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NO. COA13-1134
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

JODI MARIE SAUNDERS

v.

Union County
No. 13 CVD 808

DAVID SCOTT PEDERSEN

Appeal by defendant from order entered 2 April 2013 by Judge Joseph J. Williams in Union County District Court. Heard in the Court of Appeals 20 February 2014.

No brief filed for plaintiff-appellee.

The Helms Law Firm, PLLC, by Tate Helms, for defendant-appellant.

CALABRIA, Judge.

David Scott Pedersen ("defendant") appeals the trial court's order which granted a domestic violence protective order ("DVPO") to his ex-wife, Jodi Marie Saunders ("plaintiff"). We reverse and vacate the order.

Plaintiff and defendant (collectively "the parties") were married on 17 February 1990, had three children, and then divorced. On 12 February 2013, the parties settled child custody

and support as well as alimony and equitable distribution by a consent order filed in Mecklenburg County District Court ("the consent order"). At the time of the consent order, only one of the parties' children was a minor, and the parties agreed to share joint custody of that child.

On 19 March 2013, plaintiff filed a motion to show cause why defendant should not be held in contempt of the consent order in Mecklenburg County. Plaintiff alleged that defendant willfully violated the consent order by consuming alcohol during custodial periods and by failing to enroll in and complete an outpatient program. Defendant became aware of the contempt motion's existence on 20 March 2013.

On 22 March 2013, plaintiff filed a complaint seeking a DVPO for herself and the minor child in Union County District Court. Plaintiff's complaint alleged, *inter alia*, that defendant had previously threatened her and damaged her car on 20 March 2013. Plaintiff also informed the court that there was a contempt motion pending in Mecklenburg County. The trial court granted plaintiff an *ex parte* DVPO.

On 2 April 2013, defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013) and an answer to plaintiff's complaint in Union County. According to

defendant, plaintiff's DVPO complaint lacked the required specificity regarding the time and nature of the alleged threats. In addition, defendant claimed that the complaint was so vague that he would be precluded from raising a *res judicata* defense in a future proceeding. After a hearing, the trial court denied defendant's motion to dismiss and granted plaintiff a one-year DVPO. Defendant appeals.

As an initial matter, we note that although the DVPO expired on 2 April 2014, defendant's appeal is not moot. See *Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (holding that an appeal of an expired DVPO was not moot because of "'stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse'" and "the continued legal significance of an appeal of an expired domestic violence protective order" (quoting *Piper v. Layman*, 726 A.2d 887, 891 (Md. Ct. Spec. App. 1999))).

Defendant argues that the trial court erred by finding and concluding that he committed acts of domestic violence against plaintiff such that the issuance of a DVPO was justified. We agree.

When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's

findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Kennedy v. Morgan, ___ N.C. App. ___, ___, 726 S.E.2d 193, 195 (2012). “[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.” *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (internal quotation and citation omitted).

Pursuant to N.C. Gen. Stat. § 50B-3, “[i]f the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence.” N.C. Gen. Stat. § 50B-3(a) (2013). Acts of domestic violence include, *inter alia*, “[p]lacing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]” N.C. Gen. Stat. § 50B-1(a)(2) (2013). In the instant case, the only act of domestic violence found by the trial court was that defendant placed plaintiff in fear of continued harassment and that the harassment rose to the level of inflicting severe emotional distress. Defendant contends

that the evidence presented at the DVPO hearing does not support this finding because there was insufficient evidence that plaintiff suffered severe emotional distress.

Substantial emotional distress, as defined by statute, is "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A(b)(4) (2013). In the instant case, the trial court found that defendant had caused plaintiff significant emotional distress based upon the following:

On 3/20/13, . . . [d]efendant injured plaintiff's vehicle after being served with a contempt motion in a pending civil action; in the past he has threatened defendant by saying "Maybe I'll save some money and put you out of your misery like I did Benji." Benji is the family dog whom he shot. Defendant told plaintiff if she didn't drop the custody suit there would be painful consequences for her. He told her she'd pay the ultimate price, along with her mom. He called her bitch, slut, whore, and threatened to cancel her insurance.

The record reflects that defendant's statement to plaintiff that he would cancel her insurance did not fit within the definition of harassment in N.C. Gen. Stat. § 14-277.3A. That statute defines harassment as conduct "directed at a specific person that torments, terrorizes, or terrifies that person and

that serves no legitimate purpose." N.C. Gen. Stat. § 14A-277.3A (b)(2) (2013) (emphasis added). The undisputed evidence in the record is that defendant had no legal obligation to continue to provide plaintiff with health insurance, and thus, defendant had a legitimate purpose when he informed plaintiff that he would no longer continue voluntarily paying for her insurance coverage. Therefore, defendant's statement cannot be appropriately characterized as conduct directed at plaintiff "that serves no legitimate purpose," and accordingly, the statement cannot be used to support the trial court's finding of continued harassment.

The remaining testimony from the DVPO hearing reflects that two of the threats referenced in the trial court's order, the threat invoking the family dog and the threat that plaintiff would "pay the ultimate price," occurred during the same conversation in June 2011. Plaintiff specifically testified that she was "terrified" by those threats. However, plaintiff never stated during her testimony how she felt when defendant threatened that she'd suffer "painful consequences" in October 2012 or when he injured her vehicle in March 2013. Thus, there is no evidence in the record regarding plaintiff's mental state

other than during the conversation in June 2011, which was more than twenty-one months before the DVPO complaint was filed.

Ultimately, there is no evidence in the record that plaintiff suffered emotional distress from any of defendant's actions referenced in the trial court's continued harassment finding of fact at any time other than a single conversation almost two years before the DVPO complaint was filed. Thus, the trial court's finding that defendant placed plaintiff in fear of *continued* harassment which rose to the level of inflicting emotional distress is erroneous. Without this finding, the trial court's conclusion that defendant committed acts of domestic violence against plaintiff is not supported by its findings of fact. Accordingly, the trial court's DVPO must be reversed and vacated. See *Burress v. Burress*, 195 N.C. App. 447, 451, 672 S.E.2d 732, 734-35 (2009). In light of our holding, we need not address defendant's remaining arguments.

Reversed and vacated.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).