IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-728

Filed: 20 December 2016

Rowan County, No. 16CVD473

EMMA RENEE HARMON THRU HER GUARDIAN AD LITEM KEIRA HARMON, Plaintiff,

v.

ANN KRUEGER HARMON, Defendant.

Appeal by defendant from order entered 21 March 2016 by Judge Charles E. Brown in Rowan County District Court. Heard in the Court of Appeals 28 November 2016.

No brief filed on behalf of plaintiff-appellee.

Hoffman Law Firm, PLLC, by James P. Hoffman, Jr., for defendant-appellant.

BRYANT, Judge.

Where the only act of domestic violence found by the trial court was that defendant placed her granddaughter "in fear of imminent serious bodily injury," and no competent evidence supports this finding, there was no legal basis for entering the DVPO against defendant, and we reverse.

On 1 March 2016, plaintiff Emma Renee Harmon, through her Guardian ad Litem ("GAL") Keira Harmon (plaintiff's mother), filed her complaint and motion for

domestic violence protective order ("DVPO"). The complaint stated the defendant Ann Krueger Harmon was plaintiff's grandparent and that

> [d]efendant has attempted to cause or has intentionally caused me bodily injury; or has placed me or a member of my family or household in fear of imminent serious bodily injury or in fear of continued harassment that rises to such a level as to inflict substantial emotional distress; or has committed a sexual offense against me in that: . . . Slapped me twice in the face. My brother Jacob Harmon witnessed it. 2-14-16[.]

On 21 March 2016, the Honorable Charles E. Brown, District Court Judge presiding, entered a DVPO finding that on 14 February 2016, defendant placed plaintiff in fear of imminent serious bodily injury by "str[iking] [plaintiff] 9 [years of age] granddaughter of [defendant] in face." Judge Brown concluded "[t]here [was] danger of serious and immediate injury to . . . plaintiff[,]" and ordered that defendant "shall not assault, threaten, abuse, follow, harass . . . or interfere with the plaintiff." He further ordered that defendant have no contact with plaintiff for one year.

On 15 April 2016, defendant filed notice of appeal. However, the certificate of service of the notice of appeal was not filed until four days later.

Petition for Writ of Certiorari

Service of the notice of appeal must be served and filed within thirty days of entry of the order from which appeal is taken. N.C. R. App. P. 3(c) (2015). Here, the DVPO was filed on 21 March 2016. Therefore, the notice of appeal was due to be served and filed by 20 April 2016. The DVPO from which the appeal was purportedly

taken was filed by plaintiff through her mother, who was also her GAL. The civil summons attached to the complaint and motion for DVPO did not contain an address for the GAL. However, the application for appointing a GAL contained an address in Concord, North Carolina. Therefore, on 19 April 2016, defendant attempted service of the notice of appeal by first-class mail addressed to plaintiff's mother/GAL at the Concord address. Service was also made on plaintiff's father at an address in China Grove, North Carolina. The notice of appeal to plaintiff's mother/GAL was returned, "unserved, does not live at this address" on 22 April 2016. That same day, 22 April 2016, notice of appeal was finally served on plaintiff's mother/GAL at a different China Grove address, two days past the deadline.

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1) (2015); *see also Anderson v. Hollifield*, 123 N.C. App. 426, 429, 473 S.E.2d 399, 400 (1996) (treating petitioner's brief as petition for writ of certiorari and considering the appeal on its merits after noting appellant violated numerous rules), *rev'd on other grounds by*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (upholding this Court's authority to grant a writ of certiorari despite appellant's failure to file and serve notice of appeal within the time set forth in Rule 3).

In the instant case, defendant made every effort to comply with the North Carolina Rules of Civil Procedure regarding filing and service of her notice of appeal. Defendant achieved service on the guardian ad litem two days after the deadline for filing and service, and the guardian ad litem has filed no response to defendant's petition for writ of certiorari indicating whether she has suffered any prejudice due to the two-day delay or contending why the writ should not issue. Accordingly, we exercise our discretion and grant defendant's petition for writ of certiorari.

On appeal, defendant argues the trial court erred in (I) finding that defendant placed plaintiff in fear of imminent serious bodily injury and (II) failing to find facts that would support the entry of the DVPO.

> 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, 221 N.C. App. 219, 220–21, 726 S.E.2d 193, 195 (2012) (quoting *Hensey v. Hennessey*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009)).

After finding that an act of domestic violence has occurred, a trial court may enter a protective order to prevent a defendant from committing further acts of domestic violence. N.C. Gen. Stat. § 50B-3(a) (2015). An act of domestic violence may

occur by "[p]lacing the aggrieved party . . . in fear of imminent serious bodily injury[.]" N.C. Gen. Stat. § 50B-1(a)(2) (2015). "The test for whether the aggrieved party has been placed 'in fear of imminent serious bodily injury' is subjective; thus, the trial court must find as fact the aggrieved party 'actually feared' imminent serious bodily injury." *Smith ex rel. Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (quoting *Brandon v. Brandon*, 132 N.C. App. 647, 654, 513 S.E.2d 589, 595 (1999)).

