SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NUMBER: A-3022-11T3

FILED APPELLATE DIVISION

JUN 25 2012

KENNETH C. MORETZ, JR.,	)	
	)	Civil Action
Plaintiff/Respondent,	)	
vs.	)	*On Appeal From:*
	)	
DEBRA NOVAK,	)	Superior Court of New Jersey
	)	Chancery Division-Family Part
Defendant/Respondent.	)	Burlington County
	)	Docket Number: FV-03-864-12
	)	
	)	Sat Below: Honorable Marie White Bell, J.S.C.

REPLY BRIEF OF DEFENDANT-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 Defendant/Appellant

Ronald G. Lieberman, Esquire (On the Brief)

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. REPLY STATEMENT OF PROCEDURAL HISTORY
AND STATEMENT OF FACTS 1

II. REPLY LEGAL ARGUMENT 2

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. 2

II. CONCLUSION 8

TABLE OF AUTHORITIES

NEW JERSEY CASES CITED

Cesare v. Cesare, 154 N.J. 394 (1998) 4

Crespo v. Crespo, 408 N.J. Super. 25 (App. Div. 2009) 2

Franklin v. Sloskey, 385 N.J. Super. 534 (App. Div. 2006) . . 6

State v. Crisafi, 128 N.J. 499 (1992) 6, 7

OTHER SOURCES CITED

N.J.S.A. 2C:25-17 to -33 4

I. REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

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

Defendant's cross-examination of Plaintiff was not notable for its "length" as Plaintiff argued(Pb 9) but instead was notable for what Defendant could and could not do as her own advocate. Her first question was immediately rephrased by the trial court sua sponte (T. 35:20-24), and then the trial court raised its own objection to Defendant's followup question without prompting by Plaintiff's counsel (T: 37:8-9). Defendant was unable to comport herself with proper questioning of Plaintiff, as the trial court repeatedly reminded her. The integrity of the proceedings on December 22, 2011, was compromised.

The trial court and Plaintiff's attorney interrupted Defendant no less than 25 times combined during Defendant's attempts at cross-examining Plaintiff (T. 35:17 to 47:19). Judge Bell did not let Defendant finish her attempts at cross-examination of Plaintiff and cut her off without Defendant turning Plaintiff back to his attorney as her witness (T. 47:18-21).

II. REPLY LEGAL ARGUMENT

NOTHING CITED BY PLAINTIFF 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.

Given the opportunity to do so, Plaintiff could not specify what made the hearing on December 22, 2011, fair to Defendant (Pb 22), other than the fact that the outcome was in his favor.

Plaintiff's brief was devoid of any examples of Defendant's behavior during the hearing that would have revealed her intelligent waiver of counsel or that Judge Bell protected the integrity of the proceedings on December 22, 2011. Instead, Plaintiff mischaracterized case law and in some instances supplied facts that help advance Defendant's appeal.

Contrary to Plaintiff'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 (Pb 22-23). 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. The trial court should make the offer of counsel for a defendant, similar to what

occurs in criminal matters. There currently exists no requirement of a judge to ask a litigant if he or she wants an attorney to be appointed in contrast to Plaintiff's argument because there is no current right to counsel, 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 in the first place? Plaintiff's logic is circular.

It cannot be successfully argued by Plaintiff that Defendant 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 that inquiry of Defendant.

On the issue of counsel being appointed to defendants in domestic violence matters, Plaintiff's brief runs counter to reality. Plaintiff argues to this Court that "incarceration resulting from a domestic violence proceeding is different from incarceration resulting from a child support enforcement matter." (Pb 24) But, incarceration is incarceration regardless of why it occurred, and both scenarios cited by Plaintiff lead to the same result - - a loss of freedom by the defendant.

Plaintiff goes on to argue that a defendant facing incarceration for failure to pay child support would not have acted willfully through "job loss or illness." (Pb 24) But, those examples from Plaintiff were instances of involuntary actions which by their very nature would not lead to a defendant's

incarceration. It is a willful failure to pay child support that leads to a defendant's incarceration, just as a willful act leads to a domestic violence conviction that leads to a loss of certain rights and privileges.

