

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 18-0658

THE BOARD OF DIRECTORS FOR GLASTONBURY LANDOWNERS ASSOCIATION, INC., a Montana Non-Profit Corporation, DENNIS RILEY, DANIEL KEHOE, REGINA WUNSCH, CHARLENE MURPHY, NEWMAN BROZOVSKY, GERALD DUBIEL, RICHARD JOHNSON, LEO KEELER, KEVIN NEWBY, CHARLOTTE MIZZI, PAUL RATALLO, MARK SEAVER, INDIVIDUALS,

Petitioner, Counter- Defendants and Appellees,

v.

DANIEL K. O'CONNELL and VALERY A. O'CONNELL

Respondents, Counter- Claimants, and Appellants.

On Appeal from the Montana Sixth Judicial District Court, Park County
Cause No. DV-17-135
Judge Brenda Gilbert Presiding

O'CONNELLS' APPEAL BRIEF

***PRO SE** Respondents
Counter- Claimants, & Appellants*
Daniel & ValO'Connell
PO Box 77
Emigrant, Mt. 59027
dko@mac.com
T: 406.577.6339

*Attorneys for GLA Petitioner, Counter-
Defendants and Appellees*
Alanah Griffith
PO Box 160748
Big Sky, Mt. 59716
alanah@bigskymtlaw.com
T: 406.624.3585

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I. ISSUES PRESENTED

1. Did the GLA Petition and District Court Orders of Protection Fail to Contain Sufficient Facts To Warrant the Offense of Stalking Or Threat of Immediate Harm?
2. Did the Nov. 8, 2017 *de novo* hearing violate O’Connells’ due process rights to a fair & impartial hearing?
3. Did the District Court err to dismiss O’Connells’ Counterclaim summary motion relief under rule 12(b)(6) & sanction motion, and other motion relief?

II. STATEMENT OF THE CASE

A. Procedural History

Following a two hour *de novo* hearing on Nov. 8, 2017, Appellants–Daniel and his wife–Valery O’Connell (hereafter Daniel and Valery) were subjected to an Interim Order of Protection” (Dec. 22, 2017). Then on Aug. 15, 2018 without any cause of action **and** without a hearing, Daniel and Valery were subjected to a “Final Order of Protection” permanently restraining Daniel and Valery from having any contact with GLA Appellees (hereafter GLA Petitioners). (note: O’Connells had no contact with GLA Petitioners outside of monthly GLA meetings). MCA §35-2-526 requires GLA Bylaws to ‘specify if remote communication’ is allowed for voting members. While GLA Bylaws allow Board members to participate remotely, it does not specify this for voting members. Therefore this law requires GLA to allow members (Daniel and Valery) to attend in person. But in violation of

this law (MCA §35-2-526), this Final Order permanently retrained Daniel and Valery from participating in any GLA meeting except via telephone. Emigrant Hall has no telephone service where GLA meetings are located, so GLA use of a cellphone having spotty signal and very poor audio quality does not allow Daniel and Valery to participate in GLA meetings (see Mizzi hearing testimony (pp. 91) she “couldn’t hear much” on cellphones at these meetings). So in practice, the “Final Order of Protection” permanently prevents Daniel and Valery from participating in any GLA meetings in violation of this law MCA §35-2-526. O’Connell appeal all Orders in this case after filing a rule 59 & rule 60 motion against all Orders.

B. STATEMENT OF THE FACTS

Daniel is rated 100% disabled Veteran and Valery is a college math tutor, Veteran, and teacher. Daniel and Valery have been Montana residents on or after 1990 and both are part owners and voting members of Glastonbury Landowners Association Non-Profit Corporation (hereafter called GLA). The parties’ joint ownership in the GLA Non-Profit Corporation requires them to hold monthly meetings and allow O’Connells’ attendance in person at GLA meetings (per MCA §35-2-526). GLA President–Charlette Mizzi’s hearing testimony said in the past 11 years, there has not been contact between parties outside of GLA meetings. GLA Petitioners did not submit any evidence of any unwanted contact from Daniel and Valery.

In August 2017, Valery's candidate bio was sent to GLA voting members to report she filed a report with Park County Sheriff's Office against GLA President–Dennis Riley for Riley's attempted "assault" against Valery at a Aug. 2017 GLA Board meeting¹. A month later on September 11, 2017, Val attended another GLA Board meeting (this time) with her husband –Daniel gave Riley a warning:

Park County Sherrif Deputy Dykstra's hearing transcript pp. 79: "Daniel's statement (Sept. 11, 2017) was "not a threat of death but a "defensive statement" included "a fairly well know quote by a famous General [Mattis "be courteous, professional, but have a plan to kill every person you meet."]. It is a defensive statement. The reference is to what he (Mr. O'Connell) would do if his wife was threatened in the future."

District Court Interim Orders (Dec. 22, 2017 pp. 6-7 *Exhibit 5*) said, "Daniel O'Connell came to the (Sept. 2017) GLA Board meeting on Sept. 11, 2017 and also told Dennis Riley "...IF YOU COME AGAINST MY WIFE, YOU COME TO MY WIFE AGAIN, YOUR GONNA HAVE TO COME AGAINST ME. AND I WILL DEFEND AND PROTECT...my territory... I SAID IF."

Daniel's statement above was said only once at the beginning of this four hour meeting held on Sept. 11, 2017 with all twelve GLA Board members present. During this meeting, no one objected to Daniel's statement (above) or his conduct or Valery's conduct. After this meeting and before October 2017, Deputy Dykstra (hearing testimony pp. 78-79) reported he was approached by two GLA Board members– Dennis Riley and Leo Keeler;" and they gave Deputy Dykstra a recording of Daniel's statement made at this meeting. Deputy Dykstra's testimony

¹ At the August 14, 2017 GLA Board meeting, Dennis Riley hearing testimony said he "approached towards where Val was sitting" after Riley "lost his temper" "banged his fist on the table" and "was angry at Val for calling him a liar." Witness Charles Barker testified he turned Riley away from Val "I guess to stop him" and said, "no Dennis, no Dennis..." Deputy Dykstra testified that Val O'Connell filed a report claiming Riley "tried to physically assault her;" and there were two prior reports of assaults that Val reported happened to her at GLA meetings.

(transcript pp. 79) said he investigated it and told Riley and Keeler² that Daniel's statement (Sept. 11, 2017) "wasn't a threat of death."

Then on Oct. 4, 2017, eight out of twelve GLA Board members filed this case Petition (in Justice Court) demanding "Temporary" Order of Protection. On Oct. 12, 2017, the Justice Court granted a "Temporary Exparte Order... of Protection." O'Connell filed for relief in their "Motion & Affidavit to Terminate the "Exparte Order of Protection." On that same day as the Order, GLA refiled their Petition in District Court (as case DV-17-135). Daniel's statement became the basis for GLA Petitioners' Order of Protection. GLA Petition (pp. 2) alleged Daniels' statement was an "imminent" threat of death" and:

"Their [Daniel and Valery O'Connells'] stalking behavior includes threatening the [GLA] Board constantly with lawsuits, threatening the members attending [meetings] with lawsuits, and on September 11, 2017, [at the meeting, Daniel] threatening the Petitioners with death."

Out of twelve GLA Board members total, four GLA Board members (including Mizzi, Regina Wunch—GLA Treasurer, Paul Rantallo, & Newman Brozovski) all refused to sign that GLA Petition. According to Valery's affidavit, Riley retaliated against her by using Daniel's statement as an excuse to file the Petition relief to "remove O'Connells from all GLA meetings."

² GLA WITHHELD DEPUTY DYKSTRA's REPORT FROM THE COURT: O'Connells filed sanction motion that stated GLA Petitioners—Riley and Keeler withholding evidence in their Petition of Deputy Dykstra's report amounts to "fraud or false swearing and warrants sanctions."

On November 8, 2017, a *de novo* hearing was held to consider GLA's Petition for "Temporary" Order of Protection. Six out of eight GLA Board member Petitioners failed to testify at the *de novo* hearing. Hearing transcript (pp. 99) shows Valery made verbal motion request to remove or "bump" these six absentee Petitioners from the Petition; her motion was ignored. Also, District Court repeatedly denied Daniel and Valery's eight requests to testify at the hearing. Hearing transcript shows O'Connells both made repeated objections, because they did not get to testify at the hearing, and Daniel was denied to cross-examine any witnesses. O'Connells' rule 60 motion said this denied them a fair hearing and due process defense against the Petition.

Only two Petitioners—Dennis Riley and his friend Dan Kehoe testified against O'Connells at the Petition hearing. Riley and Kehoe both testified that Valery did NOT threaten anyone, and only Kehoe felt threatened by Daniel's statement. GLA President—Charlette Mizzi hearing testimony (pp. 89) swore in the 11 years Mizzi attended GLA meetings with O'Connells, she never saw or heard O'Connells "threaten" "harm" or "intimidate" or "stalk" "anyone."

On Dec. 22, 2017, District Court Judge—Gilbert issued a two year "Interim Order of Protection" against both Daniel and Valery for "stalking" (per MCA §45-5-220); which order erroneously interpreted O'Connells behavior at GLA Board meetings of "disrupting meetings" and Daniel's free-speech statement to be a "threat" and "stalking." Then nine months later on Aug. 6, 2018, without a

hearing, without any cause, and absent any findings, the Court issued a “Final Order of Protection” that permanently restrained Daniel and Valery from attending any GLA meetings or contact with GLA Petitioners. As a result, O’Connells filed a counterclaim motion, sanction motion, and rule 59 and rule 60 motions against all Orders of Protection; which motions were denied by the District Court. In Nov. 2018, O’Connells filed timely notice of appeal “for a decree from ALL judgments or orders entered in the DV-17-135 cause of action against the O’Connells...”

C. SUMMARY OF THE ARGUMENT

The primary reason for GLA’s complaint was that on September, 11 2017, Daniel O’Connell attended a GLA meeting and made an alleged threatening statement about protecting his wife “if” Dennis Riley came at his wife again. GLA Petitioners filed for an Order of Protection claiming Daniel’s statement was “stalking” as the primary reason given for requesting such order. Valery was also accused of stalking for “disrupting” GLA meetings.

Overall, GLA’s PETITION FAILS TO ESTABLISH THE OFFENSE OF STALKING. GLA’s Petition did NOT contend Valery said anything threatening at all; and GLA’s Petition did NOT contend O’Connells threatened anyone, other than lawsuit threats and Daniel’s statement—not a threat, but protected free speech.

THE PETITION ALSO FAILS TO SET FORTH SUFFICIENT FACTS OF IMMEDIATE DANGER. Regardless of sufficiency of the evidence (or lack) of any underlying offense of stalking, the court Orders failed to find (as MT. stalking

law MCA §40-15-201 required) that GLA Board members are subject to “immediate” harm; and Court Orders findings fail to prove “good cause exists for the temporary order of protection to be continued, amended, or made permanent” as MCA §40-15-202 required. On the contrary, Daniel’s free speech statement and O’Connells meeting “disruptions” or complaints show lack of “good cause” and lack of “immediate” harm against GLA as sufficient grounds to deny all Orders. O’Connells’ motions against all orders contend District court Orders, as a matter of law, fail to find “good cause” to determine that the Petition lacks sufficient facts to establish immediate danger; and Petition lacks evidence to establish the offense of stalking—especially since Daniel’s statement (said once not repeated) is protected free speech. In summary:

- a. District Court’s last Order (October 26, 2018) fails as a matter of law absent required elements of “stalking” and unjustly denied the counterclaim relief to dismiss GLA’s Petition on Summary judgment for “failure to state a claim for relief” per rule 12(b)(6).
- b. Also the “Final Order of Protection” fails as a matter of law violating MCA §40-15-403 & §40-15-202 & MCA §45-5-220. This is because the “Final Order...” is absent a hearing and did not give O’Connells any “an opportunity to be heard before the court issued the orders” and permanent restraint did NOT “issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection” (as §40-15-403 requires); and final order failed to give any

findings of facts or what, if any “good cause exists for the temporary order of protection to be continued, amended, or made permanent” as MCA §40-15-202 required.

c. Temporary Exparte Order...(Oct. 12, 2017) & Final Order & Interim Orders all fail as a matter of law, because they fail to give any “presentation of credible evidence of violation of this [stalking] section” as requirement per MCA §45-5-220(4); and Orders fail to give “good cause” for the “Exparte” “temporary order to be continued, amended, or made permanent” as MCA §40-15-202 required.

d. Temporary Exparte Order...(Oct. 12, 2017) & Final Order & Interim Orders all fail as a matter of law, because, in addition to evidence of violation of certain enumerated offenses, the court failed to find evidence of “immediate” harm to GLA Applicants; as MCA §40-15-201(2) this law requires.

Thus, the Temporary Exparte Order and Interim Order (Dec. 22, 2017) both fail as a matter of law and arbitrarily and capriciously err for abuse of the Court’s discretion for violating law requirements above; and Orders denied Daniel’s constitutional right to free speech; and Orders lack the necessary elements of stalking and are contrary to all material evidence of affidavits and hearing testimony. Also, the Final Order arbitrarily and capriciously errs for abuse of the Court’s discretion, and it also fails as a matter of law for violating law

requirements above: that failed to give any findings or facts or conclusions of law, no hearing, and no cause of action to order a permanent restraint.

All Orders should be reversed by this Court (as a matter of law and for abuse of discretion) especially because, two GLA Petitioners—Riley and Kehoe hearing testimony (cited below) admitted Valery never threatened anyone and only Riley felt threatened by Daniel’s statement made only once—which is not a repeated threat; and Deputy Dykstra’s hearing testimony said Daniel’s “defensive statement” was “not a threat of death;” and Mizzi’s testimony (cited above) refuted GLA Petition claim of “stalking;” and O’Connells’ two sworn affidavits also refuted the “stalking” claim.

Additionally, the Court ignored O’Connells objections to hearsay testimony from Riley, Kehoe, and McCowen. Interim Order finding (pp.7) admits the Court relied on hearsay “witnesses testifying on behalf of the Petitioners.” Six out of eight Petitioners were absent from the hearing, so Interim Order (pp.7) thus admits her Finding relied on hearsay testimony AFTER the Court overruled all Valery’s objections to all hearsay testimony and speculation from Kehoe and Riley at the hearing (see transcript pp. 7, 8, 25, 45, 59, 61, 81). The Court eight times also denied O’Connells to testify in their own behalf; and the Court refused to let **both** O’Connells cross-examine witnesses; which fatally harmed their defense and due process right to a fair and impartial hearing. The Court then denied O’Connells sanction motion; which motion cites hearing testimony and evidence factually

proving GLA Petitioners negligently or deliberately withheld material evidence of Dykstra's report that exonerates Daniel's statements as being non-threatening, and after Petitioners lied under oath about O'Connells "having firearms" as negligent misinformation or fraud on the court to falsely procure an Order against them.

III. ARGUMENT

ISSUE #1: The GLA Petition and District Court Orders of Protection Failed to Contain Sufficient Facts To Warrant the Offense of Stalking Or Threat of Immediate Harm.

GLA's PETITION FAILS TO ESTABLISH THE OFFENSE OF STALKING.

The primary reason for GLA complaint was that Daniel O'Connell made an alleged statement (at GLA meeting on September, 11 2017) that the Petition (pp. 2) claimed was "stalking." Daniel's full statement (transcript pp. 27) said:

"I would like to dissuade you, President Riley, and anyone else, that I am not a pacifist, in fact think of me as an anti-pacifist where I live by a kind of code where I embrace a motto you have heard [from General Mattis], which is to be courteous, professional, but you have a plan to kill every person you meet." "When I heard about what happened, last month, to my wife [Valery], it brought, you know, a lot of rage in me, I must admit, and I still kind of have some of that rage, now – which is thirty days later – but if you come against my wife, you come to my wife again, and you're going to have to come against me, and I will defend and protect – and somebody interrupted, and I said if – I will defend and protect every square inch of my territory."

At no time during this four hour meeting was any comment or reply made by GLA regarding Daniel's statement above. GLA Board members–Riley and Keeler later gave a recorded copy of this Daniel's statement to Park County Sherrif

Deputy Dykstra, and Dykstra reported back to them that Daniel's statement was "not a threat of death." GLA Petitioners hid this deputy's report from the Court when it filed for an "Exparte" Order of Protection claiming Daniel's statement was "stalking." This statement was the primary reason stated in GLA's Petition for requesting such order. The Petition also accused Valery of "stalking" by threatening to sue GLA and (at the hearing) Kehoe claimed Daniel's statement and Valery's "disruptive" conduct at GLA meetings were evidence of "stalking."

The offense of stalking is defined in law as;

"The person commits the offense of stalking if the person **purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly**; (a) following the stalked person; or (b) harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication... or any other action, device, or method. (2) This section does **not** apply to a constitutionally protected activity... (6) Attempts to contact the stalked person after the accused person had been given actual notice that the stalked person does not want to be contacted or followed constitutes prima facie evidence that the accused person purposely Or knowingly followed, harassed, threatened, or intimidate the stalked person."

Mont. Code Ann. Section 45-5-220 (emphasis added).

GLA's Petition pleading did NOT contend that O'Connells followed them.

Accordingly, this is a non-issue. And GLA's Petition and hearing transcript did NOT contend Valery said anything threatening ever. GLA's Petition (pp. 2 cited below) only contends:

"O'Connells have always been disruptive, threatening and harassing towards the Petitioners at the Board meetings... Their behavior includes threatening the [GLA] Board constantly with lawsuits, threatening the members attending [meetings] with

lawsuits, and on September 11, 2017, [at the meeting, Daniel] threatening the Petitioners with death.”

GLA Petition above said O’Connells have “always been...threatening” but the hearing transcript testimony cited no threats at meetings except for Daniels one statement (above). Petition (cited above) asserts that Daniel made one threatening comment at a meeting on September 11, 2017. He never repeated the statement that was quoting General Mattis. The Court yet falsely interpreted Daniel’s statement as “reasonable apprehension of bodily injury or death” (per §45-5-220 MCA). Interim Orders (pp. 7) finding somehow divined “From observing the demeanor of the witnesses testifying on behalf of the Petitioners,...that the Petitioners have experienced reasonable apprehension of bodily harm” merely because GLA “petitioners interpreted it as threatening.”

A *de novo* hearing was held Nov. 2017 to consider the GLA Petition request for “Temporary Order of Protection.” The court **refused** eight times to ever let Valery and Daniel testify at this hearing. Also at this hearing, Valery did repeatedly object to hearsay testimony and speculation by the only two Petitioners who did testify– Kehoe and Riley (see transcript pp. 7, 8, 25, 45, 59, 61, 81). Yet, six out of eight Petitioners were absent and did **not** testify at this *de novo* hearing. This fact did not stop the Court from granting the six absent Petitioners all “Permanent” Orders of Protection”(Aug. 2018). But notice the “Interim Order” finding (Dec. 2017, pp.7) admits Findings were based on “witnesses testifying on behalf of the

Petitioners” at the hearing. This obviously implies that the Interim Order relied on **hearsay** testimony “on behalf of the [six absentee] Petitioners”). Since six Petitioners were absent from the hearing, this Finding (pp. 7) means that the Orders of Protection relied on hearsay testimony of Riley and Kehoe.

Also notice the stalking statute (§45-5-220 cited above) says it does “not apply to a constitutionally protected activity.” Daniel’s (Sept. 11th) statement was constitutionally protected free speech. Yet District Court in error refused to even consider O’Connells’ counterclaim & rule 60 motion pleadings that argued Daniel’s statement was encompassed in the caveat of constitutionally protected free speech.

This court’s Opinion, *SJL Assocs. Ltd. P’ship v. City of Billings*, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993) said, “statutory interpretations will not be elevated over the protection found within the Constitution.”

The MT. Supreme Court examined free speech in the context of stalking in *State v. Cooney*, (1995) 271 Mont. 42, 894 P.2d 303. The Supreme Court Opinion in that case defined the limits of free speech and noted:

‘There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting words”--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are not essential part of any exposition of ideas, and are of such slight social value...

State v. Cooney, (1995) 271 Mont. 42, 894 P.2d 303, citing to *State v. Lance* (1986) 222 Mont. 92, 103, 721 P.2d 1258, 1266.

Daniel O'Connell's defensive statement (quoting General Mattis) is such protected free speech. Nothing in his statement is lewd, profane, libelous, or "fighting words." While GLA Petitioners merely interpret Daniel's words as offensive, he said it only once and not said by Valery, his words did not constitute the offense of stalking. They were meant to warn Riley to stay away from his wife, and Daniel added "if" Riley again came at his wife he would "protect and defend" them. But District Court Interim Orders of Protection called his statement "stalking" and in error never considered O'Connell's rule 60 motion pleading throughout that argued this Daniel's statement was constitutionally protected free speech.

'Even on *de novo* review, a single act of threatening or harassing nature will not give rise to stalking.' Mont Code Ann. Section 45-5-201, see also, *State v. David*, 266 Mont. 365, 880 P.Zd 1308.

The burden of proof of the offense of stalking requires GLA to show repeated acts of a threatening, harassing or intimidating nature. Montana law relating to the offense of "stalking" demands the actions repeatedly caused deliberate "substantial emotional distress" or "reasonable apprehension of bodily harm." The law demands that stalking actions be more than just Daniel's one statement or flippant comments that allegedly disrupt GLA meetings. Other than Daniel's free-speech statement, GLA (Petition and hearing) gave no evidentiary basis for stalking, nor were Petitioners at risk of harm from Daniel or Valery if not restrained from further contact with the GLA.

All Orders finding O’Connells meeting conduct was a threat is in error and outside the scope of the Petition claim itself (above).

The Court’s Interim Order Finding is in error to say “disrupting” meetings was a threat or stalking. Under this criteria, every speaker at every Board meeting in America could be deemed stalkers for “disrupting” a meeting. Also, GLA Board member–Mizzi hearing testimony (pp. 91-92) said that GLA meeting “disruption comes from a lot of people... there’s other people that disrupt meetings.”

Furthermore, GLA Petition and all Orders of Protection failed to establish the prerequisite credible evidence for proof of the offense of stalking—as repeated deliberate distress or danger of harm. Daniel’s statement intent was to ward off Dennis Riley after Riley’s attempted assault (at the meeting 30 days prior). This was after Riley hearing testimony (pp. 18-19) admits he “pounded his fist on the table” was “angry” and “lost his temper” at Val for “calling [Riley] a liar” and came about 4 feet of her before being turned back by another member–Charles Barker (transcript pp. 84). Riley was also upset at Valery for telling other members about this event. Valery’s affidavit pleading has a copy of Riley’s email to other GLA Board Petitioners shows Riley instigated the Petition after Valery reported Riley’s alleged attempted assault to other GLA members and the deputy. In any case, Riley’s actions are what prompted Daniel’s “defensive statement.”

Free speech allows Daniel’s statement (quoting General Mattis) whose intent was to protect his wife. And GLA Petitioners–Riley and Kehoe hearing testimony

reported nothing Valery did at a meeting was threatening; and many other members are also “disruptive” at GLA meetings (Mizzi testimony pp. 91). The Petition & hearing did not show any such conduct giving rise to the stalking charge.

THE PETITION FAILS TO SET FORTH SUFFICIENT FACTS OF IMMEDIATE DANGER.

To award a protection order, a court must find that failure to award the restraining order will result in immediate harm to the GLA Applicant. (Mont. Code Ann. Section 40-15-201(2)) The law provides that in addition to evidence of violation of certain enumerated offenses, the court must find the possibility of immediate harm. Orders do not assert any evidence that O’Connells conduct at meetings posed any immediate harm to GLA (as required by MCA §40-15-201(2)). The Petition never cited any meeting conduct other than threats of lawsuits and Daniel’s statement. Lawsuits are not a threat, and neither was Daniel’s protected free-speech statement. Each and every contact made by O’Connells with GLA Petitioners occurred only during GLA meetings. GLA failed to show they gave O’Connells any notice or any warning against their meeting conduct or if or how they were in danger from such meeting conduct.

All Orders are outside the scope of the petition charge and do not support stalking. Even if disrupting meetings were a threat, GLA allows other members to “disrupt” GLA meetings according to Mizzi. Riley hearing testimony (pp. 28) said GLA Board allows its members to have comment periods, some all speaking at

once. But such contentious Board meetings certainly do not pose an immediate threat to the GLA Board. So regardless of sufficiency of the evidence (or lack) of any underlying offense of stalking, the court Orders failed to find GLA Board members are subject to immediate harm from O'Connells meeting "disruptions" or Daniel's free speech statement (said once): and instead shows lack of immediate harm against GLA as sufficient grounds to deny the Order of Protection. Therefore, the district court did error for failing to determine GLA Petition lacks sufficient facts to establish immediate danger; and Petition lacks evidence to establish the offense of stalking—since Daniels statement (said once) was not repeated and is protected free speech.

ISSUE #2: Nov. 8, 2017 *de novo* hearing violates O'Connells' due process right to a fair & impartial hearing.

The Nov. 8, 2017 *de novo* hearing did indeed violate O'Connells' due process and right to a fair impartial and hearing; which fatally harmed their defense against GLA's Petition. The Court's abuse of process is factually proven by the *de novo* hearing transcript showing the court denied both O'Connells to testify, and it denied Daniel to cross examine any witness, then it allowed **hearsay** testimony "on behalf of the [GLA] Corporation" and **hearsay** testimony "on behalf of the [six absentee] Petitioners" (excerpts cited below):

(transcript (pp. 3) **MS. GRIFFITH:** And I'll be honest, your Honor, we've been debating how to present this to the Court. I've never actually asked for a restraining order on behalf of a corporation, before, but I think we do have to keep it the corporation and the named individuals. **THE COURT:** Okay..."

(transcript pp. 6) **(Riley) Q.** Okay. What's your general feeling regarding those who attend and the feeling about the O'Connells at the meetings? **MS. O'CONNELL:** Object, calls for speculation. **THE COURT:** Overruled.

(transcript (pp. 7) **(Riley) Q.** Okay. What is your purpose for asking for this order of protection for the Board, as a whole? **A.** Not only does the Board – **MS. O'CONNELL:** Objection, could we say that it's hearsay to speak for the rest of the Board? **THE COURT:** Overruled.

(transcript (pp. 24) **(Riley) Q.** If you don't receive the order of protection, what do you believe is going to continue to happen? **A.** Well, I think that there will be more threats. I think that the audience participation in meetings will go way, way down. People will not attend. **MS. O'CONNELL:** Objection, that calls for speculation and opinion. **THE COURT:** Overruled.

(transcript (pp. 61) **(Kehoe) A.** At our last meeting, we passed a motion to have an armed guard at the meeting. **Q.** Why? **A.** Because, as the Board, we feel responsible for everyone – **MS. O'CONNELL:** Your Honor, objection. **THE COURT:** Your objection? **MS. O'CONNELL:** He can't – he's not the President. Unless he has a statement from each board member as to why they voted for it, he's speculating and has no idea. **THE COURT:** Why don't you lay a little foundation for why he understands that to be the reason... **A.** The reason was because, from the September meeting, we had felt that there was a threat level that us, just as the Board, was not necessary to meet should something happen to fulfill that threat. **Q.** And where was the threat coming from? **A.** Daniel O'Connell.

(transcript (pp. 59) **(Kehoe) Q.** Okay. Has she [Administrative Assistant] come to you to discuss her further employment with the Board? [Kehoe] **A.** She, actually, relayed that to Charlene, and Charlene relayed it to the Board. **MS. O'CONNELL:** Objection. She's asking about hearsay information, somebody says something to somebody else that says something to him. [objection was denied]

(transcript (pp. 69) **(Kehoe) Q.** In your mind, are the O'Connells a team **A.** Yes. **Q.** Why? **A.** Because Valery gave the story to Daniel in a very select – from what we heard – **MS. O'CONNELL:** Objection. **THE COURT:** Overruled.

The Court then denied O’Connells’ seven requests to testify, as follows:

(hearing transcript pp. 42) **MS. O’CONNELL:** Your Honor, could I just say [McCowan] that she’s speculating ...she has no idea why I was looking at the clip-board. **THE COURT:** And you can testify to that when it’s your turn.”

(hearing transcript pp. 42) **MR. O’CONNELL:** Your Honor, may I interject something? I would like, at some point, to actually speak and get up there and ask questions of the petitioners. And I further only recognize two petitioners in this room, and there are eight against us, and we can’t even question the eight. **MS. O’CONNELL:** Are the rest of them here, your Honor? **THE COURT:** Alright, further direct. **MS. GRIFFITH:** Thank you, your Honor.”

(hearing transcript pp. 75) “**MS. O’CONNELL:** Okay. Can I testify while he’s coming in [the court], though, about something? **THE COURT:** No.”

(hearing transcript pp. 79) **MS. O’CONNELL:** Your Honor, can I testify, for the record, that I – **THE COURT:** No, not at this time.”

(hearing transcript pp. 87) **MS. O’CONNELL:** can I testify, now, because I talked to him on the phone, not in person? **THE COURT:** No, you can’t...”

(hearing transcript pp. 101) **MS. O’CONNELL:** Your Honor, I want to make an objection. I never got to testify at this hearing, and neither did my husband. **THE COURT:** Well, you had a lot more time spent at the hearing presenting your case in cross-examination...” **MS. O’CONNELL:** I thought you said that we had – only ten minutes longer we’d gone, at the last check...”

(hearing transcript pp. 101) **MS. O’CONNELL:** Since me and Daniel didn’t get to testify, can we offer additional testimony based on what we heard, today? **THE COURT:** No...”

All these hearing transcript excerpts (cited above) prove for this issue #2 that Nov. 8, 2017 *de novo* hearing violates O’Connells’ due process right to fair & impartial hearing. The Court failed to give due weight to all testimony, and the hearing was neither fair nor impartial (O’Connells never got to testify and Daniel

was denied to cross-examine. The Court's abuse of discretion overruled all Valery's objections against the hearsay testimony, then the Court relied on unsupported or hearsay allegations (from Riley, Kehoe and McCowan³) to trump testimony against the stalking charge. All Orders of Protection should be reversed by this Court as a matter of law, abuse of hearing process, and abuse of discretion, and because of the all lack of sufficient facts to establish immediate danger and the lack of credible evidence (excluding **hearsay** evidence) to establish the offense of stalking.

ISSUE #3:

The District Court did err to dismiss O'Connells' Counterclaim summary motion relief under rule 12(b)(6) & sanction motion, and other motion relief to "dismiss all Orders of Protection."

District Court's last Order (October 26, 2018) abused its discretion and fails as a matter of law.

Oct. 28th Order fails as a matter of law that dismissed O'Connells Counterclaim and rule 60 motions relief request "to dismiss all orders" for 'lacking necessary elements of stalking and lacking "just cause" for Orders of Protection under the stalking statute.' That Oct. 2018 Order also fails as a matter of law because GLA's Petition "failed to state a claim for relief" per rule 12(b)(6).

³ The Court denied Valery's objections against McCowan's testimony about herself (not a petitioner) made outside the scope of the Petition (see hearing transcript pp. 42 of McCowan's testimony against Valery's objection raised since it did 'not relate to the petitioners as relevant'). The Interim Order yet cited McCowan's testimony (about herself) as evidence for "stalking."

A District Court's determination that a complaint failed to state a claim for relief is a conclusion of law. See *Boreen v. Christensen* (1994), 267 Mont. 405, 408, 884 P.2d 761, 762. This Court's standard of review of a district court's conclusion of law is whether the court's interpretation of the law is correct. *Boreen*, 267 Mont. at 408, 884 P.2d at 762 (citing *Steer, Inc. v. Department of Revenue* (1990), 245 Mont. 470, 474-75, 803 P.2d 601,603).

Rule 60 motion pleadings said District Court Orders in this case acted under “a mistake of law, in error, and any other reason that justifies relief under rules 59 & rule 60” (motion pp. 12). This rule 60 motion said all Orders of Protection were “causing a gross injustice for erroneously interpreting O’Connells “disrupting meetings” and Daniel’s statement (Sept. 11th, 2017) to mean “stalking” (per §45-5-220, MCA) absent necessary elements in the law; including lack of evidence of “stalking” and failure to consider all available evidence” especially hearing testimony against the stalking charge. This is evidenced by Deputy Dykstra’s hearing testimony (pp. 77) and Mizzi’s testimony (pp. 93) refuted GLA Petition claim of “stalking;” and O’Connells’ two sworn affidavits also refuted the “stalking” claim (and O’Connells never got to testify against the Petition claim). But, two GLA Petitioners–Riley and Kehoe hearing testimony (cited below) admit Valery never threatened anyone and only Riley felt threatened by Daniel’s statement:

Dan Kehoe’s hearing testimony:

Hearing testimony from Dan Kehoe (pp. 62-63) **Q.** You said Daniel threatened the Board. **A.** That’s what I said. **Q.** Okay. You never said I [Valery] threatened the Board. **A.** I did not say anything about you threatening or not threatening the Board. **Q.** Okay. Did I [Valery] threaten the Board? **A.** No.

Hearing testimony from Dan Kehoe (pp. 64) said, “A. My understanding is that the legal term of stalking encapsulates the behavior that was going on in the board meetings. Q. Which is? A. Interrupting, and when [Valery] you’re asked to come into order, continue to interrupt only escalating the volume. Q. So, your interpretation of [O’Connells] stalking is interrupting and being loud, correct? A. I’m saying that’s my interpretation.”

Dennis Riley’s testimony:

Hearing testimony from Dennis Riley (pp. 6), “A. In our covenants, it says that our board meetings are open to all of the members. Q. Okay. So, you feel that you need this order of protection in order to exclude them [O’Connells] from the board meetings. A. Yes.

Hearing testimony from Dennis Riley (pp.11) Q. Okay. So, the only time you felt threatened was what Daniel told you at the September 11th meeting. A. Me – Q. Is that the date of the meeting at Daniel said this? A. Me, personally, yes.

Hearing testimony from Dennis Riley (pp. 21), “ Q. Why did you recuse yourself? [Riley] A. I thought it was the ethical and logical thing to do, because it [the Petition request for restraining Order] was evolved out of whatever that August 11th meeting was. Q. So, you got my [Valery’s] official complaint against [you] Dennis Riley that I gave to the Board where I accused you [Riley] of assaulting me, yes? A. Yes.

Hearing testimony from Dennis Riley (pp. 25), A. You know, I wasn’t, initially, afraid, until I started thinking about they [O’Connells] might have guns. I’m, personally, not afraid of either one of them [O’Connells], but if they have guns, I’m concerned.”

Hearing testimony from Dennis Riley (pp. 28) Q. Thank you, you’ve answered the question, now. Did you – you said, just a few minutes ago, that you didn’t feel threatened by me or Daniel. A. Not at the time, no.”

The District Court Orders failed to consider Kehoe testimony that admits Valery never threatened the Board, and Kehoe falsely claims “stalking is interrupting and being loud” contrary to stalking law. Orders also ignored Riley’s witness that he is “not afraid of either one of them” (O’Connells) and did

not feel threatened except for “what Daniel told you [Riley] at the September 11th meeting.” **ALL** Orders of Protection yet instead relied upon unsupported allegations and hearsay while ignoring all testimony (above) against the stalking charge, (which are summarized here):

- a. Kehoe and Riley testimony admitted they did not feel threatened by Valery;
- b. Riley said he only felt threatened by Daniel’s statement (Sept. 11th);
- c. Daniel’s statement was “not a threat of death” according to Deputy Dykstra testimony who investigated that recording of the statement.
- d. Kehoe testimony falsely interpreted O’Connells “stalking is interrupting and being loud” contrary to the stalking law.
- e. GLA President–Mizzi testimony specifically refuted the stalking charge.
- f. O’Connells asked seven times to testify at the hearing in their own behalf; for which the Court refused seven times.

FINALLY, THIS COURT SHOULD TAKE NOTICE THAT THE DISTRICT COURT, IN ERROR, DISMISSED ALL O’CONNELLS’ MOTIONS.

O’Connell motions yet cite numerous false swearing and omissions of material facts in the Petition as just cause to throw out all Orders of Protection:

Oct. 2018 Order did, in error, dismiss all O’Connell motions and counterclaim. O’Connells’ counterclaim requested to “alter/amend/or rescind all Orders in this case,” because they “fail as a matter of law” and for Counterclaim Summary Judgement motion: ”failure to state a claim for relief” (per rule 12(b)(6)) and ‘insufficient grounds for “stalking” charge nor any just cause for issuance of a permanent order of protection retraining both Valery and Daniel.’ Also, the counterclaim and rule 59 & rule 60 motions argued that the District Court did not have legal jurisdiction to issue a “permanent” order of protection under the

criminal stalking statute (MCA §455-220) without any charging document from petitioners or the County Attorney's office.⁴

The last Order (October 26, 2018) denied all counterclaim and sanction motion claims to dismiss the Petition and Orders. None the less, one more issue contained in the O'Connells motions is just cause to throw out all Orders of Protection regarding Petitioners' false swearing and omission of material facts:

For instance, Riley's hearing testimony (cited above) said he was merely "concerned" for his own safety "if they have guns." Yet this issue of O'Connells having guns was a **material** reason cited for need of protection (within Petition pp. 2). Riley and others swore in the Petition that O'Connells "have firearms in their home."⁵ The Court relied upon this sworn statement to issue "Exparte Order...", then denied O'Connells (Oct. 2017) Motion & Affidavit to Terminate the "Exparte Order of Protection" that swore O'Connells never had any guns ever.

The Exparte and Interim Orders also relied upon another false statement (within Petition pp. 2) that swore Daniel's statement was a "threat of death" even

⁴ Rule 60 motion exhibit contained a written copy from Park County Attorney—Bruce Becker that he never authorized the Court to charge O'Connells with stalking (nor would he). And the Court never had any motion or petition asking for a "permanent" order of protection. So the motions raised the issue as to whether or not a permanent order of protection can arise merely from the District Court (without a hearing and without a charging document).

⁵ GLA's sworn Petition (pp. 3) falsely swore under oath that, "O'Connells are both ex-military and to the best of the petitioner's collective knowledge, they [Daniel and Valery] do have firearms in their home." O'Connells sworn affidavit proves they never owned any guns nor shoot guns, and certainly do NOT have firearms in their home. In fact, O'Connells sanction motion and counterclaim motion states GLA Petition claim is a misinformation or fraud meant to influence the court to grant an order of protection.

though Deputy Dykstra told Petitioners–Riley and Keeler otherwise BEFORE they filed their petition. Had Deputy Dykstra reported anything favorable, it would likely have been included in GLA’s Petition. But, GLA Petitioners withheld this material evidence of Dykstra’s report exonerating Daniel's statement; and Petitioners lied under oath that O’Connells “have firearms” without any proof which is grounds for the sanction motion against Petitioners. Petitioners’ negligent misinformation and omission of material fact is thereby just cause to throw out all Orders of Protection.

Here is a brief summary of O’Connells’ motion pleadings “against all Orders of Protection” that violate their rights under Montana laws:

- a. District Court’s last Order (October 26, 2018) fails as a matter of law absent required elements of “stalking” and unjustly denied the counterclaim relief to dismiss GLA’s Petition on Summary judgment for “failure to state a claim for relief” per rule 12(b)(6).
- b. Also the “Final Order of Protection” fails as a matter of law violating MCA §40-15-403 & §40-15-202 & MCA §45-5-220. This is because the “Final Order...” is absent a hearing and did not give O’Connells any “an opportunity to be heard before the court issued the orders” and permanent restraint was NOT “issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection” (as §40-15-403 requires); and final order failed to give any findings of facts or what, if any “good cause exists for the temporary order of protection to be continued, amended, or made permanent” as MCA §40-15-202 required.
- c. Temporary Exparte Order...(Oct. 12, 2017) & Final Order & Interim Orders all fail as a matter of law, because they fail to give any “presentation of credible evidence of violation of this [stalking] section” as requirement per MCA §45-5-220(4); and Orders fail to give “good cause” for the “Exparte” “temporary

order to be continued, amended, or made permanent” as MCA §40-15-202 required.

d. Temporary Exparte Order...(Oct. 12, 2017) & Final Order & Interim Orders all fail as a matter of law, because, in addition to evidence of violation of certain enumerated offenses, the court failed to find evidence of “immediate” harm to GLA Applicants; as MCA §40-15-201(2) this law requires.

e. Counterclaim motion (pp. 8-9) also concluded the Orders of Protection violated O’Connells rights: “... violations of O’Connell’s Constitutional “due process” right to equal protection under the law §45-5-220 MCA... Statutory laws ...and also §40-15-403 MCA...” [&] ...in violation of [these laws and] O’Connells Civil Rights, and more⁶ under Federal & MT.. Constitution Article II. Part II. Section 24...” (free speech).

Contrary to these laws above, District Court Orders of Protection acted arbitrarily and capriciously on its own without a hearing or just cause to grant a permanent “Final Order of Protection.” Stalking laws (MCA §45-5-220, 201 & §40-15-403) require fact finding to prove by a preponderance of evidence if anyone was in immediate danger from “substantial emotional distress or reasonable apprehension of bodily injury.” That did not happen. No hearing was held before the (Aug. 2018) final order, and there are no findings to justify “permanent” restraining Order against both Daniel and Valery. The O’Connell’s have no record, never violated any order or law, and they have been model citizens who served their country twenty-five years ago (with honor). The transcript, motion evidences, and O’Connells’ affidavits at least give reasonable proof against

⁶ Six out of eight GLA Petitioners did not make an appearance at the Petition hearing. Yet the District Court arbitrarily and capriciously granted these six Petitioners Permanent Order of Protection AFTER the Court denied both Mr. and Mrs. O’Connell’s numerous requests to question their accusers-six absent Petitioners (Murphy, Dubiel, Johnson, Keeler, Newby & Seaver) or else remove “bump” them from the Petition.

the stalking charge. But (again), regardless of sufficiency of evidence (or lack) of any underlying offense of stalking, all Orders fail as matter of law for lack of sufficient facts to establish GLA Board members are subject to “immediate” danger (contrary to MCA §40-5-201); and Orders lack sufficient facts or else “credible evidence” to establish the offense of stalking (contrary to MCA §45-5-220(4)); and Final Orders lack “good cause... to make the Order permanent” (Final Orders lack any findings at all), as contrary to MCA §40-15-202.

IV. CONCLUSION

Orders of Protection were envisioned by the Legislature to protect citizens against unwarranted, threatening, harassing or intimidating behavior by abusive persons—not to advance vindictive, revengeful or harassing assaults upon others for whom the petitioning party is displeased. The two GLA Petitioners that testified most certainly advanced that they were not threatened by Valery, and only Riley was threatened by Daniel’s statement; which is free-speech. GLA failed to establish that they were in harm's way, being abused at any meetings that O’Connells attended in the last 11 years. For the foregoing reasons, the Respondents respectfully requests the following relief;

- a. that the district court orders be reversed and rescinded;
- b. that Defendants and Appellants be awarded their costs, and sanction motion damages;
- C. that this complaint be dismissed and Orders of Protection (given to law enforcement) be expunged from the record;
- c. that this Court grant any and all relief that the court deems necessary and appropriate.

DATED this 4th day of February, 2019.



Valery O'Connell–Appellant



Daniel O'Connell–Appellant

CERTIFICATE OF COMPLIANCE

* * * *

This is to certify, pursuant to Rule 11 of the Rules of Appellant Procedure, that this Appellant's brief is double spaced, except for quoted and indented material which is single spaced, and the document uses a monospaced typeface New Times Roman text typeface of 14 points. As pursuant to section (4)(b) or (c) of this rule, there are twenty-seven pages containing 7,130 words in the document (excluding table of contents, table of citations, certificate of service, certificate of compliance and the appendix hereto).

DATED this 4th day of February, 2019.



Valery O'Connell–Appellant

CERTIFICATE OF SERVICE

* * * *

I certify that on February 4th, 2019, a true and correct copy of the foregoing was served by U.S. Mail, first-class postage prepaid to the following:

Alannah Griffith
PO Box 160748
Big Sky, Mt. 59716



Valery O'Connell–Appellant

EXHIBIT APPENDIX

- Exhibit 1 GLA’s “Sworn Petition Fore Temporary Order of Protection...”
- Exhibit 2 “Temporary Exparte Order of Protection” (October 12, 2017)
- Exhibit 3 Interim Order of Protection (December 22, 2017)
- Exhibit 4 Final Order of Protection (August 15, 2018)
- Exhibit 5 Order Granting Summary Judgement [against] Counterclaim (October 26, 2018)
- Exhibit 6 Official Transcript of Nov. 8, 2017 Hearing on GLA’s Petition for Temporary Order of Protection