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Division III
State of Washington

Court of Appeals No. 333051-III
Benton County Superior Court Cause No. 15-2-00655-7

WASHINGTON STATE COURT OF APPEALS
DIVISION III

KIMBERLY MAY,

Appellee/Petitioner,

vs.

MARK SCOPA,

Appellant/Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant/Respondent, Mark Scopa ("Mr. Scopa"), seeks relief from a Domestic Violence Protective Order and hereby files this Brief of Appellant.

II. ISSUES/ASSIGNMENT OF ERRORS

The Trial Court erred in granting the Appellee/Petitioner ("Ms. May") a Domestic Violence Protection Order (hereinafter "Petition") where there was insufficient evidence presented to establish Ms. May reasonably feared imminent infliction of domestic violence as required by RCW 26.50.010.

III. STATEMENT OF CASE

A. Substantive Facts.

1. Ms. May's romantic relationship with Mr. Scopa

Mr. Scopa and Ms. May (collectively referred to as "the Parties") were in a romantic relationship from October 2012 through November 2014. (CP 16:14).[1]

The Parties lived together from March 2013 through the middle of September 2014. (CP 16:14-15). Mr. Scopa moved out of the Parties' shared residence in September 2014, but many of his personal belongings were left at Ms. May's residence. (CP 16:15-18).

Mr. Scopa and Ms. May maintained mutual contact via text

message and email from the time he moved out until November 2014. (CP 16:18-20). The Parties attempted reconciliation during that timeframe, taking a romantic vacation to the Oregon Coast at the end of October 2014. (CP 16:20-22). The relationship definitively ended in November 2014. (*See* CP 16:14).

The Parties had very little communication from November 2014 through March 2015. (*See* CP 17:15-18). Most of the communication was initiated by Mr. Scopa and related to the return of his personal belongings or to address unwanted communication between Ms. May and Mr. Scopa's family. (CP 17:17-18).

2. Mr. Scopa's Health Condition

Mr. Scopa is a disabled Iraq War Veteran, medically retired from the U.S. Navy FMF Corpsman. (CP 15:15). Mr. Scopa suffered multiple spinal cord injuries during his years of service. (CP 15:16-17). He suffers from Bilateral Sciatica, and Quadriparesis, which causes weakness, pain, numbness, and tingling in his arms, back, and legs. (CP 15:17-18). He also suffers from tendonitis in in his right shoulder due to a dislocation in January 2008, and the ligaments in his right knee are badly damaged. (CP 16:6-9). As recently as March 2015, Mr. Scopa was diagnosed with a herniated disk in his back. (CP 15:22-24).

Mr. Scopa has significant physical limitations. He spends most of

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[1] "CP" refers to Clerk's Papers

his days lying in bed with an ice pack on his back. (CP 16:5-6). Mr. Scopa must use a walker to remain upright while walking any sort of meaningful distance, and he must wear a back brace anytime he is mobile. (CP 16:1-2, 4-6). Even when out of bed, Mr. Scopa cannot sit upright for more than 15-20 minutes at a time and he has severely restricted range of motion. (CP 16:3-4).

Mr. Scopa was diagnosed with Post-Traumatic Stress Disorder ("PTSD") as a result of watching his close friends being killed in action, and dealing with the emotional fall-out of his friends who committed suicide after returning from service. (CP 16:10-13). He received professional treatment for PTSD during and after his relationship with Ms. May. (*See* CP 16:11-13). Mr. Scopa also received spiritual guidance after his relationship with Ms. May ended. (*See* CP 17:5-6). He was advised by his spiritual and professional counselor to apologize to all those he felt he had wronged and to seek forgiveness. (CP 17:5-6).

Ms. May is a nurse at Kadlec Regional Medical Center ("KRMC"). (*See* CP 17:1-4).

3. Onset of issues leading to this Petition

On March 18, 2015, Ms. Scopa's sister entered KRMC to deliver Mr. Scopa's nephew, which required surgery. (CP 16:23-24). Mr. Scopa sent Ms. May a picture of his newborn nephew, via text message, and told her she was welcome to come down and see the baby if she wanted. (CP

16: 24-25). Mr. Scopa's sister remained in the hospital for the next few days recovering. (*See* CP 17:1-2).

