

FOR PUBLICATION

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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RENEE A. TORTORELLO, Petitioner-Appellee,
v.
WILSON TORTORELLO, JR., Respondent-Appellant

NO. 27459

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-DA NO. 05-1-1453)

JUNE 30, 2006

BURNS, C.J., AND FOLEY, J.; AND FUJISE, J., DISSENTING

OPINION OF THE COURT BY BURNS, C.J.

Respondent-Appellant Wilson A. Tortorello, Jr. (Wilson) appeals from the August 1, 2005 Order For Protection entered in the Family Court of the First Circuit by Judge Darryl Y.C. Choy in favor of Petitioner-Appellee Renee A. Tortorello (Renee). We reverse.

BACKGROUND

At the time of the August 1, 2005 hearing, Renee and Wilson were married and had two minor sons. On June 28, 2005, Renee commenced FC-DA No. 05-1-1291, a proceeding against Wilson pursuant to Hawaii Revised Statutes (HRS) Chapter 586 (Supp.

2005)¹, by filing an "Ex Parte Petition for a Temporary

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§ 586-4 Temporary restraining order. (a) Upon petition to a family court judge, an ex parte temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time the order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family or household member. . . .

. . . .

(c) The family court judge may issue the ex parte temporary restraining order orally, if the person being restrained is present in court. The order shall state that there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order further shall state that the temporary restraining order is necessary for the purposes of: preventing acts of abuse or preventing a recurrence of actual domestic abuse; and ensuring a period of separation of the parties involved. The order shall describe in reasonable detail the act or acts sought to be restrained. . . .

§ 586-5 Period of order; hearing. (a) A temporary restraining order granted pursuant to this chapter shall remain in effect at the discretion of the court, for a period not to exceed ninety days from the date the order is granted.

(b) On the earliest date that the business of the court will permit, but no later than fifteen days from the date the temporary restraining order is granted, the court, after giving due notice to all parties, shall hold a hearing on the application requiring cause to be shown why the order should not continue. . . .

The protective order may include all orders stated in the temporary restraining order and may provide further relief, as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention.

§ 586-5.5 Protective order; additional orders. (a) If, after hearing all relevant evidence, the court finds that the respondent has failed to show cause why the order should not be continued and that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for a further fixed reasonable period as the court deems appropriate.

The protective order may include all orders stated in the temporary restraining order and may provide for further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention services. . . .

Restraining Order for Protection and Statement". In this petition, Renee alleged that:

1. On June 24, 2005, Wilson threatened that "if you take a hard line with me, fine I will make it twice as hard on you."

2. Wilson subjected her to "extreme psychological abuse by: screaming at [her,] calling [her] a "fuckin bitch" repeatedly in front of [her] child, Wilson attacked [her] sister, . . . in front of [Renee's] 5 yr old [child] - pushed & hit her [sister]. [Wilson] has displayed extreme irrationality & violence." The last date that Wilson did this was on June 14, 2005.

3. She is in immediate danger of Wilson abusing her "because of his extreme irrational & violent behavior" and the fact that "[h]e is very insecure and tries to dominate & invalidate [Renee]."

(b) A protective order may be extended for such further fixed reasonable period as the court deems appropriate. Upon application by a person or agency capable of petitioning under section 586-3, the court shall hold a hearing to determine whether the protective order should be extended. In making a determination, the court shall consider evidence of abuse and threats of abuse that occurred prior to the initial restraining order and whether good cause exists to extend the protective order.

The extended protective order may include all orders stated in the preceding restraining order and may provide such further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention services. The court may terminate the extended protective order at any time with the mutual consent of the parties.

4. She believes that Wilson would very soon physically harm, injure, or assault her, hurt her family, and take her children to Brazil without her permission.

Judge Paul T. Murakami granted a Temporary Restraining Order (TRO) expiring on September 26, 2005. On July 12, 2005, Judge Matthew J. Viola heard the petition and, when Renee began her testimony, the following discussion occurred:

BY [COUNSEL FOR RENEE]:

Q. [Renee], how long have you been married to [Wilson]?

A. Eight years.

Q. Okay. And during that time, has there been any physical abuse in your relationship?

A. Yes.

[COUNSEL FOR WILSON]: I'm going to object to this line of questioning. The restraining order -- we're talking about three years ago. I don't think those at this point are relevant.

THE COURT: Those -- as I read the Petition, there are no allegations in here regarding physical abuse so I'm constrained to limit the hearing to the matters that are identified in the Petition. Because, otherwise, [Wilson] didn't have notice of those allegations."²

. . . .

BY [COUNSEL FOR RENEE]:

Q. I'd like to turn your attention to the reason behind the filing of the Petition for the Temporary Restraining Order. Could you explain to the judge the purpose of the filing of the Temporary Restraining Order, why you felt you needed to file.

A. Yes. An altercation took place on June 14th on the evening, approximately 11:15 p.m.

(Footnote added.)

² In other words, the objection asserted by counsel for Respondent-Appellant Wilson A. Tortorello, Jr. was not the basis used by the court for deciding "to limit the hearing to the matters that are identified in the Petition."

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At the conclusion of the hearing, Judge Viola decided that the evidence was insufficient to show "that an order for protection is necessary to prevent a domestic abuse or a recurrence of domestic abuse" and dissolved the TRO.

