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IN THE COURT OF APPEALS OF INDIANA

K.B.,

Appellant-Petitioner,

v.

B.B.,

Appellee-Respondent.

May 7, 2021

Court of Appeals Case No. 21A-PO-99

Appeal from the Marion Superior Court

The Honorable Timothy W. Oakes, Judge

The Honorable Caryl F. Dill, Magistrate

Trial Court Cause No. 49D02-2011-PO-41770

Najam, Judge.

Statement of the Case

[1] K.B. appeals the trial court's dismissal of her petition for an order for protection against B.B. K.B. raises one issue for our review, namely, whether the trial

court erred when it dismissed her petition without first holding an evidentiary hearing.

[2] We reverse and remand for further proceedings.

Facts and Procedural History

[3] K.B. and B.B. live across the street from one another. On November 24, 2020, K.B. filed a petition for an order for protection against B.B. and a request for a hearing. In that petition, K.B. alleged that, between April 24, 2019, and November 22, 2020, B.B. had committed several acts against her that she contended constituted harassment and that placed her in fear of physical harm. *See* Appellant's App. Vol. 2 at 11. Specifically, K.B. alleged that B.B. had:

- become "visibly angry and aggressive" toward K.B. at a homeowner's association meeting in "retaliation" for her questions to him;

- placed a gargoyle statue on the roof of his house that faced K.B.'s house to "publicly intimidate" her in retaliation for her questions at the meeting;

- entered K.B.'s property without permission when K.B. was not present and "confront[ed]" a female contractor, which "aggressive behavior" by B.B. placed the contractor in fear such that she "retreated" into K.B.'s home;

- entered K.B.'s property a second time without permission when K.B. was not present and "approached" another contractor to "acquire information" about K.B., which caused the contractor to believe that B.B. was "obsessed" with K.B.;

- placed a "large red bow" on the gargoyle as an "escalation" of the gargoyle's original purpose to "intimidate and retaliate" against K.B.;
- sarcastically yelled: "Howdy neighbors! How are you DOOOOING?" to K.B. as she exited her car in her driveway; and
- "intentionally blocked" K.B.'s entry to her driveway for "at least five minutes" while a vehicle exited his driveway.

Id. 2 at 16-22. K.B. alleged that each of those incidents caused her to feel "terrorized, frightened, intimidated, and threatened" and caused her "emotional distress" such that she now "fear[s]" leaving her house. *Id*. at 15.

[4] The trial court did not hold a hearing on K.B.'s petition. Rather, the court dismissed K.B.'s petition *sua sponte*.[1] Thereafter, K.B. filed a motion to correct error in which she asserted that the trial court was required to hold a hearing on her petition because she had alleged "multiple instances" where B.B. had engaged in conduct that would cause a reasonable person to suffer emotional distress. *Id*. at 7. As such, K.B. maintained that she had alleged "facts sufficient to support her claim for relief." *Id*. The trial court denied that motion on the ground that the alleged behavior, if true, did not "rise to the level of harassment[.]" *Id*. at 5. This appeal ensued.

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[1] The trial court's order dismissing K.B.'s petition stated that it "denied" the petition on the ground that she had not shown "by a preponderance of the evidence" that harassment had occurred. *Id*. at 4. However, the court did not hold a hearing to adjudicate her claim.

Discussion and Decision

[5] K.B. contends that the trial court erred when it dismissed her petition for an order for protection without a hearing. While B.B. did not file a motion to dismiss K.B.'s petition, the court *sua sponte* dismissed the petition for failure to state a claim upon which relief can be granted. Our review of such dismissals is *de novo*. *See Jacob v. Vigh*, 147 N.E.3d 358, 360 (Ind. Ct. App. 2020).

[6] K.B. filed her petition for an order for protection against B.B. pursuant to the Indiana Civil Protection Order Act ("CPOA"). That act provides that "[a] person who is or has been subjected to harassment may file a petition for an order for protection against a person who has committed repeated acts of harassment against the petitioner." Ind. Code § 34-26-5-2(b) (2020). At that point,

> [i]f it appears from a petition for an order for protection . . . that harassment has occurred, a court:
>
> > (1) may not, without notice and a hearing, issue an order for protection . . . ; but
> >
> > (2) may, upon notice *and after a hearing*, whether or not a respondent appears, issue or modify an order for protection.
>
> A court must hold a hearing under this subsection not later than thirty (30) days after the petition for an order for protection . . . is filed.

I.C. § 34-26-5-9(b) (emphasis added).

[7] Other cases have addressed the adequacy of a hearing on a petition for an order for protection. *See Essany v. Bower*, 790 N.E.2d 148, 153 (Ind. Ct. App. 2003) (holding that the trial court failed to hold an adequate hearing when it did not allow the petitioner to testify at the hearing or otherwise cross examine the respondent before dismissing the petition for an order for protection); *see also Maurer v. Maurer*, 712 N.E.2d 990, 991 (Ind. Ct. App. 1999) (holding that the trial court erred when it refused to allow any evidence to be presented at the hearing on a petition for an order for protection). However, no case has addressed when a hearing is required under the CPOA.

