NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

JACQUELINE FISHBEIN,

Plaintiff

v.

ROBERT FISHBEIN,

Defendant

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
SOMERSET COUNTY

DOCKET NO. FV-18-955-08

Civil Action

OPINION AND DECISION
ROBERT B. REED, J.S.C.

PROCEDURAL HISTORY AND RECORD ON TRIAL:

In the civil complaint filed under the New Jersey Prevention of Domestic Violence Act ("PVDA"), N.J.S.A. 2C:25-17 et seq., Jacqueline Fishbein ("Plaintiff") seeks a final restraining order against Robert Fishbein ("Defendant"). Trial of this matter commenced on June 19, 2008, and continued thereafter on July 6, 2008, August 12, 2008, and October 23, 2008, concluding the evidentiary portion on January 21, 2009. Additionally, the parties conducted the de bene esse deposition of Tewksbury Township Patrolman Wayne J. Beam, Jr. on June 23, 2008, which was incorporated into the trial record.

The complaint alleges that on the night of May 27, 2008 Defendant committed an act of domestic violence, i.e. trespassing and harassment of Plaintiff (a protected party under the Act) by being in the back yard of the Plaintiff's boyfriend's house, where she resided, and with a rifle or shotgun in his possession.

The fact pattern begins the night before. On August 12 and October 23, 2008, Plaintiff testified that on May 26, 2008, she was in the kitchen washing dishes when she "looked outside the window and I saw some movement go by". She continued,

> "[I] saw that it looked like a person. So I really couldn't get a good look so I went to the living room window to see if I could get a better look to see who or what it was. At that point, I could tell it was a body. And I got very, very upset and I said I need to go get some binoculars. Went upstairs, got the binoculars, and looked outside our bathroom window. And from the bathroom window with the binoculars, I could see hunched over on the waterfall rocks it was my ex-husband's head and one of his arms. I got a very good look at that." (emphasis supplied)

She testified that she was able to see Defendant's face as he crouched near some rocks adjacent to the swimming pool. Landscape lighting illuminated the area and Plaintiff testified that she continued to observe Defendant while she dialed 911, emergency.

The Warren Township Police responded to the Plaintiff's residence at 11:40 p.m. on May 26, 2008, and attempted to locate Defendant, to no avail. The officers inquired as to what kind of vehicle Defendant might be driving, and were informed that Defendant owned a red Hummer.

The Warren Township police dispatcher contacted the Tewksbury Township Police Department and requested that an officer be dispatched to Defendant's home. Officer Wayne Beam responded to the call, and testified (by way of de bene esse deposition given on June 23, 2008) that he arrived at Defendant's home at 12:14 a.m. on May 27, 2008, and noted that there were no cars in the driveway. He attempted to look in the garage, but the windows were covered with curtains. Officer Beam stated that he then approached the front of the house. Officer Beam stated that he knocked on Defendant's front door and rang the doorbell, and that he continued to knock two or three more times, and after receiving no response, left Defendant's home at 12:32 a.m.

Later that day (May 27, 2008), the Plaintiff attempted to obtain a Temporary Restraining Order against Defendant under the New Jersey Prevention of Domestic Violence Act. The Plaintiff's application for that restraining order, based upon the events that transpired the previous night, was denied.

That night (still on May 27, 2008) at approximately 10:35-10:40 p.m., the Plaintiff testified that she again saw Defendant in the back yard, this time while she was looking out her bedroom window. According to Plaintiff, Defendant, who was wearing beige pants and carrying a long gun like a shotgun or rifle, climbed over the fence and positioned himself behind an oak tree. Plaintiff testified that she was able to see and clearly identify Defendant and see the stock of the gun without any visual magnification. She testified that Defendant remained behind the oak tree for several minutes, and then laid down with the gun pointed at the home. Plaintiff stated that she immediately went downstairs to "arm" the home alarm and turn on the exterior lights.

Plaintiff testified that she then returned to the bedroom and called 911 emergency at 10:45 p.m. She again visually identified the person in the yard as Defendant (who remained after the exterior lights were turned on) while she was talking with the 911 dispatcher. The police arrived at the home at 11:01 p.m. in response to her call.

The Warren Township police again requested that Tewksbury Township police drive by Defendant's home to ascertain his whereabouts.

Officer Beam testified that he again responded, arriving at Defendant's home at 11:20 p.m. accompanied by Officer Olivera and Officer Krok. No vehicles were in the driveway, and he proceeded to the front door while the other officers took positions at his side. Officer Beam testified that the only illuminated interior light was the light in the front foyer, and no exterior

lights were on. Officer Beam testified that he proceeded to knock forcefully and ring the front doorbell several times, but received no response. The officers left Defendant's home at 11:43 p.m.

Plaintiff testified that Warren Township police officers took her to their headquarters to apply for a temporary restraining order, which was granted. Officers Beam, Olivera, and Krok subsequently returned to Defendant's home at 4:13 a.m. to serve the restraining order and arrest Defendant thereon. Officer Beam testified that when he knocked on the front door, he saw Defendant in an upstairs window. Defendant answered the door, and the officers served Defendant with the restraining order and confiscated his weapons, ammunition and firearms identification card. (Six weapons were retrieved, including one Remington twelve-gauge shotgun, one Glenfield Marlin Model 10 rifle, and four handguns.).

At trial, Plaintiff also testified about the history of domestic violence between the parties and that Defendant had physically and mentally abused her throughout their marriage, and intimidated and humiliated her. She stated that after the honeymoon, for example, Defendant told her that he could "have her" whenever he wanted, and there was nothing she could do to stop him. Plaintiff went on to state that Defendant made physical threats to her, telling her that she could never leave or he would have her killed. She stated that Defendant would hit the wall near her face and tell her that the police and courts could not help her. Although Plaintiff testified that Defendant never struck her, he did assault her. She stated that he would hold her arms against the wall and threaten her with physical violence, while grabbing and dragging her by her arms, and squeezing her arms and legs hard enough to leave marks. She further stated that Defendant forced her to have sex on several occasions, and that she was scared of Defendant, but did not report the violence to the police out of the fear of reprisal by Defendant.

Plaintiff testified that Defendant became less threatening after the divorce. Since custody was shared, Samantha (the parties' daughter) stayed with Defendant part of the week. Plaintiff explained that Samantha was not getting along with her (Plaintiff's) boyfriend, and in an effort to minimize any problems, she stayed at Defendant's home one day a week until she was able to purchase her own home. (Thus, despite the level of domestic violence she suffered during the marriage, she stayed at Defendant's home. How staying at Defendant's home would ameliorate the child's problems with Plaintiff's boyfriend is a mystery.)

The Plaintiff called Officers Drew Corsilli and Eric Yaccarino from the Warren Township Police Department as her witnesses, and they testified on June 19, 2008. Officer Yaccarino testified that he arrived at the Plaintiff's residence at 11:40 p.m. on May 26, 2008, and that Officer Bryan Horst arrived at the same time. Officer Yaccarino said Plaintiff appeared visibly upset and scared. He testified that there was good lighting around the pool and adjacent landscaped area, with good visibility. Upon inspection, Officer Yaccarino did not find any physical evidence of an intruder.

Officer Yaccarino said that he also responded to the home on May 27, 2008, and officers from neighboring municipalities also responded due to the report of a weapon. He testified that the lighting was the same as the night before, and that upon searching the property with the other officers, found no evidence of Defendant's presence. Officer Yaccarino again said Plaintiff appeared frightened and upset.

Officer Corsilli stated that on May 27, 2008 he arrived at the same time as Officer Yaccarino and that he spoke with Plaintiff, who told him that she saw Defendant jump over a fence and run toward an oak tree, and that Defendant knelt down and pointed what appeared to

be a shotgun or rifle at the home. He stated that he observed that there was good visibility in the area around the oak tree.

Defendant called John Hughes as an expert witness to testify on October 23, 2008 and January 21, 2009. Mr. Hughes testified that he was a licensed burglar and fire alarm installer, and that his company installed part of the alarm system in Defendant's home. Mr. Hughes stated that he has thirty years of experience in the alarm industry, but acknowledged that he has had no specialized training, education or experience in forensic alarm investigations. He also conceded that he has no specialized knowledge about the possible ways an alarm system could be defeated. The Court accepted Mr. Hughes as being qualified as an expert, pursuant to N.J.R.E. 702, limited to the installation and operation of alarm systems.

