

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-443

MAY TERM, 2003

Catherine Piscitelli	}	APPEALED FROM:
	}	
	}	Windsor Family Court
	}	
v.	}	DOCKET No. 193-8-02 Wrfa
	}	
David Piscitelli	}	Trial Judge: Hon. Paul F. Hudson
	}	
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Defendant David Piscitelli appeals from the trial court's final relief-from-abuse order. He argues that the trial court erred in granting plaintiff's request for relief because the evidence does not support a conclusion that he placed plaintiff in fear of " imminent serious physical harm." We agree, and vacate the court' s order.

Plaintiff Catherine Piscitelli and defendant are married, with divorce proceedings pending as of May 2001. The parties currently share custody of their two minor children. Plaintiff and defendant reside together in a duplex residence, which they have divided into two units. Plaintiff lives in the downstairs portion of the duplex, while the children' s bedrooms and defendant's living area are on the second level.

In August 2002, plaintiff filed a relief-from-abuse complaint, alleging that defendant had placed her in "fear of imminent serious physical harm" and that there was a danger of future abuse. In her supporting affidavit, plaintiff alleged that defendant had eavesdropped on a telephone conversation, followed her when she traveled out-of-state, swore at her in front of the children, entered her apartment without her permission and searched through her belongings, and threatened to destroy gifts purchased by plaintiff' s boyfriend. Based on this evidence, the court issued a temporary relief-from-abuse order. The court ordered defendant to refrain from further abuse, refrain from communicating with plaintiff, and refrain from entering her apartment and the children' s rooms.

After a hearing, the court made the following findings. During the parties' marriage, defendant engaged in behavior that plaintiff perceived as controlling. Plaintiff has begun dating another man, a friend of the family. Defendant has followed plaintiff for as much as a weekend. He has harassed plaintiff by " going on a diatribe, losing control in front of her and the children, and opening the door into her residence, walking through her apartment and declaring the place is " his.' " He encouraged the children to violate the court' s temporary relief-from-abuse order by insisting that they leave the door open between the two apartments. He accused plaintiff of having a sexual relationship with her boyfriend and threatened to destroy gifts plaintiff's boyfriend had purchased. He entered plaintiff' s apartment and went through her belongings. He threatened to take the house and children away from plaintiff if she pursued her complaint. He once grabbed plaintiff by her torso, without her consent, and told her that she had " that look" in her eyes, and made a " pass" at her. Based on these facts, the court concluded that plaintiff had established by a preponderance of the evidence that she was entitled to a relief-from-abuse order. This appeal followed.

We review the factual findings of the trial court in the light most favorable to the prevailing party below, disregarding the effect of any modifying evidence, and we will not set aside the findings unless they are clearly erroneous. Coates v.

Coates, 171 Vt. 519, 520 (2000) (mem.). We will uphold factual findings if supported by credible evidence, and we will uphold the court's conclusions if they are supported by the factual findings. Id. In this case, plaintiff had the burden of proving by a preponderance of the evidence that defendant " attempt[ed] to cause or caused her physical harm" or placed her " in fear of imminent serious physical harm." 15 V.S.A. § § 1101(1)(A) & (B); 15 V.S.A. § 1103(b).

Defendant argues that the evidence does not support the trial court's conclusion that he physically harmed plaintiff or placed her in fear of imminent serious physical harm. See 15 V.S.A. § 1101(1)(A) and (B). Defendant argues that, in the absence of such evidence, the court abused its discretion by granting plaintiff's request for a relief-from-abuse order. He relies on Coates, 171 Vt. 519, in support. In Coates, we vacated a relief-from-abuse order after concluding that the evidence did not support a conclusion that defendant had placed plaintiff " in fear of imminent serious physical harm." Id. at 521. In that case, defendant sent plaintiff three graphically violent Christmas song parodies and indicated that he would be traveling from Florida to Vermont to visit plaintiff and their minor child. Id. He also told plaintiff that he would be petitioning the court to modify custody. Id. Plaintiff testified that she was " kind of disgusted" by the songs and feared defendant's impending visit. Id. She did not testify that she feared imminent physical harm from defendant. Id. We concluded that, based on this evidence, the trial court abused its discretion in issuing a relief-from-abuse order.

We agree that in this case, as in Coates, the court's factual findings do not support a conclusion that defendant has placed plaintiff in fear of imminent serious physical harm. As defendant points out, plaintiff testified that she initiated her complaint because she wanted her " privacy." There is no evidence in the record that defendant has ever threatened to, or has actually, caused physical harm to plaintiff. The only factual finding that involves a physical interaction between the parties is the court's finding that defendant once grabbed plaintiff by the torso and made a "pass" at her. This finding is insufficient to satisfy 15 V.S.A. § 1101(1)(A) and (B). The court's other factual findings do not involve allegations of physical abuse. " Going on a diatribe," for example, does not support a conclusion that plaintiff is in danger of imminent serious physical harm. Although entering plaintiff's apartment, and following her on a weekend trip, are certainly invasive acts, they do not involve the threat of "serious imminent physical harm." Nor are defendant's threats to destroy property sufficient to support the court's conclusion. The purpose of the abuse prevention statute is "to provide immediate relief to victims of domestic violence." Rapp v. Dimino, 162 Vt. 1, 4 (1993); see also, 15 V.S.A. § § 1101-1109. There is no indication in the record, or in the court's findings, that defendant has physically abused, or threatened to physically abuse, plaintiff. We therefore conclude that the trial court abused its discretion in granting plaintiff's request for a relief-from-abuse order because its factual findings do not support its conclusion.

Vacated.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned

