

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0314-16T3

C.L.,

Plaintiff-Respondent/
Cross-Appellant,

v.

J.L.,

Defendant-Appellant/
Cross-Respondent.

Submitted April 10, 2018 – Decided May 15, 2018

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Bergen County,
Docket No. FM-02-1180-15.

Kimm Law Firm, attorneys for appellant/
cross-respondent (Michael S. Kimm and Adam
Garcia, on the brief).

Matthew Jeon, PC, attorneys for respondent/
cross-appellant (Matthew Jeon, on the brief).

PER CURIAM

In January 2015, during the forty-third year of their
marriage, J.L., the wife, obtained a final restraining order (FRO)

against her husband, C.L., under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The FRO was entered based on a predicate act of assault that had occurred in October 2014.¹

In November 2014, while the complaint for the FRO was pending, C.L. filed for divorce. J.L. answered and later asserted counterclaims for marital torts based on claims of assault and abuse. The parties resolved all issues except the marital tort claims, and those claims were addressed at a bench trial. The court found that C.L. had assaulted and abused J.L. and awarded her \$150,000 in compensatory damages. The court also awarded J.L. just over \$26,000 in attorney's and expert's fees.

J.L. appeals, contending that the compensatory damages and attorney's fees were inadequate and that she also should have been awarded punitive damages. C.L. cross-appeals and argues that the trial court erred in (1) entering a default judgment against him for failing to timely answer the counterclaims, (2) collaterally estopping him from contesting the assault that formed the predicate act for the FRO, and (3) awarding J.L. damages. Having considered both parties' contentions in light of the record and law, we affirm.

¹ We use initials to protect the privacy interests of the parties. R. 1:38-3(d)(9).

I.

We summarize the facts and procedural history that are relevant to the issues on the appeal and cross-appeal. The parties were married in April 1972 in South Korea. They have two children, a son born in 1973, and a daughter born in 1976. Both adult children are emancipated.

In 1986, the parties moved to the United States, and since 1987, they have lived in Bergen County. In October 2014, J.L. sought a restraining order against C.L. asserting that he had assaulted her. That domestic violence action was tried by a Family Part judge and resulted in an FRO entered on January 29, 2015, based on a predicate act of assault.

In November 2014, while the domestic violence action was pending, C.L. sued for divorce on the grounds of irreconcilable differences. J.L. answered, and in December 2015, she filed an amended answer and counterclaims. In her counterclaims, C.L. asserted marital torts based on allegations of physical assaults and mental and emotional abuses. She also claimed that as a result of those repeated assaults and abuses, she suffered from battered woman's syndrome and emotional distress.

The court entered case management orders setting deadlines for factual and expert discovery. The case was then scheduled for

trial in May 2016. Just before the start of trial, both parties filed in limine motions. Among other forms of relief, C.L. sought to bar testimony from J.L.'s expert concerning battered woman's syndrome. J.L. sought to enter a default on her claims of marital tort because C.L. had not answered her counterclaims. She also sought to preclude C.L. from contesting the assault that formed the predicate act for the FRO.

The trial court heard oral arguments on the in limine motions on the first day of trial, on May 24, 2016. The court granted C.L.'s motion to bar the supplemental report from J.L.'s expert, in which the expert discussed battered woman's syndrome. Specifically, the court found that a prior case management order required all expert reports to be served by a certain deadline, and the supplemental expert report was not submitted before the deadline. Thus, the court found that it would be unfair to allow the expert to discuss battered woman's syndrome. The court also granted J.L.'s motion to enter a default against C.L. for his failure to timely answer the counterclaims. Finally, the court found that C.L. should be collaterally estopped and barred by the doctrine of res judicata from contesting the assault that had formed the basis for the predicate act for the FRO.

Thereafter, the parties, with the assistance of legal counsel, resolved all issues related to the divorce except for the

marital tort claims. Accordingly, on June 8, 2016, a judgment of divorce, incorporating the resolved issues, was entered.