Mr. Hughes presented the specific "alarm log" from Defendant's home alarm system, and opined that the log would record every "event" in the system without exception. Mr. Hughes described an "event" as any arm, disarm, entry or exit activity. He testified that the system was tamper proof, and that one could not change the settings or bypass the system without that "event" being logged, or without the system leaving a residual data trail. When questioned further, Mr. Hughes stated that there was "absolutely no way" Defendant could arm the system, leave the house, return, and disarm the system (permitting his undetected exit and entry) without creating a series of events recorded on the alarm log. (Note that the evidence showed that the system was armed before the time of his allegedly being observed by Plaintiff, and disarmed the following morning.)

On cross examination, Mr. Hughes was steadfast in his opinion that no one could enter or exit this alarmed home without the recordation of a logged event, but admitted that he had not determined the condition of the alarm system as it existed on May 26 and May 27, 2008. He

further stated that he had no knowledge of whether the alarm control system or the switches installed in Defendant's home had been installed correctly, were tampered with, or were working properly on the dates in question.

On January 21, 2009, Plaintiff called Jeffrey Zwirn as her expert witness, to rebut Mr. Hughes' expert testimony. Mr. Zwirn testified that he has over thirty-five years of education, training and experience in alarm design, installation, programming and inspection, and that he had been qualified as an alarm expert in federal and state courts. Mr. Zwirn stated that he has conducted many instructional and training seminars. (Mr. Hughes acknowledged Mr. Zwirn was an expert in his field, and stated that he attended seminars conducted by Mr. Zwirn, and consulted with Mr. Zwirn with respect to his own business.) The Court accepted Mr. Zwirn's qualifications as an expert in alarm systems and alarm science, which includes the forensic study of alarm systems, pursuant to N.J.R.E. 702.

Mr. Zwirn disagreed with Mr. Hughes' opinion in regard to the impossibility of bypassing or disarming the alarm system to permit undetected exit and entry to the home. Mr. Zwirn testified that anyone with a basic understanding of the system who was motivated to bypass the alarm could do so, as long as they had access to the interior of the premises. He identified four relatively easy ways to bypass (i.e. neutralize) the security system, all of which may be done from inside the home, and each of which would provide the ability to disarm the system and permit undetected access and egress.

The first is to bypass the alarm switches on the doors. In his inspection of Defendant's home, Mr. Zwirn learned that the doors were monitored by roller-ball type switches. To bypass the switch, a person needs only to depress the roller ball part of the switch to the "closed" position, and thereby prevent the circuit from being completed, and resulting in the system being

tricked into believing that the door remained closed. This can be accomplished with tape, and as long as the tape is in place, the circuit will remain closed and the door can be opened and closed without activating the system or detecting the event.

The second method involves the wireless switches from the windows while the system is disarmed. Defendant's system contains a mix of hardwired switches and wireless switches. The wireless switches are attached to the windows with double stick tape. To bypass that switch, one can physically remove the wireless contacts while the system is disarmed, and just set them aside in proximity to the window. (As long as the contacts are next to one another, the system will not detect their removal, "believe" that the point of access remains secured, and the window can be opened and closed at will.)

The third way to bypass the system is to "trick" the magnetic system in a wireless switch. The wireless switches contain two contacts. Since the main unit is unable to distinguish between the sources of magnetic fields, a small magnet near the main component will keep the circuit closed.

The fourth way to bypass the system is to bypass the electrical connection of a hardwired switch, thereby shorting the system. To bypass the switch, one must connect a wire to each side of the switch. A system that is installed correctly incorporates an "end-of-line" resistor designed to detect any attempt to bypass the system. Defendant's system was not properly installed in Mr. Zwirn's opinion, as the resistors were located in the control panel rather than at the end of the line. (Mr. Zwirn then successfully demonstrated the different bypass methods with a live demonstration, using a mock up of the system).

Also, Mr. Zwirn testified that upon his inspection, he observed that the front door access was not fully alarmed, explaining that the front entrance to Defendant's home is actually made

up of two doors. In 2006, when Mr. Hughes updated Defendant's system, his job quote was for four exterior doors. Mr. Zwirn testified that the home actually has five exterior access doors, including the second front door. Mr. Zwirn testified that he attempted to inspect the second front door but was stopped by Defendant. He stated that he did not observe any alarm mechanism on that door. This would suggest that one could exit and enter through the non-alarm equipped door without having to bypass or trick the system at all.

Mr. Zwirn concluded that Mr. Hughes' assertion that Defendant could not have left the home without a logged event was unsupported by the facts. He further opined that Mr. Hughes' reliance on the event log to reach his conclusion was indefensible, in consideration of the ease with which the alarm system could be bypassed, and a logged event avoided. Further, Mr. Zwirn noted that Mr. Hughes did not know whether the second front door was alarmed at all. Mr. Zwirn opined that since Mr. Hughes did no independent testing to support his conclusions, Mr. Hughes' opinions should be disregarded as being without support.

Defendant testified on January 21, 2009. He stated that he has a degree in computer science and has been in that industry for over ten years. Defendant testified that he had been to the Plaintiff's residence in Warren many times to pick up his daughter, Samantha. Defendant denied ever threatening or abusing the Plaintiff during the marriage. He further opined that both the Plaintiff and his daughter are liars. Defendant categorically denied that he went to the Plaintiff's home on either the evening of May 26 or May 27, 2008. He testified (in response to Plaintiff's case) that he did not hear the police officers at his door at 12:14 a.m. on May 27, 2008 nor at 11:43 p.m. on May 27, 2008. He opined that perhaps it was because he took sleeping medication and had large fans running in his bedroom. Defendant, however, admitted that he

woke up when the officers arrived at 4:13 a.m. on May 28, 2008 to serve him. He testified that he went downstairs, turned the alarm off and let the police in.

On direct examination, Defendant testified that the first time he learned of the allegations that he abused Plaintiff during the marriage, was when he was arrested on May 28, 2008. Also, that the first he learned of the allegations that he sexually abused Samantha was during Officer Yaccarino's testimony on June 19 and July 6, 2008. He denied ever having been contacted by any agency in regard to these allegations by his daughter. Although Defendant admitted receiving a letter from the Division of Youth and Family Services (DYFS) closing its investigation, according to Defendant, DYFS never contacted him during its investigation.

LEGAL DISCUSSION:

This matter is before the Court and is governed by the New Jersey Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The PDVA provides "both emergency and long-term civil and criminal remedies." Cesare v. Cesare, 154 N.J. 394, 399 (N.J. 1998). Restraining orders sought under the PDVA are civil in nature. Franklin v. Sloskey, 385 N.J.Super. 534, 542 (App. Div. 2006). Thus, the quantum of proof required is a preponderance of the evidence. Cesare, 154 N.J. at 401. A preponderance of evidence is described as follows: "[T]he evidence supporting the claim must weigh heavier and be more persuasive in [the fact finder's] mind than the contrary evidence. It makes no difference if the heavier weight is small in amount, as long as the evidence supporting the claim weighs heavier in [the fact finder's] minds, then the burden of proof has been satisfied and the party who has the burden is entitled to [the fact finder's] favorable decision on that claim. Saks v. Ng, 383 N.J. Super. 76, 98 (App. Div. 2006). Thus, proof of possibility as distinguished from probability is

not enough. The right of a party to have the other bear the required burden of proof is substantial, and not just a matter of form or procedure. In that context, a complaint may be found to be proved (sustained) if the Court concludes that the evidence supporting the complaint outweighs the contrary evidence, even if that preponderance be slight.

The Legislature, in establishing predicate offenses under the PDVA, drew from the State's criminal code to set forth the acts and conduct that are considered acts of "domestic violence" under the PDVA. N.J.S.A. 2C:25-19. Included in the acts of domestic violence under the PDVA are the offenses of Harassment, N.J.S.A. 2C:33-4, and Criminal Trespass, N.J.S.A. 2C:18-3. Both of these predicate offenses are alleged here. An individual is guilty of Criminal Trespass, N.J.S.A. 2C:18-3 if the person "knowing that he is not licensed or privileged to do so, [...] enters or remains in any place as to which notice against trespass is given by [...] fencing or other enclosure manifestly designed to exclude intruders." N.J.S.A. 2C:33-4(b).

A person is guilty of Harassment if he or she:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.
[N.J.S.A. 2C:33-4.]

Here, it is §c at issue, which must be established by a preponderance of the credible evidence.

"'[C]ourts must consider the totality of the circumstances to determine whether the harassment statute has been violated.'" Peterson v. Peterson 374 N.J.Super. 116 (App. Div.

2005) (quoting Cesare v. Cesare, 154 N.J. 394, 404 (1998)). "'The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse' must be considered in evaluating a domestic violence claim." H.E.S. v. J.S.C., 175 N.J. 309, 319 (2003) (quoting N.J.S.A. 2C:25-29a(1)). "Furthermore, in making their determinations, trial courts can consider evidence of a defendant's prior abusive acts regardless of whether those acts have been the subject of domestic violence adjudication." Cesare, supra, 154 N.J. at 405. There is no question that if the Court finds Defendant to have been in Plaintiff's backyard with a weapon, he has committed the predicate acts of trespass under N.J.S.A. 2C:18-3 and harassment under N.J.S.A. 2C:33-4(c). A determination of this matter depends upon this Court's analysis of two factors: (1) The credibility of the witnesses; and dependent thereon, (2) a determination of the facts.

Model Civil Jury Charge 1.12L (Approved 11/98) gives the following factors for a fact finder's consideration when making credibility determinations,

1. Does the witness have an interest in the outcome of this case?

2. How good and accurate is the witness' recollection?

3. What was the witness' ability to know what he/she was talking about?

4. Were there any contradictions or changes in the witness' testimony? Did the witness say one thing at one time and something different at some other time? [...]

5. [The fact finder] may consider the demeanor of the witness[, i.e. ...] the way the witness acted, the way the witness talked, or the way the witness reacted to certain questions.

Having considered these factors, the Court makes the following credibility determinations.

The Court finds the police officers' testimony to be credible.

The police officers who testified in this action are disinterested in its outcome and trained to make observations. Their observations were made in furtherance of their official duties. Therefore, the Court finds the officers' testimony to be credible, but not dispositive of the issue.

The Court finds Plaintiff's testimony to be somewhat credible.

The officers' testimony shows that Defendant had time to leave the Plaintiff's premises after his presence was detected by the Plaintiff. Plaintiff testified that she first saw Defendant in her yard on May 26, 2008, at about 11:15 p.m. Thirteen minutes elapsed between the time Plaintiff made the 911 call and the time Officer Yaccarino arrived at the home, leaving sufficient time for Defendant to leave the property before the police arrived, so the fact that he was not found on the premises upon their arrival does not eliminate the possibility of his earlier presence, but also, it does not establish it. There is no other evidence of his presence.

Plaintiff testified that she initially saw Defendant on the property on May 27, 2008, at about 10:30 p.m. She called the police dispatcher at 10:45 p.m. The officers arrived at her home at 11:01 p.m., about one-half hour after she first saw him enter the property. Again, Defendant had time to flee before the police arrived, but again, that does not prove he was there.

During trial, Plaintiff's credibility was questioned because there was a period of time after the parties' marriage when she stayed at Defendant's home. This behavior is not consistent with the level of abuse Plaintiff allegedly experienced. Plaintiff testified that, when the divorce was finalized, she felt like she was free from Defendant's abuse, unlike during the tenure of her marriage. She felt that she was finally free of him. Upon questioning by the Court, Plaintiff stated that her fear of Defendant after the divorce was less than her fear of him prior to the divorce. On redirect, Plaintiff explained that she and Defendant shared custody of Samantha and

at the time, she was living with her boyfriend in Hopewell. Samantha was not getting along with Plaintiff's new boyfriend, straining the relationship between mother and daughter. Plaintiff decided that rather than keeping her daughter in a stressful situation, she agreed to stay with Samantha one night per week at Defendant's home. The arrangement (which makes absolutely no sense) lasted until Plaintiff was able to find her own housing. Although there is a question as to whether the arrangement was for two months or nine months, that discrepancy is not relevant to whether Plaintiff was afraid of Defendant. Plaintiff stated that she was putting her daughter's wellbeing first, but how staying at Defendant's home with her daughter accomplishes that objective is indiscernible considering the problem described by Plaintiff was the daughter's relationship with Plaintiff's boyfriend.

This discrepancy is a matter of importance because it affects the probability of whether Plaintiff was telling the truth about Defendant abusing her. If Plaintiff was lying or mistaken about that, then she is more likely to be lying or mistaken about seeing Defendant in her yard. In judging credibility, common sense has fair play. Plaintiff's testimony that she returned to stay with her abuser, albeit for the benefit of her daughter, does not seem logical or reasonable. In other words it does not make sense. However, that does not end the determination of her credibility on the issue of domestic violence.

During trial, Defendant implied that Plaintiff was pursuing the restraining order out of anger toward Defendant for what Samantha accused Defendant of doing to her. The basis for the Plaintiff's first temporary restraining order request was as follows:

> 05/26/2008 11:30 PM PLA SAW DEF OUTSIDE IN HER YARD. DEF WAS WATCHING HER HOUSE. POLICE RESPONDED AND DEF WAS GONE.

The basis for the Plaintiff's second request, which was ultimately granted, was as follows:

> Victim stated she saw Robert Fishbein (ex-husband) jump over the back fence of her residence (4 Top of the World Way, Warren, NJ 07059), and run behind an oak tree with what appeared to be a rifle or shotgun pointing upright. The victim stated she turned on the back yard lights and there was R. Fishbein laying on the ground and pointing the weapon at the home.

There was no mention of Defendant's alleged abuse of Samantha. Further, the only prior incidents of domestic violence Plaintiff gave to the Court were incidents that happened to her, not her daughter. From this Court's observation of Plaintiff, it seems likely that if she were motivated by anger at Defendant for what he did to their daughter, some of that anger would have been represented in her application for a restraining order, particularly because the allegations would buttress her case. Thus, it seems unlikely that Plaintiff's basis for her complaint is anger at Defendant for what Defendant allegedly did to her daughter. Accordingly, the Court finds that Plaintiff is motivated in her complaint by the acts of Defendant which she described on May 26 and May 27. The officers' testimony establishes that lighting conditions were good at the time Plaintiff testified she saw Defendant on her property. Accordingly, Plaintiff's testimony is credible and although her behavior in staying at Defendant's home does not make sense, Plaintiff's conduct is not inconsistent with post trauma behavior of victims of domestic violence.

Finally, counsel for Defendant implied that Plaintiff concocted a plan to manufacture the incident. During cross examination, he asked Plaintiff if her boyfriend or daughter saw Defendant, but she answered in the negative. She testified that she gave the binoculars to her boyfriend (Bernie Glassman), but that he did not see Defendant.

Plaintiff's actions do not support a conclusion that Plaintiff engaged in such an intricate and detailed fabrication. She testified that on the first night she went upstairs to look at Defendant through the binoculars. She further testified that she gave the binoculars to Mr. Glassman, but that he was unable to see Defendant. Counsel implied that she must have been lying if Mr. Glassman was unable to see Defendant; however, the implication is incorrect. If Plaintiff went to the trouble to manufacture the situation knowing that Defendant was not in the yard, it would strain credibility to believe that she would have handed the binoculars to Mr. Glassman, knowing that he would be unable to see Defendant.

Giving the binoculars to Mr. Glassman was one variable she had control over since she would have known Mr. Glassman would not have been able to corroborate her story. Instead, Plaintiff testified that she gave the binoculars to Mr. Glassman but that he was unable to see Defendant. Moreover, creating some sort of physical evidence of an intruder would have been another fact that she would have been able to manufacture in support of her allegations. This Court thus finds it more probable that Plaintiff had some other motive to stay at Defendant's home, than that she manufactured her testimony of seeing Defendant in her yard. In light of all the other testimony, Plaintiff's testimony is more likely true than not.

The Court does not find Defendant's testimony to be credible.

This Court finds Defendant's testimony to lack credibility. His testimony that he did not hear Officer Beam at his door for two consecutive nights is not credible. Officer Beam testified that he knocked forcefully and rang the doorbell many times before leaving the premises. The first night, he was at the door for eighteen minutes and the second night he was there for fourteen minutes. According to Defendant, both he and Dale Atkinson, his girlfriend, were in the house at that time. It is difficult to conclude that neither Defendant nor his girlfriend were able to hear

and respond to Officer Beam. The Court rather comes to the conclusion that Defendant was not home either night, when the police arrived to verify his whereabouts. While that does not establish his presence at Plaintiff's residence, it does affect his credibility. Further, Defendant's testimonial demeanor, the way he answered questions, lack of eye contact (looking down or away) in reaction to certain questions, reflect negatively on his credibility.

Defendant's failure to produce Dale Atkinson creates an inference that her testimony would be unfavorable to him.