In the instant case, the trial court found that defendant had placed the minor plaintiff "in fear of serious bodily injury" on 14 February 2016, after defendant "struck [plaintiff] . . . in [the] face." The minor plaintiff (nine years old at the time of the hearing) did not testify, but plaintiff's mother, who did not witness the incident, testified about why she filed the complaint:

> Q. All right. So what caused you to fill out this complaint on your daughter's behalf on March the first?
>
> A. February 14th my son sent me a text and said, "Mommy, you are going to be p-i-s-s-e-d," but he didn't say that, he typed the actual word out. And then he said later on that night Emma would tell me, and Emma called me and let me know that she said "fricking" and her Granny slapped her in the face twice. We have a court order that nobody is to touch our children but Pete and myself.
>
> At nine year old -- I have an 18-year-old without Pete, and Jacob is 12. Pete and myself have never touched our children in the face. On the butt, of course, we spank our children, but never in the face. Nobody hits our children in the face, not even us.

> Q. All right.
>
> A. And I know it's going to cause problems because [defendant] is definitely -- definitely does help Pete out since him and his girlfriend work, but I'm the mother. I do not work. I'm quite capable of taking care of the children, but since she took it upon herself to touch my daughter in the face, I think this is deemed necessary. It's going to be painful for them, but that's why they have me.

Defendant also took the witness stand to testify about the incident:

> Q. And what would you like me to know about these allegations that you inappropriately slapped your granddaughter?
>
> . . .
>
> A. All right. Sir, I will tell you the circumstance involved to the complaint. I was in the dining room and my granddaughter came rushing out of her bedroom and screaming at the top of her lungs, "Jacob, you freaking jerk," and then within three seconds, she said "Who the freak do you think you are?"
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> And I, obviously startled, looked down the hall. I was probably ten feet away, and standing right in front of her were two very small children, age seven and five, with their eyeballs wide open and absolute scared expressions on their face. I told her to come down to me, and at that time, I said, "Do you have any idea what you said in slang terms of the ugly word you meant to say."
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> And she said, "Yes, I do," and I said, "I'm going to punish you for each time you said that." And I tapped -- I guess the term some people call "popped." Using my hand, three fingers on the corner of her mouth right here (indicating.)
>
> Judge, I left no mark. I think her hurt was hurt feelings. I told her to go to her room and to think about what had happened. Five minutes later, I went to the room and I wiped away her tears. She was still crying.

> As I said just a moment ago, there was no mark. And I spoke with her about the term she used, the slang term. Did she really know the word she was meaning to say but not saying. And she said, "Yes, I do."
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> And I said, "Well, I guess maybe you've heard that a lot." And she said, "yes." And I said, "You're nine years old. You should not be saying something like that, and you scared the be jeepers out of those two little kids," and I called them by name. . . .
>
> And I said, "It was uncalled for and ridiculous. We talked about it. I hugged her. I said, "Are we okay" and she said, "yes." And I said, "Okay then, go ahead with what you've been doing," and I thought that was it.

Notably, the trial court did not find that defendant intentionally caused bodily injury to plaintiff. Indeed, the mother's direct evidence explained why the trial court could not make this finding:

> Q. When -- did you call law-enforcement or DSS --
>
> A. I went --
>
> Q. -- with any --
>
> A. -- I went straight up --
>
> Q. -- any assault or abuse?
>
> A. -- I went straight up there. I sent the police out there --
>
> Q. Where?
>
> A. -- I -- I didn't go there. I called the police to go out there. There was a mark, but it didn't last longer than two hours.
>
> Q. So the police responded and did not take action?
>
> A. The mark didn't last longer than two hours or so.

> Q. I'm asking if the police responded and took action?
>
> A. Yeah. They did respond, yes.
>
> Q. And did they arrest [defendant]?
>
> A. No, sir.
>
> Q. All right. And the DSS aspect of this -- did DSS get called?
>
> A. I called DSS myself, yes, sir.
>
> Q. What happened?
>
> A. Nothing.

"The test for whether the aggrieved party has been placed 'in fear of imminent serious bodily injury' is subjective; thus, the trial court must find as fact the aggrieved party 'actually feared' imminent serious bodily injury." *Id.* at 437, 549 S.E.2d at 914 (quoting *Brandon*, 132 N.C. App. at 654, 513 S.E.2d at 595). Here, plaintiff's mother offered no evidence that her daughter "actually feared" imminent serious bodily injury and the trial court did not hear from the minor plaintiff herself at all.[1] Indeed,

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[1] When asked if she had other witnesses to call, defendant told the trial court she "would ask [her] granddaughter to come in . . . ." The following colloquy took place, after which defendant was apparently dissuaded from asking the minor plaintiff to testify:

> THE COURT: You're going to call the 9-year-old granddaughter into this after you just told me that you popped her? You want -- you want to call her in as a witness, the 9-year-old? Put her on the witness stand under oath where you're going to question her?
>
> [Defendant]: I only would want her to tell you the truth, but if it's going

plaintiff's mother's testimony did not provide any evidence of the minor plaintiff's mental or emotional state after the incident (which the mother herself did not witness[2]), nor did it provide evidence that the minor "actually feared" imminent serious bodily injury at the hands of defendant. To the contrary, defendant's testimony suggested that she and the minor plaintiff came to an understanding after the incident when they hugged and the minor plaintiff indicated she was okay.

Because the only act of domestic violence found by the trial court was that defendant placed her granddaughter "in fear of imminent serious bodily injury," and no competent evidence supports this finding, there was no legal basis for entering the DVPO against defendant as there was no predicate act of domestic violence. Accordingly, the trial court's order is

REVERSED.

Chief Judge MCGEE and Judge ENOCHS concur.

Report per Rule 30(e).

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to be too dramatic for her, no.

[2] Notably, the minor plaintiff's brother, Jacob, allegedly witnessed the incident, but he was not called to testify on behalf of either party.