERMAN, P.A.

By:

  
\_\_\_\_\_  
RONALD G. LIEBERMAN

Docket # FV-03-000864-12-V Police Case # \_\_\_\_\_  
 In the Matter of \_\_\_\_\_ Plaintiff's  
 Plaintiff (Victim): MORETZ, KENNETH C \* Sex M Date of birth 03/03/1970  
 \*\*\*\*\*  
 D Name: NOVAK, DEBRA Sex F Date of birth 08/03/1969\*  
 E AKA NOVAK, DEBBIE Race CAUCASIAN Wt. 00 Ht. 00 \*  
 F Home Address 10 WYNDHAM \*  
 E VOORHEES NJ 08043-0000 SSN \*\*\*-\*\*-5262 \*  
 N Work Address \_\_\_\_\_ \*  
 D \_\_\_\_\_ Hair Color BLONDE Eye Color BLUE \*  
 A Other Marks, Scars \_\_\_\_\_ \*  
 N Work Phone No. (000)000-0000 Home Phone No. (856)797-9047 \*  
 T\*\*\*\*\*

The undersigned complains that said defendant did endanger plaintiff's life health or well being (Give specific facts regarding acts, threats, abuse and the date(s) and time(s) they occurred; Specify any weapon(s):

ON | AT | BY  
2/06/2011 05:00 PM PLA ARRIVED HOME TO FIND DEF CAR IN FRONT OF HIS HOUSE  
 SE-DEF WAS IN BACK YARD. PLA FOUND DEF PEEKING THRU HIS HSE WINDOW. PLA TOLD DEF SHE IS NOT TO BE THERE. DEF TRIED TO STORM IN THRU DOOR & CURSED AT PLA. DEF PUNCHED PLA SEVERAL TIMES ON HIS CHEST, AND SMACKED HIM ON FACE 3x.  
 (Clerk DV)

which constitute(s) the following criminal offense(s) (Check all applicable boxes; Attach N.J.S.P. UCR DV1 offense report(s)):

- ( ) Homicide ( ) Criminal Restraint ( ) Lewdness (X) Harassment *3x, 2 y.o. daughter witness*
- (X) Assault ( ) False Imprisonment ( ) Criminal Mischief ( ) Stalking
- ( ) Terroristic Threats ( ) Sexual Assault ( ) Burglary
- ( ) Kidnapping ( ) Criminal Sexual Contact ( ) Criminal Trespass

1. Any prior history of domestic violence reported or unreported? (If yes, explain):  
 (X) YES ( ) NO DEF GOES BY PLA HOME EVERY DAY, KNOCKS ON HIS DOOR - LOOKS THRU HIS WINDOW, CURSES OFTEN, DEF IS BIPOLAR.

- AR.
2. Does defendant have a criminal history? (If yes, attach CCH Summary)  
 ( ) YES (X) NO
  3. Any prior/pending court proceedings involving parties? (If yes, enter Docket #s, County, State) (X) YES ( ) NO PAST DVS DISM; FD 03 485-09 REOPENED
  4. Has a Criminal Complaint been filed in this matter? (If yes, enter Docket #, County, State) ( ) YES (X) NO
  5. If law enforcement officials responded to domestic violence call, were weapons seized? ( ) YES (X) NO (Describe) \_\_\_\_\_ Was defendant arrested? ( ) YES (X) NO
  6. (A) The plaintiff and defendant are 18 years old or older or emancipated AND are
    1. ( ) married ( ) divorced, OR
    2. ( ) present household members ( ) former household members; OR
 (B) The defendant is 18 years old or older or emancipated AND
    1. plaintiff and defendant are ( ) unmarried (X) co-parents ( ) expectant parents OR
    2. ( ) plaintiff and defendant have had a dating relationship.
  7. Where appropriate, list children (Include name/sex/d.o.b./with whom resides):  
MORETZ ALAYNA S F 06/09/99 RESIDES WITH PLA AND DEF

8. The plaintiff and defendant: ( ) presently (X) previously ( ) never resided together  
 (X) family relationship NO RELATION & NO RELATION (Specify)

\*\*\*\*\*CERTIFICATION\*\*\*\*\*  
 I certify that the foregoing responses made by me are true. I am aware that if any of the foregoing responses made by me are willfully false I am subject to punishment.  
12/7/11 Date *[Signature]* Signature of plaintiff

*Dal*

\*\*\*\*\*

\* PART I - RELIEF - Instructions: Relief sought by plaintiff \*

\* TRO FRO GRANTED DEFENDANT: \*

\* 1. (X)N/A (✓) You are prohibited from returning to the scene of violence \*

\* 2. (X)(X) (✓) You are prohibited from future acts of domestic violence \*

\* 3. (X)(X) (✓) You are barred from the following locations: \*

(X)RESIDENCES OF PLAINTIFF (X)PLACE(S) OF EMPLOYMENT OF PLAINTIFF\*

(X)OTHER(S) (LIST ONLY ADDRESSES KNOWN TO DEFENDANT): \*

30 FAYBROOKE DR, MARLTON NJ; ALL SEASONS TREE AND \*

LANDSCAPE, MT LAUREL NJ \*

\* 4. (X)(X) (✓) You are prohibited from having any oral, written, personal, \*

( ) ( ) ( ) electronic or other form of contact with: PLAINTIFF \*

( ) ( ) ( ) OTHER(S) \*

\*\*\*\*\*

\* 5. (X)(X) (✓) You are prohibited from making or causing anyone else to \*

( ) ( ) ( ) make harassing communications to: PLAINTIFF \*

( ) ( ) ( ) OTHER(S) - SAME AS #4 ABOVE OR LIST NAMES \*

\*\*\*\*\*

\* 6. (X)(X) (✓) You are prohibited from stalking, following or threatening \*

( ) ( ) ( ) to harm, to stalk or to follow: PLAINTIFF \*

( ) ( ) ( ) OTHER(S) - SAME AS #4 ABOVE OR LIST NAMES \*

\*\*\*\*\*

\* 7. ( ) ( ) ( ) You must pay emergent monetary relief to (describe amnt & method) \*

( ) ( ) ( ) PLAINTIFF \*

( ) ( ) ( ) DEPENDANT(S) \*

\* 8. ( ) ( ) ( ) You must be subject to intake monitoring of conditions/restraints \*

( ) ( ) ( ) Other: (evaluations or treatments, describe) \*

\*\*\*\*\*

\* 9. ( ) ( ) ( ) Psychiatric evaluation: \*

\*\*\*\*\*

\* 10. (X)(X) (✓) PROHIBITION AGAINST POSSESSION OF WEAPONS: You are prohibited \*

from possessing any and all firearms or other weapons and must \*

immediately surrender these firearms, weapons, permit(s) to \*

carry, application(s) to purchase firearms and firearms \*

purchaser ID card to the officer serving this Court Order. \*

Failure to do so will result in your arrest and incarceration. \*

Other weapon(s) ANY AND ALL NOT TO POSSESS; NONE KNOWN OF BY PLA \*

\*\*\*\*\*

PLAINTIFF: \*

\* 11. (X)(X) (✓) You are granted exclusive possession of (list residence or \*

alternate housing only if specifically known to defendant): \*

30 FAYBROOKE DR, MARLTON NJ \*

\* 12. ( ) ( ) ( ) You are granted temporary custody of: \*

\*\*\*\*\*

\* 13. ( ) ( ) ( ) Oth Relief Pla: \*

( ) ( ) ( ) " " Children: \*

\*\*\*\*\*

LAW ENFORCEMENT OFFICER: \*

You are to accompany to scene, residence, shared place of business, other \*

(indicate address, time, duration and purpose): \*

( ) ( ) ( ) Plaintiff \*

\*\*\*\*\*

( ) ( ) ( ) Defendant \*

\*\*\*\*\*

Dc 2

\*\*\*\*\*

\* WARRANT TO SEARCH FOR AND TO SEIZE WEAPONS FOR SAFEKEEPING \*  
\* ( ) TO ANY LAW ENFORCEMENT OFFICER HAVING JURISDICTION: This Order shall serve as \*  
\* a warrant to search for and seize any issued permit to carry a firearm, \*  
\* application to purchase a firearm and firearms purchaser identification card \*  
\* issued to the defendant and the following firearm(s) or other weapon(s): \*  
\* \*  
\* 1. You are hereby commanded to search for the above described weapons and/or \*  
\* permits to carry a firearm, application to purchase a firearm and firearms \*  
\* purchaser identification card and to serve a copy of this Order upon the \*  
\* person at the premises or location described as: \_\_\_\_\_ \*  
\* 2. You are hereby ordered in the event you seize any of the weapons described \*  
\* above, to give a receipt for the property seized to the person from whom \*  
\* they were taken or in whose possession they were found, or in the absence of \*  
\* such a person to have a copy of this Order together with such receipt in or \*  
\* upon the said structure from which the property was taken. \*  
\* 3. You are authorized to execute this order immediately or as soon thereafter \*  
\* as is practicable: ( ) Anytime; ( ) Other: \_\_\_\_\_ \*  
\* 4. You are further ordered after the execution of this Order, to promptly provide \*  
\* the Court with a written inventory of the property seized per this Order. \*

\*\*\*\*\*

PART II - RELIEF - DEFENDANT:

- 1.    No parenting time/visitation until further ordered;  
   Parenting time pursuant to \_\_\_\_\_ suspended until furth Order  
   Parenting time/visitation permitted as follows:  
\_\_\_\_\_  
\_\_\_\_\_
- 2.    Risk assessment ordered (by whom/any requirements/return dates):  
\_\_\_\_\_
- 3. You must provide compensation as follows:  
   Emergent support for plaintiff: \_\_\_\_\_  
   For dependent(s): \_\_\_\_\_  
N/A   Ongoing support for plaintiff: \_\_\_\_\_  
N/A   For dependent(s): \_\_\_\_\_  
   Compensatory damages for plaintiff: \_\_\_\_\_  
N/A   Punitive damages to plaintiff: \_\_\_\_\_  
N/A   To Third Party(ies) (describe): \_\_\_\_\_  
\_\_\_\_\_  
   Medical coverage for plaintiff: \_\_\_\_\_  
   For Dependent(s): \_\_\_\_\_  
   ( ) Rent ( ) Mortgage payments (specify amount(s) and recipient(s))  
\_\_\_\_\_
- 4.    You must participate in a batterers intervention program:  
\_\_\_\_\_
- 5.    You are granted temporary possession of personal property (describe):  
\_\_\_\_\_

PART II - RELIEF - PLAINTIFF:

- 1.    You are granted temporary possession of personal property (describe):  
\_\_\_\_\_

COMMENTS: FD03-485-09 ADDRESSES CUSTODY, VISITATION, CHILD SUPP.  
*Plaintiff primary residential parent of child  
as per FD03-485-09,*

A violation of any section of this Order by defendant may result in arrest and incarceration. Only a Court can change this Order.

*Dc3*



\*\*\*\*\*

( ) TRO DENIED. Complaint dismissed by Family Part.

( ) TRO DENIED by Municipal Court, forwarded to Family Part for administrative dismissal, and plaintiff advised of right to file new Complaint in Superior Court, Family Division.

TRO GRANTED: The Court has established jurisdiction over the subject matter and parties pursuant to N.J.S.A. 2C:25-17 et seq., and has found sufficient grounds and exigent circumstances that an immediate danger of domestic violence exists and that an emergency restraining Order is necessary pursuant to R.5:7A(b) and N.J.S.A.2C:25-28 to prevent the occurrence or recurrence of domestic violence and to search for and seize firearms and other weapons as indicated in this Order.

ALL LAW ENFORCEMENT OFFICERS WILL SERVE AND FULLY ENFORCE THIS ORDER. This ex parte Domestic Violence Complaint and Temporary Restraining Order meets the criteria of the federal Violence Against Women Act for enforcement outside of the State of New Jersey upon verification of service of defendant. 18U.S.C.A 2265 & 2266.

\* THIS ORDER SHALL REMAIN IN EFFECT UNTIL FURTHER ACTION OF THE COURT AND SERVICE OF SAID ORDER ON THE DEFENDANT.

12/7/11 *Debra R. [Signature]* Burlington  
Date/time ( ) via telephone Honorable Court/county

\*\*\*\*\*

NOTICE TO APPEAR TO PLAINTIFF AND DEFENDANT

1.  Both the plaintiff and defendant are ordered to appear for a final hearing on (date) 12/14/11 at (time) 9:15 AM at the Superior Court, Chancery Division, Family Part, Burlington County, located at (address)

*49 RANCOCOS RD. UNIT 100*  
*MT. HOLLY NJ 08060*

NOTE: You must bring financial information including pay stubs, insurance information, bills & mortgage receipts with you to court.

2. ( ) The final hearing in this matter shall not be scheduled until: \_\_\_\_\_

3. ( ) Interpreter needed. Language: \_\_\_\_\_  
Upon satisfaction of the above-noted conditions notify the Court immediately so that a final hearing date may be set.

IMPORTANT: The parties cannot themselves change the terms of this Order on their own. This Order may only be changed or dismissed by the Superior Court. The named defendant cannot have any contact with the plaintiff without permission of the Court.

NOTICE TO DEFENDANT:

A violation of any of the provisions listed in this Order or failure to comply with the directive to surrender all weapons, firearm permits, applications or identification cards may constitute criminal contempt pursuant to N.J.S.A. 2C:29-9(b) and may also constitute violations of other state and federal laws which may result in your arrest and/or criminal prosecution. This may result in a jail sentence.

You have the right to immediately file an appeal of this temporary Order before the Superior Court, Chancery Division, Family Part, as indicated above, and a hearing may be scheduled.

*Day*

RETURN OF SERVICE

(X) Plaintiff was given a copy of this Complaint/TRO by:

RAM 1035am 12/7/11 [Signature] SPD 2  
PRINT NAME TIME & DATE SIGNATURE/BADGE #/DEPT

(X) I hereby certify that I served the within Complaint/TRO by delivering a copy to defendant personally:

CEK Keley 12/8/11 10:45am [Signature]  
PRINT NAME TIME & DATE SIGNATURE/BADGE #/DEPT

( ) I hereby certify that I served the within Complaint/TRO by use of:  
substituted service as follows:

\_\_\_\_\_  
PRINT NAME TIME & DATE SIGNATURE/BADGE #/DEPT

( ) Defendant could not be served. Explain:

\_\_\_\_\_  
PRINT NAME TIME & DATE SIGNATURE/BADGE #/DEPT

DEFENDANT MUST SIGN THIS STATEMENT: I hereby acknowledge the receipt of the restraining Order. I understand that pursuant to this Court Order, I am not to have any contact with the named plaintiff even if the plaintiff agrees to the contact or invites me into the premises and that I may be arrested and prosecuted if I violate this Order.

[Signature] 12/8/11  
SIGNATURE OF DEFENDANT TIME & DATE

\*THE COURTHOUSE IS ACCESSIBLE TO THOSE WITH DISABILITIES.  
PLEASE NOTIFY THE COURT IF YOU REQUIRE ASSISTANCE.

DAS

STATE OF NEW JERSEY  
PREVENTION OF DOMESTIC VIOLENCE ACT

BURLINGTON COUNTY, Superior Court, Chancery Division, Family Part

FINAL RESTRAINING ORDER (FRO)    AMENDED FINAL RESTRAINING ORDER

DOCKET NUMBER FV-03-000864-12

IN THE MATTER OF: PLAINTIFF MORETZ, KENNETH C		PLAINTIFF'S DATE OF BIRTH 03/03/1970	
DEFENDANT NOVAK, DEBRA	DEFENDANT'S SEX   RACE F   CAUCASIAN	DEFENDANT'S DATE OF BIRTH 08/03/1969	HT ' '    DEFENDANT'S WT LB    SSN# ***-**-5262
DEFENDANT'S HOME ADDRESS 10 WYNDHAM VOORHEES, NJ 08043	SCARS, FACIAL HAIR, ETC.	DEFENDANT'S HOME TELEPHONE NO. (856) 797-9047	
DEFENDANT'S WORK ADDRESS	HAIR COLOR: BLONDE EYE COLOR: BLUE	DEFENDANT'S WORK TELEPHONE NO. ( ) -	

The Court having considered plaintiff's Complaint dated 12/07/2011 seeking an ORDER under the Prevention of Domestic Violence Act, having established jurisdiction over the subject matter and the parties pursuant to N.J.S.A. 2C:25-17 et seq., and having found good cause to believe that plaintiff's life, health or well-being have been and are endangered by defendant's act(s) of violence:  
It is on this Monday of Dec, 2011 ORDERED that:

SOUGHT	GRANTED	PART I RELIEF
		<b>DEFENDANT:</b>
1.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> You are prohibited against future acts of domestic violence.
2.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> You are barred from the following location(s): <input checked="" type="checkbox"/> RESIDENCE(S) OF PLAINTIFF <input checked="" type="checkbox"/> PLACE(S) OF EMPLOYMENT OF PLAINTIFF <input checked="" type="checkbox"/> Other <u>30 FAYBROOKE DR, MARLTON NJ. ALL SEASONS TREE AND LANDSCAPE, MT LAUREL NJ</u>
3.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> You are prohibited from having any (oral, written, personal, electronic or other) form of contact or communication with: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Others (List names & relationship to plaintiff): _____
4.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> You are prohibited from making or causing anyone else to make harassing communications to: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Others (Same as above or list names & relationship to plaintiff): _____
5.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> You are prohibited from stalking, following, or threatening to harm, to stalk or to follow: <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Others (Same as above or list names & relationship to plaintiff): _____
6.	<input type="checkbox"/>	<input type="checkbox"/> You must pay <input type="checkbox"/> plaintiff <input type="checkbox"/> dependent (s) emergent monetary relief (describe amount and method): _____
7.	<input type="checkbox"/>	<input type="checkbox"/> Other appropriate relief: <input type="checkbox"/> Defendant (including substance abuse, mental health or other evaluations and subsequent treatment): _____
8.	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> Psychiatric evaluation: <u>ATTEND &amp; Complete</u>
9.	<input type="checkbox"/>	<input type="checkbox"/> Intake monitoring of conditions and restraints(specify) _____

A violation of any section of this Order by defendant can result in arrest and incarceration. Only a Court can change this Order.

Da 6

PREVENTION OF DOMESTIC VIOLENCE ACT

FINAL RESTRAINING ORDER (FRO)

AMENDED FINAL RESTRAINING ORDER

FV-03-000864-12

SOUGHT GRANTED

PART I RELIEF continued

DEFENDANT:

10.

PROHIBITION AGAINST POSSESSION OF WEAPONS: You are prohibited from possessing any and all firearms or other weapons and must immediately surrender these firearms, weapons, permits to carry, applications to purchase firearms and firearms purchaser ID card to the officer serving this court Order. Failure to do so can result in your arrest and incarceration. Other Weapon(s) (describe) ANY AND ALL NOT TO POSSESS; NONE KNOWN OF BY PLA

PLAINTIFF:

11.

You are granted exclusive possession of (residence or alternate housing, list address only if specifically known to defendant): 30 FAYBROOKE DR, MARLTON NJ

12.

You are granted temporary custody of (specify name(s)):

13.

Other appropriate relief: Plaintiff (describe)

Child(ren) (describe)

LAW ENFORCEMENT OFFICER

You are to accompany to scene, residence, shared place of business, other (indicate address, time, duration & purpose):

Plaintiff:

Defendant:

20 minutes with police escort to 30 Faybrooke Dr, Marlton, Nj. to obtain her boxed up personal items. (AKMDV)

WARRANT TO SEARCH FOR AND TO SEIZE WEAPONS FOR SAFEKEEPING:

To any law enforcement officer having jurisdiction - this Order shall serve as a warrant to search for and seize any issued permit to carry a firearm, application to purchase a firearm and firearms purchaser identification card issued to the defendant and the following firearm(s) or weapon(s)

- You are hereby commanded to search the premises for the above described weapons and/or permits to carry a firearm, application to purchase a firearm and firearms purchaser ID card and to serve a copy of this Order upon the person at the premises or location described as:
- You are hereby ordered in the event you seize any of the above described weapons, to give a receipt for the property so seized to the person from whom they were taken or in whose possession they were found, or in the absence of such person to have a copy of this Order together with such receipt in or upon the said structure from which the property was taken.
- You are authorized to execute this Order immediately or as soon thereafter as is practicable.  ANYTIME  OTHER:
- You are further ordered, after the execution of this Order, to promptly provide the Court with a written inventory of the property seized per this Order.