On March 21, 2015, Mr. Scopa returned to KRMC to visit his sister and newborn nephew. (CP 17:1). He ran in to Ms. May as he traveled down to the second floor with his brother-in-law, Bevon G. Davis, to get his sister something to eat. (CP 17:1-2). The Parties exchanged brief salutations and parted ways. (*See* CP 17:3-4).

Seeing this as a positive interaction after months without meaningful communication, Mr. Scopa went to talk to Ms. May. (CP 27:9-13). He wanted to apologize to her for his miss-steps during and after their relationship and to ask for her forgiveness. (CP 17: 6-8).

Mr. Scopa never got a second chance to speak with Ms. May on March 21, 2015. (*See* CP 17:9-13). When attempting to locate Ms. May, Mr. Scopa spoke with one of Ms. May's co-workers, Crystal, to see where Ms. May was. (CP 17:9-11). The lead nurse intervened and asked Mr. Scopa to leave. (CP 17:11-13). Ms. May had advised her co-worker and the lead nurse that she did not want to see or speak with Mr. Scopa. (*See* CP 17:11-13). Mr. Scopa immediately left the vicinity without incident. (CP 17:13).

In March 2015, Ms. May filed a Petition for Domestic Violence Protective Order and a hearing was conducted on April 3, 2015. (*See* CP

1-6); (*See* RP 1-10).[2] In support of her petition, Ms. May filed text messages and email communications between the parties during their relationship and after their relationship had ended. (CP 17:14). Mr. Scopa responded the Petition by filing a declaration in response, denying any allegation of domestic violence or conduct tantamount to threatening domestic violence. (CP 17: 19-20).

B. Procedural Facts.

On April 3, 2015, this matter came on for hearing in front of the Honorable Commissioner Joseph Schneider. (RP 1). Ms. May acknowledged that Parties had dated for almost two-years and had been attempted reconciliation up through November 2014. (RP 2:12-15).

Ms. May did not allege Mr. Scopa physically harmed, injured, or assaulted her under RCW 26.05.010. (RP 1:6-4:14; 8:20-21). Ms. May did not allege Mr. Scopa threatened to physically harm, injure, or assault her. (*See* RP 2:6-16; 2:20-3:7; 3:11-4:14). Her Petition focused primarily on perceived erratic behavior by Mr. Scopa during their relationship and a general allegation of fear because Mr. Scopa would not "leave [her] alone" after they broke up. (RP 4:9-14). She accused Mr. Scopa of initiating unwanted communication with her from November 2014 to March 2015:

He's been told repeatedly to leave me alone. To not contact

[2] "RP" refers to Verbatim Report of Proceeding.

> me. Um, I had my parents to his house to try to talk to him. The behavior did stop for a little bit but once I got back from Europe that's when he started calling all the time. I had to change my email address…I had to block him on my phone. Block him on Facebook. I had to change my landline number because he kept calling and then he started texting my neighbors and he called my mom left a message begging for forgiveness.

(RP 3:11-23). She went on to attribute more recent events to her "fear" of Mr. Scopa:

> Um, it is my belief that he was also trying to get into the backyard because I heard the fence wiggle but I don't have any evidence supporting that. Later that day he also came up to the floor to try and talk to me and I just need him to leave me alone just, I'm afraid. I'm afraid to be home. Um, he's erratic. He's done some behaviors and I have documents them here that, I'm just afraid of him. I just want to be left alone. And this is the only other option.

(RP 4: 3-11). Again, Ms. May did not allege in her oral argument, or by reference to her pleadings, that Mr. Scopa had physically harmed her or threatened in any way to harm her. (RP 1:6-4: 14; 8:20-21). She expressed a general "fear" of Mr. Scopa as the factual basis for her petition under RCW 26.50.010 and RCW 26.50.060. (*See* RP 2:6-16; 2:20-3:7; 3:11-4:14).

Absent any allegation of physical harm, Mr. Scopa's opposition to the Petition centered on the alleged infliction of fear of imminent physical harm, bodily injury or assault under the second prong of RCW 26.50.010. (CP 17:19-20; RP 4:21-13). Mr. Scopa acknowledged communications between the parties during and after their relationship, but maintained that

the contact was to obtain the safe return of personal property, to stop unwanted communication occurring between Ms. May and his family, and eventually to seek forgiveness. (CP 16:18-22; 17: 7-8; 17:15-18). Mr. Scopa denied engaging in any conduct that would cause Ms. May to fear imminent physical harm, bodily injury or assault. (CP 17:19-20). It was Mr. Scopa's position that Ms. May did not actually fear imminent physical harm, bodily injury, or assault by Mr. Scopa, but instead, was merely feigning fear in order to obtain a protective order to stop unwanted communication. (RP 8:15-17).