Those lost rights and privileges include exclusion from a residence for which the litigant has an ownership interest, suspension of parenting time, monetary compensation to the victim, mandatory counseling, loss of the right to possess a firearm, restraining the defendant from contacting the victim, mandatory fingerprinting, and registration as a domestic violence abuser. See N.J.S.A. 2C:25-17 to -33.

Plaintiff makes the baffling argument that because "much of the evidence in a domestic violence proceeding is largely testimonial...the risk of error and wrongful incarceration is not as great." (Pb 24-25) It is axiomatic that "the risk of error and wrongful incarceration" is actually *greater* in domestic violence matters than "the risk of error and wrongful incarceration" would be in child support enforcement proceedings because of the nature of the evidence adduced in domestic violence trials.

As this Court knows, the evidence supplied in domestic violence matters is mainly testimonial (See Cesare v. Cesare, 154 N.J. 394, 412 (1998) holding that the evidence in domestic violence matters "is largely testimonial and involves questions of credibility") while in child support enforcement proceedings

either or both litigants supply the trial court with documentary evidence including tax returns with attachments such as W-2s or Form 1099s, Case Information Statements or Summary Financial Disclosures, paystubs, and bank and other financial account statements.

Plaintiff presents a factually inaccurate argument in his brief. He stated that Defendant competently represented herself because an objection she raised resulted in police reports not being entered into evidence. (Pb 25) But, the record below reveals that Defendant parroted Judge Bell about an evidentiary objection and instead of Defendant's objection being sustained, Plaintiff's attorney stated "Your Honor, I would ask that we just enter them [the police reports] in for identification at this time without me moving them into evidence." (T. 22:21-23)

Plaintiff argues that counsel need not have been appointed for Defendant because there was nothing in record to indicate that she could not afford an attorney. (Pb 25) Judge Bell did not make an ability-to-pay inquiry of Defendant because there are no standardized guidelines regarding a litigant who appears pro se in domestic violence matters, unlike the strict guidelines in place in criminal matters.

But if this Court now mandates standardized guidelines for trial judges to ask litigants about the right to counsel and ability to afford one as Defendant Respectfully seeks, then

issues such as the one Defendant faced - - Plaintiff arguing that Defendant did not prove financial hardship while Judge Bell did not make such an inquiry - - can be avoided altogether.

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 as to which questions to ask a self-represented litigant about a waiver of counsel or a right to counsel. Contrary to Plaintiff'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) (Pb 25) and nothing in this Court's decision in that case could lead to such a finding.

It bears repeating that a waiver of counsel must be made "knowingly and intelligently." State v. Crisafi, 128 N.J. 499, 509 (1992). In criminal matters, 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.

In the present case, the trial court's questioning of Defendant's self-represented status fell far short of the mandates of Crisafi (T. 3:11 to 5:11). In fact, the inquiry that occurred below was devoid of any mention of the charges to be tried, 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 litigant represented by an attorney. The trial court did not mention or even stress the difficulties that Defendant would face in not having an attorney on her behalf to mount a defense to Plaintiff's case-in-chief.

Plaintiff's argument that Defendant "speculate[s]" about the outcome if she had counsel (Pb 22) is irrelevant and seeks to bring into this matter a concept of "ineffective assistance of counsel." In fact, Plaintiff's argument would make sense if Defendant had an attorney and was claiming that he or she was as poor an advocate as Defendant was for herself.

It was clear from a review of the transcript of the December 22, 2011, hearing that Defendant was unable to participate meaningfully in it or to set forth her defense during it. She did

not raise objections when otherwise warranted; when she did raise one, the trial court prompted her response without even ruling on it; and she could not formulate a defense either through her testimony or cross-examination of Plaintiff.

II. CONCLUSION

This litigation is only as fair as the underlying procedural scenario in which it takes place. Defendant 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 vacate the entry of a Final Restraining Order in favor of Plaintiff.

Respectfully submitted,

ADINOLFI & LIEBERMAN, P.A.

Attorneys for Defendant/Appellant

By:

RONALD G. LIEBERMAN