A violation of any section of this Order by defendant can result in arrest and incarceration. Only a Court can change this Order.

*Da 7*

PREVENTION OF DOMESTIC VIOLENCE ACT

FINAL RESTRAINING ORDER (FRO)

AMENDED FINAL RESTRAINING ORDER

FV-03-000864-12

SOUGHT GRANTED

PART II RELIEF

DEFENDANT:

- 1.   You acknowledge parentage of: \_\_\_\_\_
- 2.   You must submit to genetic testing: \_\_\_\_\_
- 3.   No parenting time (visitation) until further order;
- 4.   Parenting time (visitation) pursuant to (prior FV, FM, or FD Order)# \_\_\_\_\_ is suspended, a hearing is scheduled for: \_\_\_\_\_
- 5.   Parenting time (visitation) is ordered as follows: (specify drop-off and pick-up times and locations, participation of or supervision by designated third party): \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- 6.   Risk assessment ordered (specify by whom): \_\_\_\_\_  
 \_\_\_\_\_ Return Date: \_\_\_\_\_
- 7.   You must provide compensation as follows: (Appropriate notices have been attached as part of this Order):  
  Emergent support - plaintiff: \_\_\_\_\_  
  Emergent support - dependent(s) \_\_\_\_\_  
  Interim support - plaintiff: \_\_\_\_\_  
  Interim support - dependent(s): \_\_\_\_\_  
  Ongoing plaintiff support: \_\_\_\_\_  
     Paid via income withholding through the: \_\_\_\_\_ Probation Div. \_\_\_\_\_  
     Other: \_\_\_\_\_  
  Ongoing child support: \_\_\_\_\_  
     Paid via income withholding through the: \_\_\_\_\_ Probation Div. \_\_\_\_\_  
     Other: \_\_\_\_\_
- 8.   Medical coverage for plaintiff: \_\_\_\_\_
- 9.   Medical coverage for dependent(s): \_\_\_\_\_
- 10.   Compensatory damages to plaintiff: \_\_\_\_\_
- 11.   Punitive damages (describe): \_\_\_\_\_
- 12.   You must pay compensation to (specify third party and/or VCCA, and describe): \_\_\_\_\_  
 \_\_\_\_\_
- 13.   You must participate in a batterers' intervention program (specify): \_\_\_\_\_
- 14.   You must make:  rent  mortgage payments (specify amount(s) due date(s) and payment manner): \_\_\_\_\_
- 15.   Defendant is granted temporary possession of the following personal property (describe): \_\_\_\_\_  
 \_\_\_\_\_

You must pay a civil penalty of \$ \_\_\_\_ (\$50.00 to \$500.00) per N.J.S.A 2C:25-29 (DVVF) to: \_\_\_\_\_ within \_\_\_\_ days. You will be charged a \$2.00 transaction fee for each payment or partial payment that you make.

Waived due to extreme financial hardship because: \_\_\_\_\_

SOUGHT GRANTED

PLAINTIFF:

- 16.   Plaintiff is granted temporary possession of the following personal property (describe)  
 \_\_\_\_\_  
 \_\_\_\_\_

A violation of any section of this Order by defendant may result in arrest and incarceration. Only a Court can change this Order.

*DaA*

PREVENTION OF DOMESTIC VIOLENCE ACT

FINAL RESTRAINING ORDER (FRO)  AMENDED FINAL RESTRAINING ORDER FV-03-000864-12

COMMENTS: FD03-485-09 ADDRESSES CUSTODY, VISITATION, CHILD SUPP.  
PLAINTIFF PRIMARY RESIDENTIAL PARENT OF CHILD AS PER FD-03-485-09

This Order is to become effective immediately and shall remain in effect until further Order of the Superior Court, Chancery Division, Family Part.

ALL LAW ENFORCEMENT OFFICERS WILL SERVE AND FULLY ENFORCE THIS ORDER.  
THE PLAINTIFF SHALL NOT BE ARRESTED FOR A VIOLATION OF THIS RESTRAINING ORDER.

DATE 12/22/11 HONORABLE M. Bell Burlington

THIS FINAL RESTRAINING ORDER WAS ISSUED AFTER DEFENDANT WAS PROVIDED WITH NOTICE AND THE OPPORTUNITY TO BE HEARD AND SHOULD BE GIVEN FULL FAITH AND CREDIT PURSUANT TO THE VIOLENCE AGAINST WOMEN ACT OF 1991, SEC. 40221, CODIFIED AT 18 U.S.C.A. S2265(a) AND S2266.

IF ORDERED, SUFFICIENT GROUNDS HAVE BEEN FOUND BY THIS COURT FOR THE SEARCH AND SEIZURE OF FIREARMS AND OTHER WEAPONS AS INDICATED IN THIS COURT ORDER.

NOTICE TO PLAINTIFF AND DEFENDANT

IMPORTANT: The parties cannot themselves change the terms of this Order on their own. This Order may only be changed or dismissed by the Family Court. The named defendant cannot have any contact with the plaintiff without permission of the court. If you wish to change the terms of this Order and/or you resume living together, you must appear before this court for a rehearing.

A violation of any of the provisions listed in this Order or a failure to comply with the directive to surrender all weapons, firearm permits, application or identification cards may constitute criminal contempt pursuant to N.J.S.A. 2C: 29-9(b), and may also constitute violations of other state and federal laws which can result in your arrest and/or criminal prosecution. This may result in a jail sentence.

NOTICE TO DEFENDANT

RETURN OF SERVICE

Plaintiff was given a copy of the Order by PCN 123pm 12/22/11 [Signature] 8001  
 Print Name Time and Date Signature/Badge No./Dept.

I hereby certify that I served the within Order by delivering a copy to the defendant personally:  
Bryan Norcross 1322 Hrs. 12/22/11 [Signature] 35123 BCSD  
 Print Name Time and Date Signature/Badge No./Dept.

I hereby certify that I served the within Order by use of substituted service as follows:  
 \_\_\_\_\_  
 Print Name Time and Date Signature/Badge No./Dept.

Defendant could not be served (explain):  
 \_\_\_\_\_  
 \_\_\_\_\_  
 Print Name Time and Date Signature/Badge No./Dept.

Defendant hereby acknowledges receipt of the Restraining Order. I understand that pursuant to this court Order, I am not to have any contact with the named plaintiff even if plaintiff agrees to the contact or invites me onto the premises and that I can be arrested and prosecuted if I violate this Order. I understand that pursuant to N.J.S.A. 53:1-15 any person against whom a Final Restraining Order in a domestic violence matter has been entered shall submit to fingerprinting and other identification procedures as required by law and I HAVE BEEN ADVISED THAT I MUST SUBMIT TO FINGERPRINTING AND OTHER IDENTIFICATION PROCEDURES.

SIGNATURE: [Signature] TIME / DATE: 1322 Hrs. 12/22/11

The courthouse is accessible to those with disabilities. Please notify the court if you will require assistance.

DISTRIBUTION: FAMILY PART, PLAINTIFF, DEFENDANT, SHERIFF, OTHER \_\_\_\_\_ (AOC 7/01)

129

8180 50

Filed with the Court

OCT 25 2011

<u>Novak</u>	)	Superior Court Of New Jersey <b>Kenneth S. Donzelli, J.S.C.</b>
Plaintiff,	)	Chancery Division - Family Part
	)	Burlington County
v.	)	Civil Action
<u>Moretz</u>	)	Docket No: <u>FD-03-485-09</u>
Defendant.	)	<b>ORDER FOR BY CONSENT</b>
	)	RETURNABLE: <u>10-25-11</u>

This Matter being presented to the Court, Plaintiff represented by self-represented Esq. and Defendant represented by D Ryan Nussey, Esq., and the court having reviewed all pleadings filed, considered the arguments of counsel and set forth its findings of fact and conclusions of law upon the record which are incorporated herein, and for other good cause shown:

31

It Is On This 25<sup>th</sup> day of October 2011, Ordered That:

- ① The parties shall share joint legal custody of their minor daughter, Alayna Moretz, dob 6-9-99;
- ② Father shall be the parent of primary residence;
- ③ Mother and Alayna to attend counseling through a counselor named on the child's healthcare plan with New Jersey Family Care, Father is seeking reinstatement of policy as of 10/3/11 counseling to address parenting time for Moth
- ④ The parties shall only communicate via email; or text;
- ⑤ Father to have exclusive possession of 30 Faybrooke Drive, Marlton, New Jersey 08053;
- ⑥ In next ~~two weeks~~ <sup>six months</sup>, Mother to notify Father's attorney of a date a time she will collect her belongings. Each party to have third person present;
- ⑦ Father shall not seek child support from

DN  
DN

K.M  
KM

**D. 10**

DN km

Should be respect

RE: Novak v. Moratz

DOCKET #: FD-03-485-09

email it was MG

(Continuation/Addendum of Order):

Mother at this time

- ⑧ ~~The matter scheduled for October 25, 2011 under FD-03-485-09 shall be canceled.~~
- ⑨ Father to reinstate Mother's phone on the family plan until May 2012. Then the plan to be canceled. Mother's usage to continue as in past, reasonable usage.
- ⑩ Mother, Alayna to schedule dinner ~~time~~ <sup>visits</sup> with Brian Novak, pending counseling, for Mother's parenting time, or Mother's sister.
- ⑪ Upon Alayna having a level of comfort with Mother, parenting to be ~~and~~ unsupervised.

Debra Novak  
10-25-11

Kenneth Moratz  
10-25-11

TERRENCE R. COOK, J.S.C.

Debra Novak  
Attorney for Plaintiff

Kenneth Moratz  
Attorney for Defendant

Da 11





New Jersey Judiciary  
Superior Court - Appellate Division  
NOTICE OF APPEAL

Type or clearly print all information. Attach additional sheets if necessary.		ATTORNEY / LAW FIRM / PRO SE LITIGANT (2)				
TITLE IN FULL (AS CAPTIONED BELOW): (1) Kenneth Moretz v. Debra Novak		NAME Ronald G. Lieberman, Esquire, Adinolfi & Lieberman, P.A.				
		STREET ADDRESS 4 Kings Highway East				
		CITY Haddonfield	STATE NJ	ZIP 08033	PHONE NUMBER 856-428-8334	
		EMAIL ADDRESS rlieberman@sjfamilylawyers.com				

ON APPEAL FROM		
TRIAL COURT JUDGE (3) Marie White Bell, J.S.C.	TRIAL COURT OR STATE AGENCY (4) Superior Court Family Part Burlington County	TRIAL COURT OR AGENCY NUMBER (5) FV-03-864-12

Notice is hereby given that (6) Debra Novak \_\_\_\_\_ appeals to the Appellate Division from a  Judgment or  Order entered on December 22, 2011 in the  Civil  Criminal or  Family Part of the Superior Court or from a  State Agency decision entered on \_\_\_\_\_

(8) If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed:

**FILED**  
**APPELLATE DIVISION**  
**FEB 02 2012**  
*[Signature]*  
**CLERK**

(9) Have all issues, as to all parties in this action, before the trial court or agency been disposed of? (In consolidated actions, all issues as to all parties in all actions must have been disposed of.)  Yes  No  
If not, has the order been properly certified as final pursuant to R. 4:42-2?  Yes  No

For criminal, quasi-criminal and juvenile actions only:

- (10A) Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed:
- (10B) This appeal is from a  conviction  post judgment motion  post-conviction relief. If post-conviction relief, is it the  1st  2nd  other \_\_\_\_\_ specify
- (10C) Is defendant incarcerated?  Yes  No  
Was bail granted or the sentence or disposition stayed?  Yes  No
- (10D) If in custody, name the place of confinement:  
  
Defendant was represented below by:  
 Public Defender  self  private counsel \_\_\_\_\_ specify

Plaintiff from immediate danger or further acts of domestic violence, the trial court made no specific findings considering the factors set forth in N.J.S.A. 2C:25-29(a) (1) to (a) (6) contrary to case authority. Cesare, supra, 154 N.J. at 400.

Given the suspect timing of Plaintiff's domestic violence filing and lack of analysis of the statute by the trial court, this Court should take issue with the trial court's issuance of the final restraining order.

In addition to the lack of domestic violence by Defendant against Plaintiff, none of the other statutory factors (had they been analyzed by the trial court below) would have weighed in favor of the entry of a final restraining order. Nothing other than the predicate act arose; there was no indication of the need for immediate protection; the financial issues would have come to light under the October 25, 2011, Order (Da10-11); and no other protection order was entered in another jurisdiction.

In Silver, this Court vacated a final restraining order, reinstated the temporary restraining order, and remanded the matter to the trial court for a determination of the second prong even though, in the context of an assault and criminal trespass by a defendant with a history of "volatility and rage," "this second determination whether a domestic violence restraining order should be issued is most perfunctory and self-

evident." Silver, supra, 387 N.J. Super. at 128.

Here, the trial court found harassment to be the predicate act without a finding of purpose to harass by Defendant and made no statutory review of the six factors under N.J.S.A. 2C:25-29(a)(1) to (a)(6).

