IMPOUNDED

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NUMBER: A-3021-11T3

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APPELLATE DIVISION
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DEBRA NOVAK,

Plaintiff/Appellant,

vs.

KENNETH C. MORETZ, JR.,

Defendant/Respondent.

Civil Action

On Appeal From:

Superior Court of New Jersey
Chancery Division-Family Part
Burlington County
Docket Number: FV-03-876-12

Sat Below: Honorable Marie White Bell, J.S.C.

REPLY BRIEF OF PLAINTIFF-APPELLANT, DEBRA NOVAK

Adinolfi and Lieberman, P.A.
Attorneys at Law
4 Kings Highway East
Haddonfield, New Jersey 08033

(856) 428-8334
FAX (856) 428-8779

Attorneys for Plaintiff/Appellant

Ronald G. Lieberman, Esquire (On the Brief)

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I. REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Responsive Brief that Defendant filed is replete with omissions of fact.

It is of no moment that there was prior history between the parties because no information was supplied to the trial court below about whether either or both parties was or were represented by counsel during any of the prior matters.

Plaintiff sought the entry of a final restraining order against Defendant on grounds of simple assault (Pa 1). Given that Plaintiff was proceeding without counsel, Judge Bell questioned Plaintiff in a manner that otherwise would have been a direct examination by an attorney of Plaintiff. Plaintiff testified that she and Defendant drove their vehicles to a store parking lot (T. 72:15-19) later identified as a Walmart (T. 82:17-25), and while she was on his truck, he drove away and slammed on his truck brakes so that she hit a side mirror and fell off (T. 73:6-20).

At no point did Judge Bell ask Plaintiff questions about her fear from further abuse by Defendant or fear for her safety.

Judge Bell, having heard Plaintiff testify that she did not have a tape of the incident outside in the Walmart parking lot (T. 87:24-to 88:10), failed to ask Plaintiff any questions about her attempts to procure that tape.

Judge Bell found the lack of a tape recording of the incident outside the Walmart to be outcome-determinative when

Judge Bell dismissed Plaintiff's application:

> - - with regard to Ms. Novak's complaint, that there's insufficient evidence. There's a conflict in - - in testimony with regard to what happened in the Walmart parking lot. I don't think that there was any evidence that she was injured or that she was struck by the side mirror or anything of that nature, so that matter's going to be dismissed. (T. 99:5-11)

Judge Bell failed to provide Plaintiff with the opportunity to cross-examine Defendant after he testified at length in his defense of Plaintiff's request for the entry of a final restraining order. When Defendant completed his lengthy direct examination conducted by his attorney (T. 89:14 to 98:5-6), Judge Bell never asked Plaintiff whether she wanted to cross-exam Defendant.

Instead, the trial court pronounced "Anything further, Ms. Novak, and then we're going to bring this to a conclusion?" (T. 98:7-8), which was in marked contrast to Judge Bell's pronouncement to Plaintiff of "You ask him questions. This is cross-examination," (T. 35:14-15) when the Court informed Plaintiff of her right to question Defendant during his testimony in support of his request for the entry of a final restraining order against her. Judge Bell cut Plaintiff off mid-sentence when Plaintiff started speaking (T. 99:4) regarding the "further" information sought of her and Judge Bell then rendered her decision on Plaintiff's request.

II. REPLY LEGAL ARGUMENT

NOTHING CITED BY DEFENDANT IN HIS BRIEF NOR SET FORTH IN THE RECORD BELOW COULD LEAD THIS COURT TO CONCLUDE THAT THE DECEMBER 22, 2011, DOMESTIC VIOLENCE HEARING COMPORTED WITH BASIC FAIRNESS AND DUE PROCESS.

Out of a transcript running 103 pages, Judge Bell spent all of seven sentences on ruling on Plaintiff's request for the entry of a final restraining order. (T. 99:5-11)

Given the opportunity to do so, Defendant made no mention whatsoever in his brief that Plaintiff's questions and actions during the hearing revealed her intelligent waiver of counsel or that Judge Bell protected the integrity of the proceedings on December 22, 2011. Instead, Defendant's attorney mischaracterized case law and in some instances actually cited case authorities that helped further Plaintiff's case.

A. Counsel Should Be Afforded to Victims of Domestic Violence

Contrary to Defendant's assertions, this Court in Crespo v. Crespo, 408 N.J. Super. 25 (App. Div. 2009), did not reject a theory of assigned counsel to litigants in domestic violence matters (Db 11-12). Instead, this Court in Crespo did not reach that issue. Id. at 45.

It cannot be rationally believed that this Court in Crespo meant to limit the assignment of counsel to litigants in domestic violence matters to only those situations when a litigant

mentions a desire for the appointment of counsel. There currently exists no requirement of a judge to ask a litigant if he or she wants an attorney in contrast to Defendant's argument, so how then could a litigant be precluded from having one appointed for not answering a question that no judge is currently compelled to ask that question of the litigant in the first place?

So, it cannot be successfully argued by Defendant that Plaintiff is out of luck for not answering a question about having an attorney appointed or provided to her on December 22, 2011, when Judge Bell never made such an inquiry (Db 12).

With the enactment of the Prevention of Domestic Violence 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:

> 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.

The concept of appointing counsel for a litigant in non-criminal (i.e., civil) matters has precedent. The right to counsel in child support enforcement hearing was held to exist in

Pasqua v. Council, 186 N.J. 127 (2006). 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).

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." Pasqua, 186 N.J. at 145. That "awesome" obligation is no less so for a victim of domestic violence than a defendant.

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 plaintiff 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, or case-in-chief.

Here, Plaintiff was involved in an accusatorial system, was untrained in the law, and could not mount an affirmative case let alone a rebuttal to a defense, during a domestic violence hearing. It is worth remembering that our Legislature and courts have considered domestic violence to be a problem of serious societal concern.

As with Pasqua, supra, Plaintiff 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.

It was clear from a review of the transcript of the December 22, 2011, hearing that Plaintiff was unable to participate meaningfully or to set forth her affirmative case-in-chief. Plaintiff could not reach the issues of fear or harm, because the trial judge did not pose them. Plaintiff could not explain why she did not procure a tape of the incident from Walmart, because the trial judge did not pose such questions to her. Defendant's counsel asked inappropriate questions to which competent counsel would have objected. Plaintiff could not explain why she registered an evidentiary objection until prompted and led to the reasoning by the trial court. Even then, the objection was shunted aside.

Instead of having uniformity that breeds predictability and thus avoids uncertainty that leads to litigation, each trial

judge is currently left to his or her own devices with no guidance from this Court on which questions to ask a self-represented litigant about a waiver of counsel or a right to counsel. Contrary to Defendant's argument, this Court did not set forth guidelines for questioning in Franklin v. Sloskey, 385 N.J. Super. 534, 540-41 (App. Div. 2006) (Db 12) and nothing in this Court's decision in that case could lead to such a finding.

This Court has held that a litigant'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 Plaintiff'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 obligations incumbent upon Plaintiff to prevail, the risks Plaintiff 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 litigant represented by an attorney. The trial court did not mention or even stress the difficulties that Plaintiff would face in not having an attorney on her behalf to mount a case-in-chief and a rebuttal to Defendant's defense.

B. Judge Bell Violated Plaintiff's Due Process Rights By Failing to Provide the Opportunity for Cross-Examination

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

This Court has held that denying a litigant the opportunity to cross-examine witnesses violates due process. Peterson v. Peterson, 374 N.J. Super. 116, 124-26 (App. Div. 2005). As the Supreme Court held in J.D. v. M.D.F., 207 N.J. 458, 481 (2011) 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 Plaintiff the opportunity to cross-exam Defendant

was a mistaken exercise of discretion by the trial court that deprived Plaintiff 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.

III. CONCLUSION

This litigation is only as fair as the underlying procedural scenario in which it takes place. Plaintiff should have been questioned thoroughly about counsel, counsel should have been made available, and nothing she did for herself can lead to a conclusion that she was an effective advocate for herself. For the reasons set forth herein, this Court should Respectfully reverse the trial court, and reinstate the Temporary Restraining Order against Defendant with directions for a final hearing to occur consistent with the provisions of this Court's remand Order.

Respectfully submitted,

ADINOLFI & LIEBERMAN, P.A.

Attorneys for Plaintiff/Appellant

By: 

RONALD G. LIEBERMAN