Cite as 2011 Ark. App. 515

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA11-118

	Opinion Delivered September 7, 2011
DAVID WALDON PASCHAL APPELLANT	APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. DR-10-1847-5]
V.	HONORABLE DOUG MARTIN, JUDGE
TRESSA PASCHAL APPELLEE	
	REVERSED and REMANDED

WAYMOND M. BROWN, Judge

Appellant David Paschal appeals the one-year order of protection entered against him on November 1, 2010 in Washington County. The protection order directed David to have contact with Tressa, his ex-wife, only via email and only as it related to their two children. David raises four points on appeal: (1) the court erred by not dismissing Tressa's petition for an order of protection for failure to allege domestic abuse as required by the statute; (2) the court erred by not barring the allegations of past abuse under the doctrine of *res judicata*; (3) the court erred by not granting David's motion for directed verdict at the close of Tressa's evidence; (4) the evidence was insufficient to support the issuance of the order of protection. We reverse and remand.

David and Tressa were divorced in November 2008, after ten years of marriage. On May 12, 2010, Tressa filed a petition for an order of protection against David, alleging that

he was abusive during their marriage, that he was suicidal because he had recently been suspended from his job, and that he told a friend of hers that his "grandmother has 2000 acres if you have any bodies you need to hide." A temporary order of protection (TOP) was granted the same day. After a hearing on May 21, 2010, the TOP was vacated. According to the order filed on May 24, 2010, Tressa's allegations were not sustained by the proof.

Tressa filed another petition for an order of protection on October 4, 2010. In this petition, she also sought an order of protection for her two children. The petition alleged that David was abusive during their marriage toward her and their children; that his behavior had become more erratic in the week before she filed the petition; that he called her house late on October 3, 2010, and when she answered the phone he threatened that she should make her male friend leave "or else"; that he sent an email, text message, and voice message within three minutes after she hung up on him; that she believed he was spying on her or had someone spying on her; that someone left a bottle of cologne called David in front of her house, and that she found it the morning after he called her and asked if he could come over; that his erratic behavior usually ended in violence; and that she was afraid of David since he was jobless and facing jail time.[1] A TOP was issued that day. An amended TOP was entered October 5, 2010. The TOP restrained David's contact with Tressa and their minor children.

David filed a motion to dismiss and a motion for expedited hearing on October 6, 2010. In his motion to dismiss, David alleged that the TOP failed to alleged domestic abuse as required by Arkansas Code Annotated § 9-15-201(e)(1)(A).[2] He also alleged that conduct

---

[1]At the time of the hearing, David was employed.

[2](Repl. 2009).

occurring during the marriage and prior to the May 12, 2010, petition for order of protection was barred by the doctrine of *res judicata*.

A hearing on the petition for an order of protection took place on November 1, 2010. David again argued that Tressa had failed to allege domestic abuse and asked the court to dismiss the petition due to that deficiency. The court denied his request. The court also denied David's attempt to limit the evidence to events that took place following the last protection hearing.

Tressa testified that David was physically abusive to her during their marriage. She stated that after their divorce, there was an episode where David jumped up and down on her vehicle in front of the children. She testified that even though David was court-ordered to only contact her via email, he called her and he would even come up to her in gymnastics and "talk non-stop about the kid or come breathing in [her] ear for some weird reason." According to Tressa, David knows information about her male friend that he should not know, thus making her believe that he is stalking her or that he has someone doing it for him. Tressa stated that David began to call her non-stop at the beginning of October "wanting to talk . . . about something highly important." She testified that during this time, David told her that he did not have access to email and could only contact her by calling. She stated that David called her at the "end of November [sic]" wanting to know if he could come over to her house. According to Tressa, after she told him no and hung up, he "called and called and called and called and, finally, he sent a text about . . . not letting [him] talk to [his] kids." Tressa testified that the next day she found a bottle of cologne in front of her house called David, and that led her to believe that he wanted to let her know that he came to her house

anyway.[3] Tressa stated that on October 3, 2010, she had put her children to bed and was visiting with her boyfriend, Jerry. She said that Jerry was not feeling well and decided to stay the night at her house. According to Tressa, David called after 10:00 that night telling her that he knew Jerry was at her house and she had better tell him to leave or else. After Tressa hung up the phone, David sent her a text message telling her not to have his children calling Jerry, dad. He also sent her an email that night. Tressa testified that David threatened to "gripe out [my] kids and was threatening [me]." Tressa filed a petition for an order of protection the following day. She stated that she is afraid of David. She admitted that David "doesn't ever verbalize" a threat but testified that serial killers do not either. Tressa said that she did not know what David meant by "or else." She stated David had spanked the children in the past, following their divorce.

On cross-examination, Tressa stated that David jumped up and down on her car at the end of 2008 or in the spring of 2009. She said that David had not been violent toward her since May 2010. She also conceded that David could be getting information concerning Jerry from Jerry's teenage daughter. Tressa contended that David threatened her by telling her to put a stop to their children calling Jerry dad. She stated that although he did not say what he would do if she did not put a stop to it, she knows what he is capable of doing.

David moved for a directed verdict at the conclusion of Tressa's case. The court denied the motion. David testified and essentially denied doing anything to threaten Tressa or put her in fear of harm. He renewed his motion for directed verdict. It again was denied.[4]

---

[3]She also said that she found male footprints in her backyard in the sand.

[4]Although termed a motion for directed verdict by counsel, because the trial was a bench trial, the motion was actually a motion to dismiss. Ark. R. Civ. P. 50(a).

The court found the evidence sufficient to support a full order of protection in favor of Tressa; it denied the protection order for the children. This appeal followed.

Our standard of review following a bench trial is whether the circuit court's findings are clearly erroneous or clearly against the preponderance of the evidence.[5] A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made.[6] Disputed facts and determinations of credibility of witnesses are both within the province of the fact finder.[7]

For his first point on appeal, David argues that the trial court erred by not dismissing Tressa's petition for failure to allege domestic abuse. This argument has no merit. Arkansas Code Annotated § 9-15-201(e)(1)(A) defines domestic abuse as physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members. It is clear by looking at the petition Tressa filed on October 4, 2010, that she alleged domestic abuse. Therefore, the court correctly denied David's motion to dismiss on this ground.

Next, David argues that the court erred by not barring the allegations of past abuse under the doctrine of *res judicata*. The concept of *res judicata* has two facets, one being claim preclusion and the other issue preclusion.[8] Under claim preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff

---

[5] *Claver v. Wilbur*, 102 Ark. App. 53, 280 S.W.3d 570 (2008).

[6] *Id.*

[7] *Id.*

[8] *McWhorter v. McWhorter*, 2009 Ark. 458, ___ S.W.3d ___.

or his privies against the defendant or his privies on the same claim.[9] Claim preclusion (*res judicata*) bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could have been litigated.[10] Where a case is based on the same events as the subject matter of a previous lawsuit, claim preclusion will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies.[11] Under issue preclusion (collateral estoppel), a decision by a court of competent jurisdiction on matters which were at issue, and which were directly and necessarily adjudicated, bars any further litigation on those issues by the plaintiff or his privies against the defendant or his privies on the same issue.[12] The true reason for holding an issue to be barred is not necessarily the identity or privity of the parties, but instead to put an end to litigation by preventing a party who has had one fair trial on a matter from relitigating the matter a second time.[13]

Tressa made some of the same allegations in both her May 12 and October 4 petitions for orders of protection. The court heard this information at the May 21, 2010 hearing on the petition and decided to vacate the TOP it issued on May 12, 2010. *Res judicata* does not bar a claimant from showing a pattern or practice when petitioning the court for an order of protection. However, the court did not use past pattern or practice as its basis for issuing the protection order in question. David's argument that *res judicata* should have barred Tressa from relitigating matters a second time is correct.

---

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Linn v. NationsBank*, 341 Ark. 57, 14 S.W.3d 500 (2000).

[13] *Francis v. Francis*, 343 Ark. 104, 111, 31 S.W.3d 841, 845 (2000).

David's third and fourth arguments both go to the sufficiency of the evidence.[14] David contends, and we agree, that the acts testified to by Tressa, which took place after May 12, 2010, did not constitute domestic violence as contemplated by the clear language of the statute. The court found David's constant calls "harassing" and his emails "controlling"; however, harassing and controlling do not fall under the legislative definition of domestic abuse.[15] There was no testimony about what David meant by "or else." And without evidence that this was in fact some sort of threat of physical or bodily harm to Tressa, we must reverse the trial court's full order of protection.

Reversed and remanded.

PITTMAN and GLADWIN, JJ., agree.

---

[14]*See Drummond v. Shepherd*, 97 Ark. App. 244, 246, 247 S.W.3d 526, 528 (2007).

[15]*See Newton v. Tidd*, 94 Ark. App. 368, 231 S.W.3d 84 (2006) (being verbally controlling is not domestic abuse).