Filed 1/31/11

NOS. 4-10-0285, 4-10-0286, 4-10-0288 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

CONNIE JOHNESSEE and BILLIE JOHNESSEE, Petitioners-Appellees, v. (No. 4-10-0285) JOHN SCHNEPF, Respondent-Appellant.	)	Appeal from Circuit Court of Pike County No. 08OP98
RICHARD JOHNSON and BRENDA JOHNSON, Petitioners-Appellees, v. (No. 4-10-0286) JOHN SCHNEPF, Respondent-Appellant.	)	No. 08OP97
JOHN SCHNEPF and DIANE SCHNEPF, Petitioners-Appellants, v. (No. 4-10-0288) BRENDA JOHNSON; RICHARD JOHNSON; CONNIE JOHNESSEE and BILLIE JOHNESSEE, Respondents-Appellees.	)	No. 08OP102 Honorable Michael R. Roseberry, Judge Presiding.

JUSTICE MYERSCOUGH delivered the judgment of the court.
Presiding Justice Knecht concurred in the judgment.
Justice McCullough specially concurred in part and dissented in part.

ORDER

Held: (1) Trial court erred by denying petitioner restitution on the basis that petitioner provoked the incident that resulted in an order of protection in petitioner's favor.

(2) Trial court's order denying petitioner an order of protection against three of the respondents was not against the manifest weight of the evidence.

In these consolidated appeals, petitioner, John Schnepf, challenges the trial court's orders granting an order of protection against John and in favor of (1) respondents Brenda Johnson and Richard Johnson (Pike County case No. 08-OP-97) and (2) respondents Connie Johnessee and Billie Johnessee (Pike County case No. 08-OP-98). John also challenges (1) the court's denial of John's claim for medical expenses, lost earnings, and legal fees incurred as a result of the battery committed upon John by Richard, against whom John obtained an order of protection; and (2) the court's denial of an order of protection against Brenda, Connie, and Billie.

For the reasons that follow, we dismiss the appeals in case No. 4-10-0285 (appeal of Pike County case No. 08-OP-98) and case No. 4-10-0286 (appeal of Pike County case No. 08-OP-97) for lack of jurisdiction. In case No. 4-10-0288 (appeal of Pike County case No. 08-OP-102), we affirm in part, reverse in part, and remand. We affirm the court's order denying John's request for an order of protection against Brenda, Connie, and Billie. We reverse the trial court's order denying John restitution in the amount of $957.70 and remand the cause for the court to consider whether to award John any attorney fees.

I. BACKGROUND

The hearings on the orders of protection took place over three days and included numerous witnesses. Because the parties are familiar with the facts, the evidence presented at the hearings will only be summarized here to put the claims in context.

John, Brenda, and Connie are three of the eight adult living children of Maxine Schnepf. Richard is Brenda's husband, Billie is Connie's husband, and petitioner Diane is John's wife.

Maxine died in July 2008. Another of Maxine's children, Raymond, who is not a party to this appeal, was the executor of her estate. Maxine had owned land in a trust, and Raymond was the trustee. The trial court took judicial notice of all the cases involving the parties, including a partition suit (Pike County case No. 07-CH-2) and the probate of Maxine's estate (Pike County case No. 08-P-49).

A. Facts Pertaining to the November 6, 2008, Incident

The petitions for the orders of protection were filed following an incident that occurred on November 6, 2008, primarily between John, Brenda, Richard, Connie, and Billie. The incident occurred outside the Meredosia school gymnasium during or immediately after a junior high basketball game.

John testified that the incident began when Connie smirked at John and called him a "thievin' bastard." Brenda ran over to John. According to John, Brenda was mad about Maxine's

will. Brenda called John a "thief" and encouraged her husband, Richard, to take John outside and work him over. Richard also told John he wanted to work him over. Connie's husband, Billie, then shoved John and hit John in the groin several times. After the principal of the school told them all to leave, Richard kicked John in the left knee.

John's wife, Diane, testified that the November 6, 2008, incident began when Connie and Richard started arguing with John. Billie punched John in the groin about 10 times. As they all left the building, Richard kicked John in the knee.

John testified he required medical treatment for his knee. The trial court admitted into evidence a hospital bill totaling $967.70. John testified he incurred additional medical expenses totaling approximately $600 and attorney fees of approximately $7,000. John also testified he could not perform his farming work and had to hire help at $14 an hour, for 12 or more hours a day, "off and on for two months." John admitted he did not know the exact amount without going through his record book.

Richard testified that the November 6, 2008, incident began when, after Richard arrived at the school, John smirked at Richard and called Richard a "queer." Billie stepped in between John and Richard. John grabbed Billie by the collar and told Billie he was not going to live very long. After the principal

of the school asked them to leave, they all began walking outside. John continued to badger Richard, saying, "[L]ook at the queer run." Richard admitted that he kicked John once in the knee.

Billie testified he ended up between John and Richard when he tried to walk past them. John grabbed him, and Billie pushed John away with his elbow. Billie denied striking John in the groin. John, four times, called Billie a "son of a bitch" and told Billie he was "going to die."

Connie testified she did not see how the incident started. According to Connie, when she entered the school, John smirked at her. She smiled back, and he called her a "fat bitch." Connie entered the gymnasium and spoke briefly to Brenda. After Brenda left the gymnasium, Connie heard John yell "Goddamn queer." Connie entered the hallway and saw Billie standing between John and Richard. John had his hands around Billie's "collar at his neck." Connie grabbed Billie's arm and John released Billie. As Connie and Billie walked away, John continued to call Richard a "queer" and Brenda a "bitch." John told Richard that he was going to blacken Richard's eye like he did before. Connie also heard John twice say to Billie "you son of a bitch, you're going to die." Connie testified she was upset and afraid.

Brenda testified that when she stepped out of the

gymnasium that day, she saw John laughing and smirking. John called Richard a "Goddamn queer." Brenda noticed Billie got in between Richard and John. John grabbed Billie by the collar, and Brenda told John to leave Billie alone because Billie was an old man. John was 52 years old and Billie was 72 years old at the time. At one point, John balled up his fist and told Brenda he should hit her. Brenda saw Richard try to kick John but believed he missed. Billie did not strike John.

Brenda, Richard, Connie, and Billie were all represented by the same attorney. Brenda testified that she and Connie were splitting the attorney fees incurred. As of June 2009, those attorney fees totaled $6,200, of which Brenda was responsible for half. As of July 2009, Brenda's share of the attorney fees totaled $4,700.

The principal of the school testified she did not see anyone hit anyone else. The police officer who arrived at the scene and ultimately arrested John and Richard testified that John told the officer that Billie did not hit John very hard in the groin--described it as a light brush. John also admitted he may have shoved Billie.

B. Procedural Background of the Case

On November 10, 2008, John sought an order of protection in Morgan County, the county where the incident occurred, against Connie and Brenda (Morgan County case No. 08-

OP-152). The trial court entered an emergency order of protection. As will be noted below, the petition was later amended to include Richard and Billie as respondents and John's wife, Diane, as a petitioner. John's petition was based solely on the November 6, 2008, incident.

On November 17, 2008, Brenda and Richard filed a petition for an order of protection against John, Pike County case No. 08-OP-97. The trial court entered an emergency order of protection. The petition identified numerous incidents as the basis for the petition, including not only the November 6, 2008, incident, but incidents dating back to 1986.

Also on November 17, 2008, Connie and Billie filed a petition for an order of protection against John, Pike County case No. 08-OP-98. The trial court entered an emergency order of protection. The petition only identified the November 6, 2008, incident as the basis for the petition.

The Morgan County case was transferred to Pike County and assigned case No. 08-OP-102. On December 15, 2007, the trial court consolidated the three cases for purposes of judicial economy.

On that same date, the trial court granted in part and denied in part John's motion to strike the allegations in Brenda and Richard's petition dating back to 1986. The court held that incidents that occurred prior to the summer of 2003 would not be

admissible but that incidents occurring thereafter were "fair game for the [c]ourt to consider in determining whether or not there is a continuing course of conduct." The court granted John leave to plead any events that occurred after the summer of 2003.

On December 31, 2008, John and Diane filed a supplemental verified petition for an order of protection against Connie, Bill, Brenda, and Richard. In this supplemental petition, John and Diane identified numerous incidents occurring since 1997 as a basis for seeking the order of protection.

On March 2, 2009, the trial court struck the allegations in John and Diane's petition that preceded the summer of 2003. Thereafter, on March 17, 2009, John and Diane filed a revised addendum to the supplemental petition limiting the incidents alleged to the summer of 2003 through November 6, 2008.

C. Testimony Regarding the Additional Incidents the Trial Court Considered

Over the course of the hearings on the petitions, the trial court heard testimony about incidents alleged to have occurred between the parties from the summer of 2003 until the hearing. The court ultimately held that a majority of those incidents were too remote or insufficient to justify an order of protection. A detailed recitation of these additional incidents is not necessary for a resolution of the issues on appeal.

D. The Trial Court's Rulings on the Petitions

1. *Trial Court Granted John a Plenary Order of Protection*

Against Richard, Denied Him an Order of Protection Against the Other Respondents, and Denied John's Request for Restitution in Pike County Case No. 08-OP-102

In July 2008, the trial court granted John, Diane, and their son a plenary order of protection against Richard in Pike County case No. 08-OP-102 based solely on the November 6, 2008, incident. The court found Richard did kick John on November 6, 2008, and the kick was an abusive act. The court found that although the kick was not justified, John provoked the kick by calling Richard a queer. The trial court further found John had only proven $957.70 in medical expenses, but the court did not order any restitution because John provoked the incident.

The trial court denied John's request for a plenary order of protection against Brenda, Connie, and Billie. The court found Brenda did not initiate the November 6, 2008, incident or call John any names. The court also found Connie did not in any way instigate the November 6 incident or do anything that would give rise to an order of protection against her. The court specifically found that Connie did not call John a "thieving bastard" during the November 6, 2008, incident.

The trial court further found Billie did elbow John, but it was justified. The court further found Billie may have brushed John in the groin but did not intentionally strike him and the brushing of the groin was justified because John had grabbed Billie by the collar.

2. Trial Court Granted Brenda and Richard's Request for a Plenary Order of Protection and Awarded Brenda $1,000 in Attorney Fees in Pike County Case No. 08-OP-97

The trial court granted Brenda and Richard a plenary order of protection against John based, in part, on the November 2008 incident. The trial court noted attorney fees were high and that the court had the authority to award reasonable attorney fees. The court found, considering that there was an order of protection entered in favor of John and his family against Richard, that John would reimburse Brenda $1,000 for attorney fees.

3. Trial Court Granted Connie and Billie's Request for a Plenary Order of Protection and Awarded Them $2,000 in Attorney Fees in Pike County Case No. 08-OP-98

The trial court granted Connie and Billie's request for a plenary order of protection against John. The court found John, without justification, grabbed Billie's collar, told Billie he was going to die, and called Connie a "fat bitch." The court ordered John to reimburse Connie and Billie $2,000 for their attorney fees.

E. Trial Court Denied Petitioners' Motion To Reconsider

In August 2009 and February 2010, John and Diane filed posttrial motions and supplemental posttrial motions in the cases. On February 16, 2010, Brenda, Connie, and Billie filed petitions for rule to show cause, asserting John was ordered to

pay the attorney fees awards on or before November 1, 2009, and he had not done so. On February 26, 2010, John filed motions to dismiss the petitions for rule to show cause.

On March 10, 2010, the trial court held a hearing on the posttrial motions. The court noted the pending petitions for rules to show cause. The attorney for respondents informed the court the petitions were not being withdrawn, but the petitions could "just be deferred." Respondents' counsel noted he did not intend to take any action "at this point." At the conclusion of the hearing, the court discussed with the parties a hearing date for the petitions for rule to show cause.

The trial court denied John's posttrial motions and entered a written order, providing in part, as follows: "Petition[s] [f]or [r]ule to [s]how [c]ause and [m]otion to [d]ismiss[] deferred for further consideration." The order contained no Supreme Court Rule 304(a) finding. Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006).

John filed a separate notice of appeal in each case. This court consolidated the three cases for purposes of the appeal.

II. ANALYSIS

A. This Court Lacks Jurisdiction Over Case Nos. 08-OP-97 and 08-OP-98

This court has an independent duty to examine its appellate jurisdiction. See *Tumminaro v. Tumminaro*, 198 Ill.

App. 3d 686, 690, 556 N.E.2d 293, 296 (1990). Because the trial court's order denying the posttrial motions referenced another pending and unresolved motion, this court directed petitioners to file supplemental briefs addressing this court's jurisdiction. In the supplemental briefs, John concedes the notices of appeal are premature in light of the pending petitions for rule to show cause. We agree in part.

Supreme Court Rule 301 provides for appeal as a matter of right from final judgments. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502, 687 N.E.2d 871, 874 (1997). "A judgment or order is 'final' if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy." *Dubina*, 178 Ill. 2d at 502, 687 N.E.2d at 874. If, however, the final order does not dispose of all claims, the order is not appealable unless the trial court makes "an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006). Without a Rule 304(a) finding, the order is not final until all the claims have been resolved. *Dubina*, 178 Ill. 2d at 502-03, 687 N.E.2d at 874.

In this case, when the trial court entered the March 10, 2010, order, petitions for rule to show cause were pending in case Nos. 08-OP-97 and 08-OP-98. An appeal filed before the resolution of a contempt petition and without a Rule 304(a)

finding is premature, and the appellate court lacks jurisdiction. *In re Marriage of Gutman*, 232 Ill. 2d 145, 156, 902 N.E.2d 631, 637 (2008). However, the three cases were consolidated only for purposes of judicial economy. In such circumstances, the cases do not merge into a single suit. *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 657 913 N.E.2d 1077, 1091 (2009) (holding that where two cases are consolidated only for convenience and economy, the cases do not merge into a single suit but retain their distinct identities). In fact, the three cases maintained separate docket entries, and John filed separate appeals in each case. Because the cases were consolidated only for purposes of judicial economy and maintained their separate identities, nothing was pending in case No. 08-OP-102 (the case filed by John and Diane) when the trial court entered the final order. Therefore, this court clearly has jurisdiction in appeal No. 4-10-0288 (case No. 08-OP-102).

In case Nos. 08-OP-97 and 08-OP-98, a petition for rule to show cause and petitioners' motion to dismiss the same were pending when the trial court entered the final order. John concedes in his supplemental briefs that this court lacks jurisdiction to address the appeal until those pending matters are resolved. See *Gutman*, 232 Ill. 2d at 156, 902 N.E.2d at 637. As such, this court dismisses appeal Nos. 4-10-0285 and 4-10-0286 (Pike County case Nos. 08-OP-97 and 08-OP-98) because, on the

present record, the notices of appeal are premature. See *In re Marriage of Schwieger*, 379 Ill. App. 3d 687, 689, 883 N.E.2d 556, 559 (2008) (pending contempt petition rendered order nonfinal and notice of appeal from that order premature). John may file a timely notice of appeal upon the trial court's resolution of the pending claims. See *Schwieger*, 379 Ill. App. 3d at 690, 883 N.E.2d at 559; see also *In re Marriage of Valkiunas*, 389 Ill. App. 3d 965, 968, 909 N.E.2d 195, 198 (2008) (noting the proper procedure was to file a timely notice of appeal or a petition for rehearing with a supplement to show that the impediment to jurisdiction has been removed). If, however, the pending claims have been resolved and the time to file a new notice of appeal has expired, John may, pursuant to Supreme Court Rule 303(a)(2), establish the effectiveness of the present notice of appeal. See *Schwieger*, 379 Ill. App. 3d at 690, 883 N.E.2d at 559. In such case, John may file a petition for rehearing and to supplement the record to establish this court's jurisdiction to address the merits in the appeals of case Nos. 08-OP-97 and 08-OP-98. See *Schwieger*, 379 Ill. App. 3d at 690, 883 N.E.2d at 559.

We now turn to the address the merits in the appeal of case No. 08-OP-102.

B. No Appellee Brief Was Filed

Respondents have not filed a brief on appeal. A reviewing court is not compelled to serve as an advocate for the

appellee and is not required to search the record for the purpose of sustaining the trial court's judgment. However, if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court should decide the merits of the appeal. On the other hand, if the appellant's brief demonstrates *prima facie* reversible error, and the contentions in the brief find support in the record, the trial court's judgment may be reversed. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976).

In this case, having reviewed the brief and the record together, this court finds that appellant's brief has demonstrated *prima facie* reversible error on the restitution issue. However, the trial court's decision to deny John an order of protection against Brenda, Connie, and Billie was not against the manifest weight of the evidence.

C. Trial Court Erred in Denying John's Claim for Reimbursement Based on Provocation but Order Denying John's Request for a Plenary Order of Protection Against Brenda, Connie, and Billie Was Not Against the Manifest Weight of the Evidence

John identifies two issues on appeal: (1) whether the court erred in denying John's claim for medical expenses, lost earnings, and legal fees when it entered an order of protection in favor of John and against Richard; and (2) whether the court erred in denying John's request for an entry of an order of protection against Connie, Billie, and Brenda.

1. *Trial Court Erred in Denying Restitution on the Basis That John Provoked the Incident*

John first argues the trial court erred in denying his claim for medical expenses, lost earnings, and legal fees after granting him a plenary order of protection against Richard. John argues the Illinois Domestic Violence Act of 1986 (Act) prohibited the trial court from denying John a remedy on the basis that Richard had cause for the use of force where that use of force did not constitute justifiable use of force.

The Act provides for a number of possible remedies upon issuance of an order of protection. See 750 ILCS 60/214 (West 2008). Section 214(e) of the Act limits the trial court's ability to deny any remedy. 750 ILCS 60/214(e) (West 2008). Specifically, section 214(e)(1) provides as follows:

> "Denial of any remedy shall not be based, in whole or in part, on evidence that:
>
> (1) Respondent has cause for any use of force, unless that cause satisfies the standards for justifiable use of force provided by Article VII of the Criminal Code of 1961[.]" 750 ILCS 60/214(e)(1) (West 2008).

In this case, the trial court specifically noted it could award restitution and that John had proven $957.70 in

medical expenses. The court found, however, that because there was provocation, John should not receive restitution.

Clearly, the trial court relied, in whole or in part, on the fact that John provoked the incident with Richard. The court had found that while provoked, Richard's act of kicking John was not justified. Therefore, the court erred in denying John restitution in the amount of $957.70, the amount the court found John had proven.

It is not clear from the record if the trial court failed to award John any attorney fees because the court offset John's attorney fees by the amount of attorney fees the court ordered John pay to Brenda, Connie, and Billie. Nor is it clear whether the court offset John's attorney fees by not awarding Richard any attorney fees, despite Richard obtaining an order of protection against John. Therefore, on remand, the trial court should determine whether to award John any attorney fees.

This court agrees with the sentiments of Justice McCullough, specially concurring in part and dissenting in part. However, the statutory language is clear that denial of a remedy may not be based, in whole or in part, on evidence that the respondent had cause for the use of force, unless the use of force was justified. The court clearly found the use of force by Richard, while provoked, was not justified.

2. *Trial Court's Findings Were Not Against the Manifest Weight of the Evidence*

John also argues the trial court's orders denying John's request for an order of protection against Brenda, Connie, and Billie were against the manifest weight of the evidence. We disagree.

In an order-of-protection proceeding, the trial court's "central inquiry is whether the petitioner has been abused." *Best v. Best*, 223 Ill. 2d 342, 348, 860 N.E.2d 240, 244 (2006). The Act defines abuse to include "physical abuse, harassment, intimidation of a dependent, interference with personal liberty[,] or willful deprivation." 750 ILCS 60/103(1) (West 2008). If the petitioner has been abused, an order of protection "shall issue." 750 ILCS 60/214(a) (West 2008). Whether a petitioner has been abused is a question of fact that the petitioner must prove by a preponderance of the evidence. *Best*, 223 Ill. 2d at 348, 860 N.E.2d at 244.

This court reviews a trial court's decision on a petition for an order of protection under the manifest-weight-of-the-evidence standard. *Best*, 223 Ill. 2d at 350, 860 N.E.2d at 245. This court gives deference to the trial court because the trial court is in the "best position to observe the conduct and demeanor of the parties and witnesses." *Best*, 223 Ill. 2d at 350, 860 N.E.2d at 245. We will not substitute our "judgment for that of the trial court regarding the credibility of the witnesses, the weight to be given to the evidence, or the

inferences to be drawn." *Best*, 223 Ill. 2d at 350, 860 N.E.2d at 245.

On appeal, John argues the Act "provides for an extension of liability in the event of abuse as defined in the Act to other persons who may be legally accountable for the acts of the primary perpetrator of that abuse." See 750 ILCS 60/216 (West 2008) (providing that for the purpose of issuing an order of protection, the Criminal Code of 1961 governs whether the respondent is legally accountable for the conduct of another person). John asserts he was entitled to an entry of an order of protection against Brenda, Connie, and Billie because they, individually or in concert, aided or abetted Richard's actions. According to John, the record was "replete with instances" in which Brenda, Connie, and Billie aided or abetted Richard's acts and the acts of each other, including the "'tag team' batteries inflicted on John" by Billie and Richard, "all while being encouraged or accompanied" by Brenda and Connie.

The trial court was in the best position to evaluate the credibility of the witnesses. The court determined that Richard kicked John and that while that kick was provoked, it was not justified. The court apparently did not believe any of the testimony that would support John's theory that Brenda, Connie, and Billie should be legally accountable for Richard's actions. The court found that Brenda did not initiate the November 5,

2008, incident and did not call John any names. Connie did not instigate the November 6, 2008, incident and did not do anything that would give rise to an order of protection against her. Finally, the court found that while Billie did elbow John, that action was justified because John was holding Billie around the neck. Any brushing of the groin was not intentional or was justified because John grabbed Billie by the collar. The court clearly did not believe the testimony that Billie hit John several times in the groin. Those findings were based on the witnesses' credibility and were not against the manifest weight of the evidence. Therefore, the court did not err in denying a plenary order of protection in favor of John and against Brenda, Connie, and Billie.

III. CONCLUSION

For the reasons stated, we dismiss appeal Nos. 4-10-0285 and 4-10-0286 for lack of jurisdiction. In appeal No. 4-10-0288, we affirm the trial court's order denying John a plenary order of protection against Brenda, Connie, and Billie. We reverse the court's order denying John restitution in the amount of $957.70 and remand the cause for a determination of whether John should be awarded his attorney fees.

No. 4-10-0285: Dismissed.

No. 4-10-0286: Dismissed.

No. 4-10-0288: Affirmed in part and reversed in part; cause remanded.

JUSTICE McCULLOUGH, specially concurring in part and dissenting in part:

I concur in part and dissent in part. I would affirm the trial court's order in full.

As shown, the hearings took place over several days and included numerous witnesses. I agree the appeals of Nos. 4-10-0285 and 4-10-0286 should be dismissed for lack of jurisdiction. As to appeal No. 4-10-0288, I would affirm the trial court's order and specifically as to restitution and attorney fees.

This case is a good example of what many families do when property is involved and death (Maxine's) occurs: spend time and money fighting over property in which they were lucky to have any interest.