**IV. THE FINAL RESTRAINING ORDER SHOULD BE REVERSED AND REMANDED TO THE TRIAL COURT BECAUSE DEFENDANT WAS CLEARLY UNABLE TO BE EFFECTIVE IN THE HEARING AND SUPPLY EVIDENCE THAT WOULD LIKELY HAVE CHANGED THE OUTCOME OF THE PROCEEDINGS**

This case brings into sharp focus the need for this Court to pick up where this Court left off in Crespo v. Crespo, 408 N.J. Super. 25, 45 (App. Div. 2009), aff'd 201 N.J. 207 (2010), and find that "the imposition of a restraining order of the scope authorized by the Act constitutes a matter of sufficient magnitude to warrant the appointment of counsel..." Domestic violence matters are too serious and too important for defendants not to be represented. This need for counsel is especially true where as in the present case an indigent defendant, unskilled in the law, was pitted against the knowledge and resources of counsel for the adverse party.

This Court should also adopt clear and unequivocal guidelines for trial courts to follow when confronted with a defendant who seeks to proceed pro se and to waive his or her

right to have an attorney. Such guidelines must ensure that the integrity of the proceeding is upheld and that such a waiver of counsel is made knowingly and intelligently.

Unfortunately, there presently exists no formal or even informal guidelines for such inquiry to be in a domestic violence matter so the guidelines in place for criminal proceedings should be adopted. As a result, there is only piecemeal, judge-by-judge approaches. A standardized, formalized process is needed to protect the integrity of the proceedings and the litigants.

**A. This Court Should Recognize A Right To Counsel For Defendants In Domestic Violence Proceedings**

This Court is well aware that the issuance of a final restraining order "has serious consequences to the personal and professional lives of those who are found guilty of what the legislature has characterized as a 'serious crime against society.'" Peterson v. Peterson, 374 N.J. Super. 116, 124 (App. Div. 2005). With the enactment of the Act, the Legislature intended "to assure the victims of domestic violence the maximum protection from abuse the law can provide." N.J.S.A. 2C:25-18.

In the Act, the Legislature also declared that:

domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants;

that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. Ibid.

In the present case, Plaintiff asserted that Defendant committed harassment (Da 1). As was held in J.D. v. M.D.F., 207 N.J. 458, 475 (2011), "harassment was not only the most frequently reported of all predicate offenses [in 2009], but it exceeded its incidence as compared to all prior reporting years." The Supreme Court went on to note the unique challenges that harassment posed:

At the same time, however, harassment is the predicate offense that presents the greatest challenges to our courts as they strive to apply the underlying criminal statute that defines the offense to the realm of domestic discord. Drawing the line between acts that constitute harassment for purposes of issuing a domestic violence restraining order and those that fell instead into the category of "ordinary domestic contretemps"...presents our courts with a weighty responsibility and confounds our ability to fix clear rules of application. Ibid. (internal citations omitted.)

The right to counsel in child support enforcement hearing was held to exist in Pasqua v. Council, 186 N.J. 127 (2006). Such hearings have some striking similarities to the risks that a defendant in domestic violence matter runs if a final restraining order is issued. The Supreme Court held a judge's

ability to make a detailed inquiry and to remedy any shortcomings through judicial education was inadequate to act as a "constitutional safeguard for an indigent litigant facing incarceration in a judicial proceeding." Id. at 139.

As the Supreme Court noted, "there is no such thing as an act of domestic violence that is not serious." Brennan v. Orban, 145 N.J. 282, 298 (1996). Committing one of the predicate acts can expose a defendant to criminal prosecution. N.J.S.A. 2C:25-27. The restraints are backed up the threat of contempt proceedings, N.J.S.A. 2C:25-30, and by criminal sanctions, N.J.S.A. 2C:25-31 and N.J.S.A. 2C:29-9(b). Thus, a defendant in a domestic violence matter runs real, not ephemeral, risks of incarceration should a final restraining order be issued.

In Pasqua, supra, the Supreme Court rejected the view child support enforcement hearings were rudimentary and instead held "an indigent litigant exposed to imprisonment" has a federal and state constitutional right to counsel." 186 N.J. at 140. Even though child support enforcement hearings may be routine for an attorney, "gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson." Id. at 145.

Here, a domestic violence trial no doubt involves

"gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense..." As with child support enforcement hearings, a pro se defendant in a domestic violence matter, facing "the maximum protection from abuse the law can provide," N.J.S.A. 2C:25-18, being untrained in the law, anxious, and inarticulate, certainly "needs the guiding hand of counsel to help prove" his or her defense. Pasqua, 186 N.J. at 145.

The argument that a trial court will ensure that the process is fair to a pro se defendant is not an adequate remedy. "However well intentioned and scrupulously fair a judge may be, when a litigant is threatened with the loss of his liberty, process is what matters." Id. at 145-146.

It makes little sense to require a defendant to litigate the underlying domestic violence matter without counsel only to then face violations that involve incarceration. "A person of impoverished means caught within the tangle of our criminal or civil justice system and subject to a jail sentence is best protected by an adversarial hearing with the assistance of a trained and experienced lawyer." Id. at 146.

It was clear from Pasqua, supra, that indigent defendants not facing incarceration were also entitled to the right to counsel under our State's due process guarantee. Id. at 147. The

loss of driving privileges and tier classifications of sex offenders, each not examples of a defendant facing incarceration, were matters having "consequence of magnitude" warranting the appointment of counsel. Id. at 148. The Supreme Court has "acknowledged '[t]he importance of counsel in an accusatorial system, underscoring that in a case with' any complexities [,] the untrained defendant is in no position to defend himself." Ibid. (Internal citations omitted.)

Here, Defendant was involved in an accusatorial system, was untrained in the law, and could not mount a defense, during a domestic violence hearing address a domestic violence complaint that our Legislature and courts have considered a problem of serious society concern.

As with Pasqua, supra, Defendant is aware here that a funding source for counsel may be needed. But, as was also held in Pasqua, "[w]e trust that the Legislature will address the current issue as well." Id. at 154.

**B. But For Defendant's Inability To Participate In The Hearing, The Final Restraining Order Likely Would Not Have Been Entered**

It was clear from a review of the transcript of the December 22, 2011, hearing that Defendant was unable to participate meaningfully or to defend herself. Plaintiff's counsel asked inappropriate questions of both Plaintiff and



Defendant, all without intervention by the trial court.

Defendant was not even given the opportunity to cross-exam Plaintiff in her case in chief. That failure was a fatal flaw in this matter.

In the present case, there was no mention made by Plaintiff in his Civil Complaint and Temporary Restraining Order (Dal) of prior acts of domestic violence by Defendant. Plaintiff was nonetheless permitted to testify about prior acts, thereby denying Defendant due process by permitting proffers of evidence of alleged prior incidents of domestic violence not identified in his complaint.