On April 3, 2015, after hearing oral argument and considering the evidence submitted by the parties, the Honorable Commissioner Schneider granted Ms. May's petition:

> It does appear to the Court that by Mr. Scopa's behaviors those both when the parties lived together and after they separated, um, causes Ms. May some serious concerns for her own safety and well-being. Um, his intentions may be different than what she perceived them to be but when he went to the nursing floor seeking to see her it scared her to death. Now he doesn't understand that. He says I'm there to seek forgiveness but because of the interactions between these two and the fact that she wants to be left alone and he won't leave her alone, she gets fearful. **Um, irrational or otherwise it's still fear that she has and its harm to her.** I am going to grant the order in this matter for a period of one year that the parties to have no contact with each other during that time period.

(CP 1-6; RP 8:22-9:13) (Emphasis added).

Mr. Scopa filed a Notice of Appeal on April 29, 2015. (CP 7-8).

IV. ARGUMENT

A. Standard of Review.

A trial court's decision to grant or deny a domestic violence protection order is reviewed by an Appellate Court for clear abuse of discretion. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (Div. II 2002) (citing *State ex. Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)); *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010) (citing *Junker*, 79 Wn.2d at 26). A trial court abuses its discretion if it is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Id.*

B. The Domestic Violence Protection Act.

RCW 26.50, the Domestic Violence Protection Act (DVPA), creates a right of action known as a petition for an order of protection in cases of domestic violence. RCW 26.50.030. Any person may seek a petition for order of protection by filing a petition with the court alleging that the person has been the victim of domestic violence. RCW 26.50.020(1)(a). A petition must be accompanied by a sworn affidavit, setting forth the specific facts supporting the request of for a protective order. RCW 26.50.020(1); RCW 26.50.030(1).

"Domestic violence" is defined, in pertinent part, as:

> (a) Physical harm, bodily injury, assault, or *the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members…*

RCW 26.50.010(1) (Italics added).

If, after notice and hearing, a trial court finds domestic violence occurred, the Court may grant a permanent order of protection. RCW 26.50.060.

In the present case, Ms. May did not allege actual physical harm, bodily injury or assault, nor was any such finding made by the trial court. (RP 1:6-4:14; 8:20-21). Ms. May did not allege Mr. Scopa threatened to physically harm, injure, or assault her. (*See* RP 2:6-16; 2:20-3:7; 3:11-4:14). Instead, her Petition focused upon Mr. Scopa's claimed "erratic" behavior during the relationship and alleged unwanted communications from November 2014 through March 2015 in order to demonstrate infliction of fear of imminent physical harm, bodily injury or assault. Thus, the trial court found the infliction of fear of imminent physical harm in granting the order of protection.

The Court erred in finding that Ms. May satisfied her burden under RCW 26.50.010 based on the facts presented, as Ms. May did not provide facts to support the requirements that her fear be *reasonably related* nor facts that she feared *imminent* physical harm, bodily injury or assault.

C. The Trial Court Erred in Finding Ms. May Produced Sufficient Evidence To Establish *Infliction of Fear* of Imminent Physical Harm, Bodily Injury or Assault by the Appellant.

Issuance of a domestic violence protection order is predicated upon

a finding that a party engaged in conduct that *inflicted fear* of physical harm, bodily injury or assault. RCW 26.50.010(1) (Italics added). "The facts supporting a protection order must *reasonably relate* to physical harm, bodily injury assault, or the fear of imminent harm." *Freeman*, 169 Wn.2d at 674 (Italics added).

For example, in *Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002), Division II upheld the issuance of a domestic violence protection order because there was evidence that the party to be restrained (1) appeared uninvited at the victims home, (2) pounded on the exterior walls, (3) demanded the victim come outside, (4) followed the victim's family, (4) had been in a physical altercation with the victim, and (5) had threatened to shoot the victim and then herself. *Cortinas*, 110 Wn. App. at 870.

The trial court in *Cortinas* initially felt a protective order was inappropriate because the facts supporting the petition sounded "more like an anti-harassment type case" because there was no evidence demonstrating actual acts of violence against the victim to substantiate fear of domestic violence. *Id.* It was not until the trial court heard evidence about the death threats made towards the victim, thereby establishing imminent fear of domestic violence, that a protective ordered was issued. *Id.* The present case does not involve the same quantum of evidence as found in *Cortinas* and the trial court should have evaluated the

evidence to determine whether the conduct of Mr. Scopa reasonably related to Ms. May's alleged fear.

Ms. May produced insufficient evidence to demonstrate Mr. Scopa's conduct reasonably related to her fear of physical harm, bodily injury, or assault. Ms. May did not allege physical harm, bodily injury or assault by Mr. Scopa as a basis for her current fear. (RP 1:6-4:14; 8:20-21). Ms. May did not allege Mr. Scopa threatened to physically harm, injure, or assault her as a basis for her current fear. (*See* RP 2:6-16; 2:20-3:7; 3:11-4:14). Instead, Ms. May relied upon communication during the Parties relationship and alleged unwanted communication after their break-up for the proposition that she had a reasonable fear. (*See* CP 17:14-20; *See also* RP 4:8-11). In fact, Ms. May repeatedly stated in oral argument that she was "afraid" simply because she felt Mr. Scopa's past behavior was "erratic" and he would not leave her alone. (RP 3:11-12; 4:6-14). However, she did not state in her pleadings or in oral argument what specific conduct of Mr. Scopa caused her to fear *physical harm, bodily injury or assault*, other than to reference a situation that occurred between the parties on November 22, 2014 when Mr. Scopa refused to leave her residence. (RP 2:20-3:1; 8:20-21).[3] She did not identify any conduct during the November 22, 2014 interaction, or any other

[3] In oral argument, Ms. May also referenced an event from September 22, 2014, but it is unknown whether this was inadvertent mistake or claims of a separate event.

interaction, that would reasonably cause her to fear physical harm, bodily injury, or assault. (RP 2:20-3:1). Thus, she failed to meet her burden under RCW 26.50.010. RCW 26.50.020(1); RCW 26.50.030(1); RCW 26.50.010(1). Unwanted communication alone is not enough to create a reasonable fear of domestic violence.

This case, as pondered in *Cortinas*, would have been more properly presented as a petition for anti-harassment order under RCW 10.14 because the allegations (most of which were disputed) are more akin to harassment than domestic violence. There was no evidence presented that could reasonably support Ms. May's claimed infliction of fear of physical harm.

In granting Ms. May's petition for protective order, the trial court declined to engage in an analysis as to whether Mr. Scopa's alleged conduct was reasonably related to Ms. May's fear. (RP 9:8-10). Under RCW 26.50.060 and *Cortinas*, a trial court must undertake such an analysis. Failure to entertain or engage in such an analysis was a clear abuse of discretion which resulted in the issuance of a protective order that was manifestly unreasonable and issued on untenable grounds. Thus, the trial court erred and its decision should be reversed.

D. The Trial Court Erred in Finding Ms. May Produced Sufficient Evidence To Establish Infliction of Fear of *Imminent* Physical Harm, Bodily Injury or Assault by the Appellant.

Issuance of a domestic violence protective order is also predicated

upon evidence that the requesting party fears *imminent* physical harm, bodily injury or assault. RCW 26.50.010(1) (Italics added). Very few Washington cases expand upon the level of evidence necessary to establish *imminent* fear. However, the Washington State Supreme Court's decision in *Freeman v. Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010) is helpful in pursuing such an analysis.

In *Freeman,* a case involving a request to modify a permanent protective order, the Supreme Court addressed the standard of proof necessary for obtaining a permanent protective order:

> Again, RCW 26.50.010(1) defines domestic violence as '[p]hysical harm, bodily injury, assault, or infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.' The facts supporting a protective order must *reasonably relate* to physical harm, bodily injury, assault or the fear of *imminent* harm. It is not enough that the facts may have justified the order in the past. Reasonable likelihood of imminent harm must be present.

169 Wn.2d at 674 (Italics in original). The remainder of the *Freeman* decision is largely inapplicable to the present case because it relates to a request to modify and/or terminate a protective order, but it nonetheless presents a workable framework for trial courts to analyze the immediacy requirement under RCW 26.50.010.

Application of the *Freeman* reasonable relation framework to the present case is supported by the decision reached in *Spence v. Kaminski*, 103 Wn. App. 325, 12 P.2d 1030 (2000). In *Spence,* the restrained party

appealed the sufficiency of evidence presented at the protective order hearing, arguing that a recent act of domestic violence was necessary to prove immediate fear under RCW 26.50.010, not just a history of past abuse. *Spence*, 103 Wn. App. at 333. This Court rejected Kaminkski's argument indicating a victim need not prove a new act of domestic violence *if the present likelihood of a reoccurrence is reasonable*, in addition to the past violence. *Freeman,* 169 Wn.2d at 674-75 (citing *Spence*, 103 Wn. App. at 333). Trial courts are directed to analyze the immediacy of fear using a reasonableness standard.

Here, Ms. May did not provide any evidence relative to the immanency of her fear. She did not produce any evidence, or provide argument, as to why the events from September-November 2014 would reasonably cause her to fear imminent domestic violence on March 2015, after months of little or no contact. In fact, the evidence presented to the Court by Mr. Scopa clearly showed how an act of domestic violence was almost physically impossible. Mr. Scopa suffers from multiple spinal cord injuries. (CP 15:16-17). He suffers from Bilateral Sciatica, and Quadriparesis, which causes weakness, pain, numbness, and tingling in his arms, back, and legs. (CP 15:17-18). He also suffers from tendonitis in in his right shoulder due to a dislocation in January 2008, and the ligaments in his right knee are badly damaged. (CP 16:6-9). Mr. Scopa was diagnosed has a herniated disk in his back. (CP 15:22-24). As a result,

Mr. Scopa has significant physical limitations. He spends most of his days in the supine position, in bed, with an ice pack on his back. (CP 16:5-6). Mr. Scopa must use a walker to maintain upright while walking any sort of meaningful distance, and he must wear a back brace anytime he is mobile. (CP 16:1-2; 4-6). Even when out of bed, Mr. Scopa cannot sit upright for more than 15-20 minutes at a time and he has severely restricted range of motion. (CP 16:3-4). This all but eliminates the possibility that Ms. May could fear imminent domestic violence at the hands of Mr. Scopa.

Not only had the parties had minimal contact from November 2014-March 2015, but Mr. Scopa is severely physically handicapped.

In the present case, the trial court failed to analyze whether Ms. May's claimed immediate fear was reasonable based on the facts presented. Mr. Scopa has never threatened Ms. May with physical violence or domestic violence. (CP 17:19-20). The only recent events complained of by Ms. May was a note left by Mr. Scopa on her car (March 2015), a rattling of a fence in her backyard (Ms. May admitted there was no evidence Mr. Scopa was near her fence), and the fact that Mr. Scopa tried to speak with her at work (March 2015). (RP 3:23-4:6; CP 17:9-13). None of these events would cause a reasonable person to fear physical injury, bodily harm, or assault. The Court's failure to engage in a reasonableness analysis is a clear abuse of discretion. Thus, the court erred and its decision should be overturned.

V. CONCLUSION

Based on the foregoing analysis, the Appellant/Respondent respectfully requests that the decision of the trial court to grant Ms. May's Petition for Protection Order be reversed.

SUBMITTED THIS 3 day of September, 2015.

TELQUIST ZIOBRO McMILLEN, PLLC

By: _____

RICHARD D. WHALEY, WSBA #44317
Attorneys for Appellant, Scopa

I, Amber Peters, am over the age of eighteen and am competent to testify as to the facts contained in this Declaration.

1. On September 8th, 2015, I electronically filed with the Washington State Court of Appeals, Division III a Table of Contents, Table of Authorities, Brief of Appellant, and this Declaration of Filing and Mailing.

2. On September 8th, 2015, I sent via U.S. Mail to Kimberly Ione May, 414 Sanford Avenue, Richland, Washington, 99352, a true and correct copy of the Brief of Appellant, Table of Contents, Table of Authorities, and this Declaration of Filing and Mailing.

Respectfully submitted this 8th day of September, 2015.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: Amber Peters

AMBER PETERS,
Legal Assistant to Richard D. Whaley