The judge held a bench trial to address the marital tort claims.² At trial, five witnesses testified: C.L., J.L., the parties' adult son and daughter, and Ms. Kathryn Dixon, L.C.S.W., J.L.'s expert. On August 8, 2016, the trial court issued a written opinion setting forth its findings of facts and conclusions of law.

Based on the testimony and evidence at trial, the trial court found that C.L. assaulted and abused J.L. throughout their marriage. Specifically, the court found at least six instances where C.L. physically assaulted or abused J.L. Those included (1) an instance in Korea when C.L. hit J.L. because she had responded to a customer at a restaurant they were operating; (2) a 1987 incident where J.L. fractured C.L.'s finger while he was hitting her; (3) an incident in New Jersey in the 1980's where C.L. pulled J.L. by the hair and kicked her; (4) a 1987 incident where C.L. locked J.L. in the bedroom and hit her with a wooden bat; (5) an incident where C.L. dislocated J.L.'s finger by pulling the finger with a pair of plyers; and (6) an incident in October 2014, where

² The parties apparently waived their right to a jury trial. We make that assumption because neither party raised that as a contested issue on this appeal.

C.L. threw a glass bowl that hit J.L., punched, slapped, and kicked her, and dragged her by her neck over broken glass. The incident in October 2014 formed the basis for the predicate act of assault in the domestic violence action that resulted in the entry of the FRO.³

In making those findings, the court found J.L. generally credible, but did note that there were times when J.L. was not fully credible. In contrast, the court found C.L. consistently incredible. The court credited some of the son's testimony as corroborating his mother's testimony, but noted his bias against his father. Finally, the court did not make specific credibility findings concerning the daughter, but did not rely on the daughter's testimony in making its findings of fact.

In assessing damages, the court noted that J.L. had not presented any medical records. Moreover, the court rejected most of the testimony of J.L.'s expert, Dixon. Specifically, the court found that Dixon's testimony was "void of any factual data or scientific basis to support her diagnosis."

³ C.L. had filed an in limine motion to limit J.L.'s claims to incidents that arose during the statute of limitations. Before that motion was decided, however, C.L. withdrew the motion. Accordingly, the statute of limitations was not addressed by the trial court and we do not address it.

After assessing all of the evidence presented at trial, the court awarded J.L. \$150,000 in compensatory damages. In making that award, the court explained: "The \$150,000.00 sum is predicated upon [J.L.'s] age, the length of the marriage and concomitant years of physical abuse, and what the [c]ourt [sees as] fair and reasonable based on [C.L.'s] testimony and the evidence."

The court also found that J.L. failed to establish clear and convincing evidence to support her claim for punitive damages. Specifically, the court found that J.L. had not established the elements of malice or willful or wanton conduct.

Finally, the court evaluated J.L.'s request for attorney's and expert's fees. The court reviewed the criteria under Rule 5:3-5(c) and the factors under Rule 4:42-9(a). The court then determined that J.L. was entitled to attorney's fees and expert's fees and found the fair and reasonable amount to be \$26,386.

Based on its findings and conclusions concerning the marital torts, on August 8, 2016, the court issued an amended judgment of divorce. The amended judgment of divorce provided that C.L. would pay the compensatory damages and fees from the net proceeds of the sale of the marital home. The parties previously agreed to sell the marital home and to share the net proceeds.

II.

In her appeal, J.L. makes two arguments. First, she contends that over forty years of domestic violence should have been the basis for a larger compensatory damage award. She urges us to reverse with instructions to have the trial court award more than "minimal" damages and to give guidance on how to award compensatory damages for domestic violence. Second, she contends that she should have been allowed to offer evidence of battered woman's syndrome, and that punitive damages should be presumed as a matter of law when the claimant has proven domestic violence.

In his cross-appeal, C.L. argues that the court erred in entering a default on J.L.'s counterclaims, collaterally estopping him from contesting the assault in 2014, and awarding C.L. the amount of compensatory damages.