On July 19, 2005, Renee commenced FC-DA No. 05-1-1453 by filing an "Ex Parte Petition for a Temporary Restraining Order for Protection and Statement". In this petition, Renee alleged essentially the same facts, fears, and beliefs that she alleged in her June 28, 2005 petition in FC-DA No. 05-1-1291. She further alleged that:

5. Many times in the last six years, Wilson hurt her with an object, and had pushed, grabbed, and shoved her. The last date he did this was May 2005.

6. Wilson maliciously damaged her property by changing all three locks on the doors to her home and the house was a mess. The last date this occurred was July 2005.

Judge Darryl Y.C. Choy entered a TRO expiring on October 17, 2005. On July 27, 2005, Wilson filed a "Memorandum in Opposition to Petitioners [sic] Petition for Temporary Restraining [sic] Order for Protection and Statement" in which he contended that

[t]his Petition is [Renee's] attempt to revisit and relitigate the unfounded allegations already heard and rejected by the family court. All matter previously litigated on 7/12/05 should be excluded from evidence at the August 1, 2005 hearing on Petitioners [sic] Motion. Further, as the allegations contained in the Petition have had a full hearing and have been found wanting, this matter is res judicata, and Petitioners [sic] Motion should be considered frivolous under [Hawai'i Family Court Rules] 11 and attorneys fees and costs should be awarded.

At a hearing on August 1, 2005, after Judge Choy ruled that "[t]oday's proceeding will not involve the allegations of June 24," there was no admissible evidence regarding allegation no. 1, listed above. With regard to allegation no. 5, listed above, there was evidence of only one incident, and it happened in May 2005. At the conclusion of the hearing, Judge Choy entered an Order for Protection expiring on August 1, 2015.

On August 23, 2005, Wilson filed a notice of appeal. This case was assigned to this court on April 27, 2006.

The following is relevant precedent:

We quoted in Ellis v. Crockett, 51 Haw. 45, 55, 451 P.2d 814, 822 (1969), from a previous opinion of this court in In re Bishop Estate, 36 Haw. 403, 416 (1943), on the effect of res judicata as follows:

"[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided."

Morneau v. Stark Enterprises, Ltd., 56 Haw. 420, 422-23, 539 P.2d 472, 474-75 (1975). Wilson contends that this precedent barred Judge Choy from considering allegation no. 5 and using it as a basis for the August 1, 2005 Order for Protection. The question is whether this precedent applies to successive HRS Chapter 586 (Supp. 2005) protective order cases filed by the same petitioner against the same respondent where the second case is based on events that occurred, and that the petitioner knew about, prior to the filing of the first petition? In the answering brief, Renee contends that it does not because a contrary answer "would

result in defeating the primary purpose of domestic abuse protection orders - to prevent harm." We agree with Wilson. In the June 28, 2005 petition, Renee alleged that an incident on June 14, 2005, and other actions by Wilson made a protective order necessary to prevent domestic abuse or a recurrence of abuse. At the hearing on July 12, 2005, Wilson showed cause why the order should not be continued and that a protective order was not necessary to prevent domestic abuse or a recurrence of abuse. In the July 19, 2005 petition, Renee re-alleged the allegations stated in the June 28, 2005 petition and added allegations of events happening pre-June 28, 2005, and post-June 28, 2005. The post-June 28, 2005 events are insufficient to support a protective order. With respect to the events happening pre-June 28, 2005, all of the reasons for the res judicata doctrine are applicable. The June 28, 2005 petition presented Renee with her one opportunity to request an Order for Protection for acts and threats of abuse occurring, and that Renee knew about, prior to the filing of her June 28, 2005 petition, and subjected Wilson to his one duty to defend against that request. The June 28, 2005 petition could have and should have included all of Renee's allegations about all past acts of abuse and threats of abuse that made a protective order necessary to prevent domestic abuse or a recurrence of abuse. The Family Court form used by Renee to file both petitions supports this position and is replicated, in part, as follows:

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IV. The following incident(s) of domestic abuse has/have happened:

A. The Defendant has physically harmed, injured or assaulted me by:

- 1. hurting me with an object. Last Date _____
- 2. pushing, grabbing, shoving me. Last Date _____
- 3. slapping, punching, hitting me. Last Date _____
- 4. kicking, biting me. Last Date _____
- 5. choking, trying to strangle me. Last Date _____
- 6. forcing me to have sex. Last Date _____
- 7. other _____ Last Date _____

B. The Defendant has threatened me with physical harm, injury or assault by threatening to:

- 1. kill me. Last Date _____
- 2. physically hurt me. Last Date _____
- 3. hurt me sexually. Last Date _____
- 4. other _____ Last Date _____

C. The Defendant has maliciously damaged my property by:
_____ Last Date _____

. . . .

D. The Defendant has subjected me to extreme psychological abuse by: _____ Last Date _____

Accordingly, we reverse the August 1, 2005 Order for Protection.

On the briefs:

Mark S. Kawata and
Craig T. Dela Cruz
for Respondent-Appellant.

Theodore Y.H. Chinn and
Edie A. Feldman
for Petitioner-Appellee.