IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-637

Filed: 20 December 2016

Buncombe County, No. 16 CVD 71

SARAH SYLVESTER, Plaintiff,

v.

PAUL "SUNNY" SYLVESTER, JR., Defendant.

Appeal by Plaintiff from order entered 18 February 2016 by Judge Edwin D. Clontz in Buncombe County District Court. Heard in the Court of Appeals 17 November 2016.

Pisgah Legal Services, by Yallana Boston McGee, for the Plaintiff-Appellant.

No brief filed on behalf of Defendant-Appellee.

DILLON, Judge.

Plaintiff Sarah Sylvester ("Wife") appeals from the trial court's order dismissing her complaint and motion for a domestic violence protective order ("DVPO") against her husband, Defendant Paul Sylvester ("Husband"). For the following reasons, we vacate the ruling of the trial court and remand for a new hearing.

I. Background

In 2014, Husband and Wife were married. In late 2015, their marriage produced a child.

In January 2016, Wife filed a complaint and motion for DVPO against Husband, contending that Husband had subjected her to "domestic violence" by committing acts which placed her in fear of imminent bodily injury and in fear of continued harassment as defined in N.C. Gen. Stat. § 50B-1(a)(2). The trial court issued a temporary, *ex parte* DVPO against Husband.

In February 2016, a hearing was held on Wife's DVPO motion. At the hearing, Wife testified that Husband had, over the course of several months, engaged in violent behavior in their home, both during and after her pregnancy, which she stated caused her to fear for the safety of her and her child and caused her emotional and mental distress.

The trial court found for Husband, entering an order concluding that Wife had "failed to prove grounds for the issuance of a domestic violence protective order." Wife timely appealed.

II. Analysis

When the trial court decides a DVPO motion, 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." *Burress v. Burress*, 195 N.C. App. 447, 449, 672 S.E.2d 732, 734 (2009). "Where there is

competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Id.* at 449-50, 672 S.E.2d at 734.

On appeal, Wife challenges the trial court's denial of her motion for a DVPO. She argues that the trial court applied the wrong legal standard in determining whether Husband's acts rose to the level of domestic violence, contending that the trial court applied an "objective" standard rather than the "subjective" standard as required by our case law. Further, she contends that the trial court discounted her testimony based on matters not in evidence. We agree. Accordingly, we vacate the trial court's order and remand for a new hearing.

Domestic violence is defined, in part, as an act which places an aggrieved party "in fear of imminent serious bodily injury *or* [in fear of] continued harassment, [which includes committing intimidating acts against the victim], that rises to such a level as to inflict substantial emotional distress. N.C. Gen. Stat. § 50B-1(a)(2) (2015) (emphasis added); *Wornstaff v. Wornstaff*, 179 N.C. App. 516, 518-19, 634 S.E.2d 567, 569 (2006). And where the court finds that the plaintiff has met her burden of proof that domestic violence has occurred, the trial court "shall grant a protective order restraining the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3(a).

In considering whether Husband has committed domestic violence *by committing an act which places Wife in fear of imminent serious bodily injury*, "[t]he

plain language of [N.C. Gen. Stat. §] 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred." *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999). *See also Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (stating that "[t]he test for whether an 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").

And in order to find that Husband has committed domestic violence *by committing an act which places Wife in fear of continued harassment*, there must be competent evidence that Husband harassed Wife *and* that by doing so, he caused her to suffer substantial emotional distress. *See Kennedy v. Morgan*, 221 N.C. App. 219, 224, 726 S.E.2d 193, 197 (2012).

Here, Wife put on evidence which tended to show that she feared Husband and that his actions caused her substantial emotional distress. Specifically, she put on evidence which tended to show that Husband made threats and acted violently in their home and that she was actually afraid of him. She testified that Husband smashed a bathroom light with a shower rod while she was taking a bath; that Husband cut his wrists in front of her; that Husband smashed his head through a sliding glass door of their home during an argument; that Husband physically restrained Wife when she tried to exit the home, causing her to fall to the floor while

holding their child; that Husband stated to Wife, "[I]s this the part of the story where the husband strangles his family and then kills himself[?]"; and that Husband's actions caused her to feel "really scared."

Wife also introduced Husband's text messages into evidence where he admitted to his violent behavior: "I put my head through a window" because I "thought it would de escalate [sic] the situation[,]" and that "[smashing things] ends violence . . . [c]alms a situation from getting violent[.]"

Husband testified that his actions were a cry for help. He admitted that Wife was scared of him. He did not deny any of Wife's testimony concerning his behavior, except to say that her fall to the floor was an accident.

After considering this evidence, the trial court ruled that Wife failed to carry her burden to prove that domestic violence had occurred. However, the trial court did not base its decision upon a finding that Wife's testimony was not credible. In fact, the trial court suggested that it believed that Wife's fear was caused, at least in part, by Husband's behavior. However, the trial court based its denial of the DVPO on its belief that Wife's fear was mostly the result of a "feeling of paranoia" caused by "hormones involved in [her] pregnancy," stating from the bench as follows:

> Based upon the evidence, it is apparent to the Court that there is more going on here than what has been stated in any complaint or any answer or what even has been presented on the stand. I don't pretend to be a doctor and to understand all the psychology of the hormones involved in pregnancy, but I think that weighs more on this than

> anything else. Based upon the testimony, I think this is more done out of some sort of feeling of paranoia rather than based on actual facts in evidence.

We conclude that the trial court did not apply the subjective test concerning Wife's fear. The trial court denied Wife's petition even though it essentially found that Wife subjectively feared Husband. We further conclude that the trial court erred in finding that Wife's fear was, at least in part, caused by "hormones involved in pregnancy." There was no competent evidence to support this finding.

For the above reasons, we vacate the order of the trial court and remand the matter for a new hearing.

VACATED AND REMANDED.

Judge McCULLOUGH concurs.

Judge TYSON concurs in the result only.

Report per Rule 30(e).