No. 10-FM-1126

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DENNIS PHILLIP SOBIN,

Appellant,

v.

DARRIN SOBIN,

Appellee.

On Appeal from the Superior Court
of the District of Columbia
Family Division
(No. 02-CPO-3586)

REPLY BRIEF FOR APPELLANT

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July 27, 2011

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellee Darrin Sobin has, for all practical purposes, conceded that the Civil Protective Order (CPO) issued by the Superior Court against his father, appellant Dennis Sobin, violated his father's First Amendment rights by prohibiting him "from coming within 100 feet of the Wilson Building for any purpose." Appellee's Brief at 32. Appellee also concedes that a CPO must "'burden no more speech than necessary to serve a significant government interest,'" *id*. at 31-32 (quoting *Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994)), and further concedes that in fashioning the CPO, the Superior Court did not apply that standard and, indeed, never took *any* account of appellant's now-undisputed First Amendment interest in access to City Hall. *Id*. at 32. Appellee agrees that if this Court reaches the merits of this appeal, "it would be appropriate to remand the case" so that appellant's constitutional rights can properly be taken into account. *Id*.

Appellee nevertheless seeks to avoid the application of the Constitution to the CPO by arguing that consideration of appellant's First Amendment rights is precluded by

res judicata. Appellee's Brief at 24-31. That is not correct. As we show below, the doctrine of *res judicata* has no application here because this case did not involve the same claim as any earlier case. Nor does the doctrine of collateral estoppel apply, because (as appellee agrees) the First Amendment issue was not actually litigated in any previous case. And in any event, appellee waived the right to assert either of those doctrines in this Court by failing to raise them below.

Thus, the case should be remanded for a proper consideration of the First Amendment. But, contrary to appellee's suggestion, *id*. at 32, it should not be remanded with the total restriction on appellant's access to City Hall undisturbed, further extending the irreparable injury that he has been suffering. Rather, as appellant requested in his opening brief, the unconstitutional City Hall provision should be vacated and the case then remanded for the Superior Court to decide, in the first instance, what—if any—restrictions on his access to the Wilson Building can be justified under the demanding standard of *Madsen v. Women's Health Center*.

ARGUMENT

Appellee has filed an exceedingly curious brief. He spends nearly 70% of it—22 of 32 pages—rehearsing the details of his father's bad behavior going back to 1992, including the truly shocking fact that in 2003 his father sent him a birthday card, which was "permitted," and included a gift, which was not permitted. Appellee's Brief at 7. He also filed a 470-page Supplemental Appendix documenting those details. But he then informs the Court that hardly anything in these 22 pages of briefing or 470 pages of appendix has the slightest relevance to the case before it. Instead, he argues, the case must be resolved by the simple application of *res judicata*. *Id*. at 24-31. One can only

wonder why these 22 pages of brief and 470 pages of appendix were filed. Surely it was not a gratuitous effort to make his father look bad in the eyes of the Court, considering that appellee counts it as actionable harassment when his father gratuitously makes him look bad in the eyes of others by informing them of true facts about appellee's criminal record. *See* Appellee's Brief at 14.

Appellant agrees that these 22 pages of appellee's brief and 470 pages of appellee's Supplemental Appendix are largely irrelevant. He has not challenged, in this appeal, the propriety of the original CPO or even its 2010 extension, except for the extension's application to his ability to enter City Hall for legitimate purposes. He will therefore now turn to the legal issues that are actually before the Court.

I. *Res Judicata* Does Not Apply Because This Case Does Not Involve the Same Claim as the Earlier Cases, and in Any Event Was Waived

A. A Petition for a New Civil Protective Order Presents a New Claim, and is Therefore Not Governed by the Prior Grant of a Previous Civil Protective Order

Appellee correctly states that "'the doctrine of *res judicata* . . . bars relitigation in a subsequent proceeding of the same claim between the same parties.'" Appellee's Brief at 24 (quoting *Patton v. Klein*, 746 A.2d 866, 869 (D.C. 1999) (ellipsis added)). But this Court has made clear, in its leading decision about Civil Protective Orders, that a petition for a new CPO presents a *new claim*. *Res judicata* therefore does not apply.

1. A Claim Based on New Evidence is a New Claim

The "law is clear that post-judgment *events* give rise to new claims, so that claim preclusion is no bar." *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72, 78

(D.C. Cir. 1997) (emphasis in original).* Proof of a post-judgment event—a violation of the 2007 CPO—was an essential element of appellee's petition for a new CPO. The petition for a new CPO was thus a new claim, as to which "claim preclusion is no bar."

This Court has repeatedly made clear that in determining whether a new action presents the "same claim" and is therefore governed by *res judicata*, "[i]t does not matter that the earlier and later proceedings differ in nature: 'as long as the parties are the same, and the essence of the claim *and evidence necessary to establish it are the same*, *res judicata* applies.'" *Washington Medical Center, Inc. v. Holle*, 573 A.2d 1269, 1281 (D.C. 1990) (quoting *Williams v. Gerstenfeld*, 514 A.2d 1172, 1179 (D.C. 1986)) (emphasis added). *Accord Ali Baba Co., Inc. v. WILCO, Inc*., 482 A.2d 418, 422 n.8 (D.C. 1984) ("*res judicata* . . . applies when the parties are the same and the essence of the claim *and evidence necessary to establish it are the same*") (emphasis added); *Henderson v. Snider Bros., Inc*., 439 A.2d 481, 484 (D.C. 1981) (*en banc*) ("When the parties are the same, and the essence of the claim *and the evidence necessary to establish it are the same*, *res judicata* applies") (emphasis added).

Thus, if new evidence—particularly *post-judgment* evidence—is necessary to prove a subsequent claim, then the subsequent claim cannot be *the same claim* as a prior claim, and cannot be precluded by *res judicata*. This is elementary, and fundamental.

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* The full quotation is, "Federal law is clear that post-judgment *events* give rise to new claims, so that claim preclusion is no bar." *Id*. But in the same case, the D.C. Circuit noted that "[t]he D.C. law of claim preclusion does not differ significantly from the federal. . . . We have said that 'we can discern no material differences in the District of Columbia's law of *res judicata* and the federal common law of *res judicata*.'" *Id*. at 78 n.4 (quoting *U.S. Industries, Inc. v. Blake Construction Co*., 765 F.2d 195, 204 n.20 (D.C. Cir. 1985)).

2. A Petition for a New CPO Requires the Submission of New, Post-Judgment Evidence by the Petitioner, and Is Therefore a New Claim

This Court has made it unmistakably clear that a petition for a new Civil Protective Order is a new claim that requires the submission of new evidence by the party seeking the new order. That was a major holding of the Court's leading case in this area, *Cruz-Foster v. Foster*, 597 A.2d 927 (D.C. 1991). In that case, Ms. Cruz-Foster (the victim) argued that no new evidence should be needed to extend a CPO; rather, she urged, the burden should be on the party opposing an extension to negate the need for continuing relief. *See id*. at 929. This Court squarely rejected that argument, noting that the Intrafamily Offenses Act "does not authorize the issuance of permanent injunctions," *id*., and that because "Ms. Cruz[-Foster] is seeking relief that has not previously been awarded to her, namely, an extension of a prior CPO of limited duration," the burden must be on her, as "the moving party[,] to show the need for an injunction which has not been previously granted." *Id*. at 930. *See also Tyree v. Evans*, 728 A.2d 101, 104 (D.C. 1999) ("a petition for a CPO is, in substance, a suit for a one-year injunction.")

The holding of *Cruz-Foster* flatly contradicts appellee's argument here that a petition to extend a CPO—a petition "for an injunction which has not been previously granted," *Cruz-Foster,* 597 A.2d at 930—presents the same claim as a prior petition, thus triggering *res judicata*. For if *res judicata* applied, no evidentiary hearing on the new petition would be necessary or even permissible—"relitigation" of the claim would be precluded. But the Intrafamily Offenses Act "does not authorize the issuance of permanent injunctions," *id.* at 929, and *Cruz-Foster* emphatically requires a new evidentiary hearing—precisely what the appellee here would call improper "relitigation."

For the same reasons, appellee's argument that appellant somehow defaulted by failing to file a written motion for modification of the prior CPO, *see* Appellee's Brief at 27-28, reflects a topsy-turvy view of the proceedings before the Superior Court. Appellant had no need to seek to modify the 2007 CPO; it was expiring of its own accord, pursuant to the statute. Appellee was petitioning for "an injunction which has not been previously granted," *Cruz-Foster,* 597 A.2d at 930, and appellant was entitled to oppose that petition, both as a whole and with regard to its particular terms.