[8] On appeal, K.B. contends that the court erred when it dismissed her petition without a hearing because the CPOA "requires" a hearing and "entitle[s]" her to present evidence in support of her petition. Appellant's Br. at 6. In response, B.B. asserts that the statute only requires a court to hold a hearing if the petition "alleges sufficient facts to support an appearance that harassment has occurred." Appellee's Br. at 9. In other words, the parties appear to agree that, if K.B. stated a claim for harassment in her petition, she was entitled to a

hearing.[2] Thus, to resolve this appeal, we must determine whether K.B. stated a claim of harassment. We hold that she did.[3]

[9] It is well settled that Indiana is a notice pleading state. Indiana Trial Rule 8(A) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Trail v. Boys and Girls Clubs*, 845 N.E.2d 130, 135 (Ind. 2006). A plaintiff need not set out in precise detail the facts upon which the claim is based, but she must plead the operative facts necessary to set forth an actionable claim. *See id*.

[10] K.B. asserts, and we agree, that her petition included sufficient operative facts to state a claim that B.B. had harassed her. "Harassment" is defined as "conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress." I.C. § 35-45-10-2.[4] And "impermissible contact" is defined as following or pursuing the victim; communicating with the victim in person, in writing, by telephone, by telegraph, or through electronic means; or posting on

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[2] In her motion to correct error, K.B. specifically asserted that "nothing in the CPOA empowers a court to unilaterally determine that a petition for an order [for] protection should be denied, without a hearing, *where a petition sufficiently alleges facts supporting a valid claim for protection*." Appellant's App. Vol. 2 at 6 (emphasis added).

[3] Because we hold that K.B.'s petition stated a claim that B.B. had harassed her, we need not decide whether, as K.B. contends, the CPOA always requires the court to hold an evidentiary hearing on a petition for an order for protection.

[4] While not cited by either party, Indiana Code Section 34-6-2-51.5 provides an almost identical definition of "harassment" that specifically applies to Indiana Code Chapter 34-26-5.

social media, if the post is directed toward the victim or refers to the victim directly or indirectly. I.C. § 35-45-10-3. Further, to obtain an order for protection, the petitioner must show that the respondent represents a credible threat to safety of the petitioner or a member of the petitioner's household. *S.H. v. D.W.*, 139 N.E.3d 214, 219 (Ind. 2020).

[11] In her petition, K.B. outlined several instances over the course of approximately nineteen months that she claimed constituted harassment by B.B. Most significantly, K.B. stated that B.B. had: become "visibly angry and aggressive" toward her at a meeting; entered K.B.'s property without permission and when she was not home and "confront[ed]" a contractor; entered K.B.'s property a second time without permission and when K.B. was not home and "approached" a contractor to "acquire information" about K.B.; sarcastically yelled at K.B. as she exited her car; and "intentionally blocked" K.B.'s access to her driveway. Appellant's App. Vol. 2 at 16-22. And K.B. alleged that each of those instances made her feel "terrorized, frightened, intimidated, and threatened" and caused her "emotional distress" such that she now "fear[s]" leaving her house." *Id*. at 15. We conclude that those allegations stated a claim for harassment, which entitled K.B. to a hearing.

[12] Still, B.B. contends that "the conduct alleged in K.B.'s petition does not rise to the level of harassment under the CPOA as a matter of law." Appellee's Br. at 14. Specifically, B.B. maintains that "none of the allegations in K.B.'s [p]etition can support even a reasonable inference, much less demonstrate, that B.B. objectively poses a credible and present threat to K.B.'s safety." *Id*. at 19.

But the relevant question on appeal is not whether the allegations in K.B.'s petition actually demonstrate that B.B. had harassed her. Rather, the question is whether she alleged facts sufficient to state a claim that B.B. had harassed her. *See* I.C. § 34-26-5-9(b).

[13] Indeed, under notice pleading, a party is not required to prove her case by a preponderance of the evidence in her initial pleading. In other words, K.B. was not required to prove the allegations in her petition in order to be entitled to a hearing. A trial court cannot avoid an evidentiary hearing simply by stating that it accepts as true the allegations in the petition for an order for protection and rule on a paper record—whether for or against the petition—without a hearing if the minimum requirements of notice pleading are met. And, as discussed above, K.B. alleged sufficient facts to warrant a hearing.

[14] In sum, K.B.'s petition alleged that B.B. had engaged in continuing impermissible contact that placed her in fear of her safety and caused her to suffer emotional distress, which states a claim of harassment. *See* I.C. § 35-45-10-2; *see also S.H.*, 139 N.E.3d at 219. And, contrary to B.B.'s assertion on appeal, we cannot conclude, as a matter of law, that B.B.'s conduct as described by K.B. would not cause a reasonable person to suffer emotional distress. Accordingly, we hold that the trial court erred when it dismissed K.B.'s petition and did not hold a hearing at which K.B. could present evidence to support her

claim.[5] We therefore reverse the trial court's judgment and remand with instructions for the court to hold a hearing on K.B.'s petition for an order for protection.

[15] Reversed and remanded for further proceedings.

Pyle, J., and Tavitas, J., concur.

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[5] We express no opinion on the merits of K.B.'s allegations.