Further, the trial court denied Defendant the right to cross-exam Plaintiff after he testified regarding her allegations in her domestic violence matter.

This Court has held that denying defendant the opportunity to cross-examine witnesses violates due process. Peterson, supra, 374 N.J. Super. at 124-26. As the Supreme Court held in J.D., supra, 207 N.J. at 481 regarding pro se litigants and cross examination opportunities:

Many litigants who come before our courts in domestic violence proceedings are unrepresented by counsel; many are unfamiliar with the courts and with their rights. Sifting through their testimony requires a high degree of patience and care. The pressures of heavy calendars and volatile proceedings may impede the court's willingness to afford much leeway to a party whose testimony may seem disjointed or

irrelevant. But the rights of the parties to a full and fair hearing are paramount.

Denying Defendant the opportunity to cross-exam Plaintiff was a mistaken exercise of discretion by the trial court that deprived Defendant of due process. The right to due process is implicit in Article I, Paragraph 1 of the New Jersey Constitution. State v. Feaster, 184 N.J. 235, 250 n. 3 (2005); Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). So, constitutional safeguards are clearly violated when due process rights are negatively affected.

There was nothing that precluded the trial court from recognizing the miscarriage of justice that was occurring while Defendant was pro se, stopping the proceedings, keeping the temporary restraining orders in place, and adjourning the hearing to allow Defendant to obtain counsel.

The 10-day provision for a final hearing under N.J.S.A. 2C:25-29(a) "does not preclude a continuance where fundamental fairness dictates allowing a defendant additional time." H.E.S. v. J.C.S., 175 N.J. 309, 323 (2003). Plaintiff would have suffered no risk because his temporary restraints against Defendant would have continued pending the continuance.

The trial court's questions of Defendant about counsel did not lend themselves to revealing whether Defendant knowingly and intelligently waived her right to counsel. The trial court did

not ask enough or even the right questions to ensure that Defendant's "waiver" of counsel was made knowingly and intelligently. This Court should remedy that systematic flaw.

This Court has held that a defendant's right of self-representation is not absolute and the State has an equal interest in ensuring the integrity of judicial proceedings and trial verdicts. State v. McNeil, 405 N.J. Super. 39, 51 (App. Div. 2009). A waiver of counsel must be made "knowingly and intelligently." State v. Crisafi, 128 N.J. 499, 509 (1992).

A trial court fulfills its duty to inquire of a defendant's decision to waive counsel by informing a defendant of the charges to be tried, the statutory defenses to the charges, and the potential sentencing exposure. Id. at 511. The trial court should also inform a defendant of the risks he faces of proceeding pro se and the problems he may encounter at trial in proceeding self-represented. Id. at 511-512. The trial court should explain to a defendant that he will be held to the same rules of procedure and evidence as a member of the bar. Id. at 512. A court should stress the difficulties that the defendant would face in not having an attorney and "specifically advise the defendants that it would be unwise not to accept the assistance of counsel." Ibid.

During the inquiry of defendant's responses to those

questions, the trial court should "indulge [in] every reasonable presumption against waiver.'" State v. Gallagher, 274 N.J. Super. 285, 295 (App. Div. 1994) (internal citations omitted). Without a probing examination by the trial court of a defendant who appeared pro se, this Court cannot be certain that the defendant "fully appreciated the risks of proceeding without counsel, and ...decided to proceed pro se with [her] eyes open." Crisafi, supra, 128 N.J. at 513.

In the present case, the trial court's questioning of Defendant's self-represented status fell far short of the mandates of McNeil or Crisafi (T. 3:11 to 5:11). In fact, the inquiry was devoid of any mention of the charges to be tried, the statutory defenses to the charges, the risks Defendant faced of proceeding pro se, the problems she may have encountered at trial in proceeding self-represented, or that she would be held to the same procedural and evidentiary standards as a licensed attorney. The trial court did not mention or even stress the difficulties that the defendant would face in not having an attorney on her behalf to mount a defense to domestic violence.

The trial court's decision to allow Plaintiff to testify about prior acts of domestic violence not listed in his Civil Complaint and Temporary Restraining Order (Da1) violated Defendant's due process rights under J.D., supra. The judicial

preponderance of the evidence; and (b) finding that Plaintiff proved the need for protection in the form of a final restraining order by a preponderance of the evidence.

Moreover, the trial court's conduct of the final hearing brings into sharp focus the need for this Court to determine once and for all that a defendant in a domestic violence hearing is entitled to counsel paid by the taxpayers of the State of New Jersey and that firm, specific guidelines need to be established for a trial court to follow before a defendant can be considered to have made a knowing and intelligent waiver of the right to counsel at a final hearing on a final restraining order.

I. THE TRIAL COURT COMMITTED AN ERROR OF LAW BY FAILING TO PROPERLY CONSIDER THE TWO PRONGS OF SILVER V. SILVER.

The Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35 [hereinafter referred to as "the Act"], placed the burden of establishing the propriety of the issuance of a final restraining order upon the party applying for it. The enabling statutory legislation is found at N.J.S.A. 2C:25-29(a) and sets forth six different factors at N.J.S.A. 2C:25-29(a)(1) to (a)(6) for a trial court to consider when ruling upon the entry of a final restraining order.

The task of the trial court, therefore, is two-pronged and as follows: "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 the definitional provisions of the Act has occurred; and second the trial court is to enter a final restraining order against the defendant only if the restraining order is necessary to protect the victim from an immediate danger or to prevent further abuse." Silver v. Silver, 387 N.J. Super. 112, 127 (App. Div. 2006).

Thus, it was Plaintiff's burden to establish both elements by a preponderance of the evidence: first, Plaintiff must

present sufficient credible proof that a "predicate act" as defined in N.J.S.A. 2C:25-19a has occurred. Once a plaintiff establishes a predicate act falling within the purview of the Act, the second, mandatory inquiry is whether a restraining order is "necessary" based upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29(a)(1) to (a)(6), "to protect the victim from an immediate danger or to prevent further abuse." *Id.* In the absence of sufficient proof of either element, a final restraining order may not issue. Cesare v. Cesare, 154 N.J. 394, 400 (1998).

In the present case, the trial court below did not cite let alone analyze any of the six specific factors under N.J.S.A. 2C:25-29(a)(1) to (a)(6). Instead, the trial court made a conclusory statement that Plaintiff needed the entry of a final restraining order.

II. THE TRIAL COURT'S "PRONG ONE" FINDING THAT DEFENDANT'S ALLEGED CONDUCT CONSTITUTED AN ACT OF DOMESTIC VIOLENCE INSTEAD OF DOMESTIC CONTRETEMPS WAS NOT SUPPORTED BY THE RECORD AND WAS AN ABUSE OF DISCRETION.

In the case before this Court, the allegation of Plaintiff was that Defendant committed the predicate act of harassment and assault against him. The trial court found harassment.