During the course of this trial, reference was made to Dale Atkinson, Defendant's girlfriend, being a person who had information relevant to the matter before the Court. Neither Plaintiff nor Defendant called her to testify. She is a person whom the Court would naturally expect the Defendant to produce to testify. Where a party fails to produce a witness who probably could clarify facts in issue, it raises a natural inference that the non-producing party fears that the testimony of the witness on that issue would be unfavorable to him. An adverse inference should be drawn here because Dale Atkinson is a witness whom the Defendant would naturally be expected to produce, and there has been no satisfactory explanation for her nonproduction. Therefore, the Court has a right to infer from the nonproduction of this witness that her testimony would be adverse to the interests of the Defendant.

The Court does not find Mr. Hughes' testimony to be credible; the Court finds Mr. Zwirn's testimony to be credible.

Finally, the Court gives no weight to the opinion of Mr. Hughes. He is a qualified expert at installing alarm systems, who merely relied upon the event log to reach his conclusion. Those conclusions are uncorroborated and unpersuasive. As Mr. Zwirn's sworn testimony established, however, the event log does not give a conclusive report of a person entering or exiting the

home. The event log merely records the events that are detected by the control panel. Mr. Zwirn demonstrated four relatively simple methods to temporarily disable one of the sensors, allowing the individual to pass in and out of the home without any evidence of being recorded on the log, i.e. undetected. Additionally, Defendant could have left undetected by the alarm through the unalarmed front door.

The Court finds Defendant committed trespass and harassing conduct.

The Court finds that Defendant could leave his house undetected. The Court finds that Defendant was not at home on May 26 and May 27, 2008, the nights he was accused of being on Plaintiff's property. The Court finds that it is more likely than not that Defendant was on Plaintiff's property with a firearm on May 26 and May 27, 2008.

Defendant's unsolicited presence at Plaintiff's home on two successive nights constitutes trespass in violation of N.J.S.A. 2C:18-3, and such conduct while in the possession of a weapon constitutes a course of alarming conduct in violation of N.J.S.A. 2C:33-4(c), i.e. harassment.

Defendant's trespass and harassment qualify as predicate acts that justify the issuance of a final restraining order under the PDVA.

CONCLUSION:

This matter is governed by the PDVA, N.J.S.A. 2C:25-17 to -35. Because a domestic violence final restraining order proceeding is civil in nature, the complainant is only required to prove the defendant committed a predicate act of domestic violence by a preponderance of the evidence and not by proof beyond a reasonable doubt. Franklin v. Sloskey, 385 N.J. Super. 534, 542 (App. Div. 2006). In this context, the complaint is sustained if the fact finder concludes that

the evidence supporting the complaint outweighs the contrary evidence. See Model Jury Charge (Civil), § 1.12I (1998).

The party with the burden of proof, Plaintiff, has the burden of proving his/her/its claim by a preponderance of the evidence. If the party fails to carry that burden, the party is not entitled to a favorable decision on that claim. Proof of possibility as distinguished from probability is not enough. The right of a party to have the other bear the required burden of proof is substantial, and not just a matter of form or procedure.

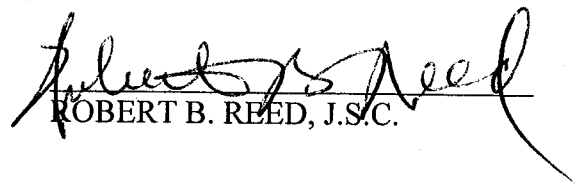
To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive than the contrary evidence. It makes no difference if the heavier weight is small in amount. As long as the evidence supporting the claim weighs heavier on balance, then the burden of proof has been satisfied an the Plaintiff is entitled to a favorable decision on her claim.

I find that the evidence weighs heavier in favor of the Plaintiff, who has the burden. Thus, the burden of proof has been carried and the Plaintiff is entitled to a decision on her claim.

A trial court must engage in a two-step analysis in domestic violence cases: first, it must decide whether plaintiff has proven one or more predicate acts (after considering previous domestic violence history) and then it must decide whether a final restraining order is needed to protect the victim from an immediate danger. Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006).

Based on the foregoing, and taking into consideration the totality of the circumstances, and applying the foregoing applicable criteria, this Court finds that Plaintiff has met her requisite burden of proof by a mere preponderance of the credible evidence, including the history of domestic violence during the marriage, along with the events of May 26 and May 27, 2008. This Court will enter a final restraining order on the facts in this matter because it is warranted to

protect Plaintiff from immediate danger. The Court finds that the weight of credible evidence preponderates in Plaintiff's favor, and therefore the entry of a final restraining order is warranted.



ROBERT B. REED, J.S.C.