B. Even if *Res Judicata* Could Apply Here, Its Application Was Waived

It is black letter law that a party may waive the protection of *res judicata* by not asserting it in a timely manner. *See, e.g., Wilson v. Holt Graphic Arts, Inc*., 981 A.2d 616, 618 (D.C. 2009) ("a party that [does] not 'amend, or seek leave to amend, its answer to plead *res judicata* before trial as an affirmative defense' [has] waived that argument") (quoting *Group Health Ass'n v. Reyes*, 672 A.2d 74, 75 (D.C. 1996)); *see also* D.C. Super. Ct. Civ. R. 8(c) (*res judicata* must be affirmatively pled); *Flippo Construction Co. v. Mike Parks Diving Corp.,* 531 A.2d 263, 267 (D.C. 1987) ("generally, 'the failure to raise affirmative defenses constitutes a waiver of those defenses'") (quoting *Goldkind v. Snider Bros., Inc.* 467 A.2d 468, 471 (D.C.1983)).

Even assuming that *res judicata* could have applied here—which we have shown it could not—appellee waived it by failing to assert it at any time in the Superior Court. Recognizing his failure, appellee seeks to salvage the issue by arguing that "the objections [he] voiced were sufficient to preserve [his] right to raise the issue now," Appellee's Brief at 27. But the two objections to which he points had nothing remotely to do with *res judicata*. Both simply asserted that appellant should not be allowed to

discuss the scope of a new CPO because he had not filed a written motion for modification of the 2007 CPO. *See* Appellee's Brief at 27 ("that hasn't been raised or argued in a motion filed regarding that") (quoting JA 164); *id*. at 29 (appellee "had yet to seek a modification of the CPO by filing a written motion") (quoting JA 232-33). We have already shown that, under the teaching of *Cruz-Foster*, appellant had no obligation to file a written motion for modification of the *previous* CPO in order to contest the terms of a requested *future* CPO.

Appellee appears to believe that the proper way to treat this Court's decision in *Cruz-Foster* is to ignore it—and, indeed, although that leading case on Civil Protective Orders was cited six times in appellant's opening brief, appellee's brief does not cite it even once. *See* Appellee's Brief at ii (Table of Authorities). Appellee may wish that *Cruz-Foster* were not on the books, but it is.

C. Collateral Estoppel Also Does Not Bar Appellant from Challenging the 2010 CPO's Provision Barring Him from City Hall

Although denying that appellant had objected to the Wilson Building bar in any proceeding before 2010, appellee suggests in a footnote that "to the extent" he may have done so, he "would now be barred by the doctrine of collateral estoppel" from relitigating that issue. Appellee's Brief at 27 n.11.

Collateral estoppel precludes relitigation of a particular *issue*, even when relitigation of the *claim* is not barred by res judicata, but only "'when (1) the issue [was] actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely

dictum.'" *Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995) (quoting *Washington Medical Center, Inc. v. Holle*, 573 A.2d 1269, 1283 (D.C. 1990)).

Appellant acknowledges that collateral estoppel would apply to many issues that had been litigated between himself and his son prior to 2010. He has not sought to relitigate any of those issues. But nothing in appellee's brief, or in the record, supports the proposition that appellant has actually litigated the City Hall issue in an earlier proceeding, or that any court has previously ruled on it. Litigation of that issue is therefore not precluded by collateral estoppel.

II. As Appellee Implicitly Concedes, If This Case is Not Governed by *Res Judicata*, the Superior Court's Order Must be Reversed

Appellee does not take issue on the merits with appellant's showing that the Wilson Building provision of the CPO cannot withstand constitutional scrutiny. He concedes that "if the Court reaches the merits of appellant's claim, a remand would be appropriate for the Superior Court to consider a CPO provision that protects appellee from appellant's harassment in the workplace while burdening no more of appellant's speech than necessary to satisfy this significant government interest." Appellee's Brief at 31 (section heading). Appellee also agrees that *Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994), "provides the proper framework" for this revision of the CPO. *Id*.

That is the relief appellant sought, but with one significant difference: appellant asked this Court to vacate the Wilson Building provision of the CPO before remanding the case. That should be done.

As shown in appellant's opening brief, the Wilson Building provision imposes a severe and unjustified prior restraint on his First Amendment rights by prohibiting him, under penalty of contempt, from entering or approaching within 100 feet of City Hall to

speak on matters of public concern and petition his government for redress—despite the undisputed fact that he has legitimate business there and the *undisputed* fact that he poses no physical threat to the appellee. Every day that these restrictions continue constitutes an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The appellee has the burden of showing the need for any particular injunctive relief. *Cruz-Foster, supra*. This Court's remand should not presume that he can carry that burden.

CONCLUSION

For the reasons stated above and in appellant's principal brief, the "City Hall" provision of the CPO should be vacated and the case should be remanded to the Superior Court for such further proceedings, if any, as may be necessary.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I hereby certify that I served one copy of the foregoing Reply Brief for the Appellant by hand-delivery upon

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this 27th day of July, 2011.

_____
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