Harassment has been defined as consisting of three different subsections pursuant to N.J.S.A. 2C:33-4. Of those three, the only one that would fit the trial court's definition was N.J.S.A. 2C:33-4(b), an offensive touching.

In order to establish harassment, a plaintiff must prove that a defendant acted with a "purpose to harass," Chernesky v. Fedorczyk, 346 N.J. Super. 34, 39 (App. Div. 2001), meaning Defendant had a conscious objective to harass Plaintiff. L.D. v. W.D., Jr., 327 N.J. Super. 1, 5 (App. Div. 1999). The analysis of a "purpose to harass" is to be analyzed from the point of view of the defendant not the victim. See State v. L.C., 283 N.J. Super. 441, 450-451 (App. Div. 1995).

The trial court erred in viewing the purpose of Defendant from the point of view of Plaintiff as illustrated by its holding that Defendant went to the home of Plaintiff "knowing full well that the exclusive possession of the property was in [Plaintiff's] custody." (T. 99:12-17).

Moreover, the testimony before the trial court established that the dispute between the parties on December 7, 2011 centered upon the parties' daughter and the premises where she was living. The trial court did not hold or even state that Defendant acted with a "purpose to harass." The only question therefore is whether Defendant's behavior was a domestic



contretemp between two parties with long-running custodial issues and disputes about residential possession.

Plaintiff testified that there was going to be follow-up custody mediation between the parties (T. 40:3-17) and Plaintiff's attorney admitted that the lack of health insurance delayed that mediation (T. 55:5-14).

Remarkably, Plaintiff testified that he filed his restraining order after he learned from a court staffer that Defendant went to the courthouse to seek mediation with Alayna "or whatever to get this - to get this Court order [of October 25, 2011] dropped." (T. 61:12-18) Moreover, Plaintiff testified that mediation was scheduled for the following month, January, 2012, because the prior mediation session was canceled "because [he] came here to file papers for a restraining order again." (T. 63:9-11) So, his own testimony established the pretextual nature of his filing of a restraining order against Defendant.

The trial testimony from Plaintiff centered on the custodial consent order he and Defendant previously entered into granting him primary custody of the parties' daughter. He admitted that he was not present when Defendant allegedly entered his home. Instead, the parties' daughter was his "star witness" whose alleged statements were inadmissible hearsay yet permitted by the trial court. See N.J.R.E. 801, 802. Defendant

did not know to raise that objection and Plaintiff's counsel did not even offer a hearsay exception.

Plaintiff testified that Defendant hit him. Any touching of Defendant by Plaintiff occurred in the midst of a dispute between the parties regarding Plaintiff's request to have parenting time with her daughter and whether Defendant had a right to be present on the premises where she lived for 10 years (T. 40:14-18). Given the opportunity to do so, Plaintiff did not supply any pictures of any physical injuries, testify about any pain or suffering caused by Defendant, or offer any medical records or testimony of receiving any medical treatment for any bruises.

There must be evidence that Defendant had a culpable *mens rea*. There must be evidence of something more than contact between the parties and that evidence is of a purpose to harass. The trial court made no such finding.

As explained by this Court in Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995), the Act was designed to protect real victims of domestic violence, not situations involving "aberrant acts" like the one described by Plaintiff. Thus, in Corrente, "domestic contretemps" were found to be unworthy of the entry of a final restraining order. Id. at 250.

The trial court's mention of "some violence in the past"

(T. 100:8) was unclear, vague, and ambiguous. Plaintiff testified at length on the hearsay records of police reports regarding prior incidents. It was similarly unclear from the trial court's statement as to whether the trial court made such a finding of "some violence in the past" based upon Plaintiff's testimony or the inadmissible police reports regarding those prior incidents or even violence by Plaintiff against Defendant.

As this Court held in State v. Wilmouth, 302 N.J. Super. 20, 23 (App. Div. 1997):

The Domestic Violence Act affords critically needed protections in appropriate situations. It was not intended to attempt to regulate and adjudicate every loss of temper, angry word, or quarrel between persons connected by a familiar relationship. (Internal citations omitted). It is essential that all institutions involved in the administration and enforcement of the Act do so in a manner that promotes rather than subverts its policies and purposes.

Decisions of this Court reviewing the requests for the entry of a final restraining order under the Act illustrate the importance of the *mens rea* element. In Peranio v. Peranio, 280 N.J. Super. 47, 54-55 (App. Div. 1995), this Court reversed the entry of a final restraining order because the trial court failed to find that defendant acted with a purpose to harass plaintiff.

The trial court here failed to find that Plaintiff presented by a preponderance of the evidence that Defendant

harbored the requisite *mens rea* of acting with a purpose to harass under N.J.S.A. 2C:33-4.

The failure of the proofs in this regard renders the final restraining order entered by the trial court reversible because it was issued on a palpably incorrect basis.

**III. THE TRIAL COMMITTED ERRORS OF LAW AND ABUSED ITS DISCRETION WHEN IT FOUND THAT PLAINTIFF SATISFIED "PRONG TWO" OF THE SILVER ANALYSIS.**

No evidence existed from which the trial court could have determined that Plaintiff needed the protection of a final restraining order to protect him from immediate danger or further abuse from Defendant.

The law is well-established regarding the second prong of the inquiry preceding the entry of a final restraining order: it does not suffice that a predicate offense was found by the trial court to have been committed; in addition to the predicate act, Plaintiff must prove the second prong of N.J.S.A. 2C:25-29 --- the need for protection --- in order for a final restraining order to issue.

In Silver, supra, 387 N.J. Super. at 123, this Court reiterated that "the Legislature did not intend that the commission of any one of these acts [contained in N.J.S.A. 2C:25-19a] automatically mandates the issuance of a restraining

order." In evaluating that second prong, our courts have been persuaded by other, non-statutory factors, such as the timing of the domestic violence charge in the midst of custody or divorce proceedings. See Corrente, supra, 281 N.J. Super. at 249-50 (noting that the invocation of the domestic violence act may have caused an unfair advantage for a matrimonial litigant).

In the present case, it was undisputed that the counseling set forth in the October 25, 2011, Order (Da10-11) had not yet occurred between Defendant and Alayna through no fault of Defendant (T. 54:6 to 55:18) but before it or the mediation between the parties could take place, Plaintiff filed his temporary restraining order against Defendant.

Timing of a domestic violence complaint filing clearly has some bearing upon whether a final restraining order is in fact necessary to prevent "immediate danger" or "further abuse." Silver, supra, 387 N.J. Super. at 128. Courts must be vigilant when a domestic violence dispute arises in the context of a breakup or dissolution of a relationship.

Here, the parties had just concluded a relationship of between 13 years and 20 years depending upon which party's testimony was believed. That relationship involved cohabitation and a child was born of it. When determining whether the domestic violence restraining order was necessary to protect