While the appeal was pending, C.L. filed a motion to effectively stay the judgment by sequestering the amounts to be paid to J.L. The trial court granted that application and entered an order on March 24, 2017. In response to a motion from J.L., we permitted J.L. to amend the notice of appeal to include an appeal from the March 24, 2017 order. We also permitted each of the parties to file supplemental briefs to address that order.

Many of the arguments raised by the parties overlap. Accordingly, we will address all of their arguments in a logical

progression. Therefore, we will consider the default, the collateral estoppel, compensatory damages, battered woman's syndrome, punitive damages, attorney's fees, and the March 24, 2017 order.

1. The Default

Entry of default is generally governed by Rule 4:43-1. That rule provides that "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by [the court] rules or court order," a default can be entered. R. 4:43-1.

Rule 4:43-3 addresses the grounds for setting aside a default. Generally, that rule requires the moving party to file a responsive pleading and show good cause for setting aside the default. We review the denial of a motion to vacate default under an abuse of discretion standard. U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012).

Here, the trial court granted J.L. a default on the first day of trial in May 2016. J.L. filed her amended counterclaims in December 2015. Indeed, the amended counterclaims were filed pursuant to a consent order. The court also had entered an order governing pretrial discovery. During pretrial discovery, C.L. never responded to the counterclaims alleging marital torts.

Just before trial, J.L. moved for default. In response, C.L. submitted a proposed answer to the counterclaims, but that answer asserted no affirmative defenses. Instead, C.L. simply denied J.L.'s allegations. In granting J.L. a default, the trial court noted that there was really no prejudice to C.L., because J.L. would still be required to prove her allegations at trial. Indeed, the trial record establishes that J.L. submitted proof of her claims and C.L. was given a full and fair opportunity to respond to and contest those claims. Given this procedural record, we find no abuse of discretion and we discern no basis to vacate the default.

2. Collateral Estoppel

C.L. argues that the trial judge erred in applying the doctrines of collateral estoppel and res judicata to the Family Part's findings in the domestic violence matter that resulted in an FRO. We agree. Indeed, we previously have held that because of the difference in the nature of a domestic violence action and a civil action seeking monetary damages, collateral estoppel should not apply. See L.T. v. F.M., 438 N.J. Super. 76, 87-89 (App. Div. 2014). The reasoning in L.T. also supports the position that the doctrine of res judicata does not apply. Ibid.

Nevertheless, here we find the error was harmless. The entry of the default had the same effect as applying the doctrine of

collateral estoppel or res judicata. More critically, as already pointed out, C.L. was given a fair opportunity to contest J.L.'s testimony and evidence concerning the alleged assaults and abuses.

3. Compensatory Damages

"Final determinations made by the trial court sitting in a non-jury case are subject to a limited . . . scope of review." Seidman v. Clifton Sav. Bank, 205 N.J. 150, 169 (2011). "We [will] not disturb the factual findings . . . of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice" In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

A plaintiff must prove that he or she suffered some loss or injury to be entitled to an award of compensatory damages. Nappe v. Anshelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 41 n.1 (1984). For damages arising out of an act of domestic violence, the plaintiff must prove the allegations in his or her complaint by a preponderance of the evidence. Silver v. Silver, 387 N.J. Super. 112, 125 (App. Div. 2006).

In this case, the judge, sitting as the trier of fact, considered all of the evidence and determined that \$150,000 was

the appropriate amount of compensatory damages. We discern no basis to disturb that ruling.

We also decline C.L.'s invitation to remand the matter to the trial court with a more detailed standard for assessing damages arising out of domestic violence. New Jersey has a well-established policy of preventing and punishing domestic violence. There already are existing standards that guide trial courts, and where appropriate, juries, when assessing compensatory damages. See Model Jury Charges (Civil), 8.11E, "Damages Charges — General" (rev. May 2017) ("You may consider [the victim's] age, usual activities, occupation, family responsibilities and similar relevant facts in evaluating the probable consequences of any injuries you find [he or she] has suffered. You are to consider the nature, character and seriousness of any injury, discomfort or disfigurement."). In particular, the PDVA provides a list of factors for the court to consider in finding an act of domestic violence and awarding damages to the injured party. See N.J.S.A. 2C:25-29(a)(1) to (6) (including, but not limited to, history of domestic violence, existence of immediate danger, the parties' financial circumstances, and the best interests of the victim).

We also reject C.L.'s attempt to compare the verdict in this case to certain civil verdicts for assault and battery or negligence.

4. Battered Woman's Syndrome

The trial court precluded Dixon, J.L.'s expert, from discussing battered woman's syndrome because the expert only raised that issue in a supplemental report filed after the deadline for submitting such reports. We review rulings addressing discovery and evidentiary issues for abuse of discretion. Townsend v. Pierre, 221 N.J. 36, 53 (2015); see also Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011) (explaining that appellate courts "apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard").

The trial court set an appropriate deadline for the submission of expert reports. J.L.'s expert did not discuss battered woman's syndrome in her first report, which was filed before the deadline. Following her deposition, the expert then attempted to submit a supplemental report where she discussed battered woman's syndrome. The trial court precluded that report as untimely and unfair because the expert had already been deposed. Significantly, Dixon was permitted to testify at trial, but the court rejected most of her testimony because it did not have a well-grounded factual basis. Accordingly, we discern no abuse of discretion in the decision precluding the expert from referring to battered woman's syndrome.

5. Punitive Damages

An award of punitive damages should be reserved for special circumstances, where the conduct is particularly egregious. Maudsley v. State, 357 N.J. Super. 560, 590-91 (App. Div. 2003). A plaintiff must prove by clear and convincing evidence that "the harm suffered was the result of . . . acts or omissions . . . actuated by actual malice or accompanied by a wanton and willful disregard" Longo v. Pleasure Prods., Inc., 215 N.J. 48, 58 (2013). We review the decision to deny punitive damages for abuse of discretion. Maudsley, 357 N.J. Super. at 590.

Initially, we note that even if an FRO is in effect, it is within the fact-finder's discretion to also award punitive damages where further punishment or deterrence of the wrongful conduct is deemed necessary. In that regard, the FRO against C.L. did not preclude an award of punitive damages to J.L.

The trial court's decision not to award punitive damages is supported by evidence in the record. Specifically, the judge found that J.L. failed to establish malice or willful or wanton conduct by clear and convincing evidence. Given our limited review of damages awards, we find no basis to disturb the court's finding.

6. Attorney's Fees

We review an award of attorney's fees for abuse of discretion. McGowan v. O'Rourke, 391 N.J. Super. 502, 508 (App. Div. 2007).

Determinations regarding attorney's fees "will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Ibid. (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)).

The award of fees in this case was made in connection with marital torts, based on findings of domestic violence. The PDVA authorizes the award of attorney's fees. N.J.S.A. 2C:25-29(b)(4). Moreover, here the parties elected to try the marital torts in the Family Part, and the Family Part has the authority to award attorney fees in family actions. R. 5:3-5(c); R. 4:42-9(a)(1); N.J.S.A. 2A:34-23.

To determine whether to grant an award of attorney's fees, the court must consider:

(1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

[R. 5:3-5(c).]

The court also must assess the reasonableness of the fee under the factors incorporated in Rule 4:42-9(b):

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

[R. 4:42-9(b) (citing RPC 1.5(a)).]

After considering those factors, the court found that the fees were reasonable and incurred as a result of C.L.'s domestic violence against J.L. Accordingly, the judge ordered \$26,386 in attorney's and expert's fees to J.L. Specifically, the judge found that the attorney's fee was reasonable and that J.L. was entitled to compensation for the expenses she incurred by retaining


an expert. Those findings are supported by credible evidence in the record, and we discern no basis to disturb the fee award.

7. The March 24, 2017 Order

In light of our affirmance of the judgment entered by the trial court, the escrow of the monies ordered in the March 24, 2017 order is vacated. Accordingly, the monies paid into court and held in escrow are to be paid to J.L.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION