DA 18-0658

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 121N

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,

Petitioners, Counter-Defendants, and Appellees,

v.

DANIEL and VALERY O'CONNELL,

Respondents, Counter-Claimants, and Appellants.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DV-17-135
Honorable Brenda Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Daniel K. O'Connell, Valery A. O'Connell, Self-represented,
Emigrant, Montana

For Appellees:

Alanah Noel Griffith, Griffith & Cummings, PLLC, Big Sky, Montana

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Submitted on Briefs: April 10, 2019

Decided: May 28, 2019

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Daniel and Valery O'Connell (O'Connells) appeal from a final order of protection from the Sixth Judicial District Court, Park County, that prohibits them from having any contact with Dennis Riley, Daniel Kehoe, Charlene Murphy, Gerald Dubiel, Richard Johnson, Leo Keeler, Kevin Newby, and Mark Seaver (Petitioners). The O'Connells also appeal an order from the District Court granting summary judgment on the O'Connells' counterclaims in favor of the Petitioners and the Board of Directors for Glastonbury Landowners Association, Inc. (the Board). We affirm.

¶3 The Petitioners are eight of twelve individual members who comprise the Board, which manages the Glastonbury Landowners Association, Inc. (Association), a homeowner's association near Emigrant, Montana. The O'Connells and each of the twelve Board members own property within the area governed by the Association and are therefore Association members. According to the Association covenants and bylaws, all property owners in the Glastonbury subdivision may freely attend Board and Association meetings.

¶4 For several years leading up to March 2017, the O'Connells filed numerous frivolous lawsuits against the Association and the Board. In March 2017, after a thorough analysis of their many lawsuits, the District Court declared the O'Connells vexatious litigants and forbade them from filing any additional lawsuits against the Association or Board without prior court approval. While the court's order prevented more frivolous litigation, the Association's covenants and bylaws still permitted the O'Connells to attend Association meetings—and they did. After the District Court's order, the Petitioners witnessed the O'Connells' behavior at Association meetings grow increasingly hostile and threatening. The O'Connells' combative behavior became so severe that Petitioners and some other Association members grew fearful of them; therefore, the Petitioners filed a petition for an order of protection in October 2017.

¶5 The District Court held a hearing on the petition in November 2017. The court limited the hearing to two hours and gave the Petitioners and the O'Connells each one hour of time to use as they saw fit. The Petitioners called the Board President, Dennis Riley; the Board Vice President, Dan Kehoe; and a member of the Association, Michele McCowan, to testify. The O'Connells submitted affidavits for themselves in lieu of testifying in open court, and they called Deputy Tad Dykstra from the Park County Sheriff's Office; Charles Barker, a member of the Association; and Charlotte Mizzi, a member of the Board.

¶6 The District Court issued findings of fact, conclusions of law, and an interim order of protection in favor of the Petitioners in December 2017. The District Court found that

while the O'Connells were consistently disruptive at Association meetings before March 2017, after the court declared them vexatious litigants, their behavior escalated into open hostility toward Board and Association members. The court found that at an August 2017 Board meeting, Ms. O'Connell's behavior—screaming and yelling over other members while pacing the back of the meeting room—was so disruptive that Riley, the Board President, felt compelled to close the meeting early. Although Riley closed the meeting, Ms. O'Connell continued acting out. Riley lost his temper, pounded his fist on the table, walked to within ten feet of Ms. O'Connell, and told her to leave.

¶7 During the order of protection hearing, Ms. O'Connell attempted to characterize Riley's conduct as an assault, but the District Court found Riley's version of events credible, especially in light of testimony the O'Connells elicited from their own witness, Charles Barker. Barker, who was present at the August 2017 meeting, was not concerned for Ms. O'Connell's safety when Riley walked toward her, but he knew Riley was angry and tried to calm him down. The District Court found Barker's account consistent with Riley's.

¶8 The court found that at a Board meeting in September 2017, Mr. O'Connell informed the Board he was "an anti-pacifist" and embraced a motto to "have a plan to kill every person" he met. He stated he felt rage because of Riley's actions at the prior meeting and, "if you come against my wife, you come to my wife again, you're gonna have to come against me." He further warned, "I will defend and protect every square inch of my territory."

¶9 Deputy Dykstra testified Mr. O'Connell's statement about having a plan to kill every person he met was similar to a quote from a well-known general. Deputy Dykstra interpreted the quote as a defensive statement about what Mr. O'Connell would do if his wife was threatened in the future. Nevertheless, the court noted that in response to Mr. O'Connell's threat, the Board passed a motion to hire a private security guard to keep the peace at meetings. The court found one Board member, Dan Kehoe, even began reaching out to Association members he knew had concealed carry permits to ask them to attend Board meetings. The District Court therefore felt it was "not compelled to wait for a catastrophic occurrence to grant the Petitioners' requested relief."

¶10 Based on the testimony on behalf of the Petitioners, the court found the Petitioners interpreted Mr. O'Connell's statement as threatening. The court found the O'Connells' behavior was long-standing and escalating: the O'Connells' conduct caused the Petitioners a reasonable apprehension of bodily injury or death by repeatedly harassing, threatening, and intimidating them. The court observed the Association had one part-time employee who Riley testified was shaken by the O'Connells' behavior and afraid to come to Board meetings. The court also described how Ms. O'Connell's conduct at the November 2017 hearing itself was intimidating, uncontrolled, and had a visible emotional impact on the witnesses she was questioning. Therefore, the District Court held the Petitioners were entitled to an order of protection on the basis of stalking by the O'Connells, as defined in § 45-5-220, MCA (2017). Although this prevented the O'Connells from attending future

meetings in person, the court also provided a method for the O'Connells to remotely participate in Board and Association meetings and business.

¶11 After the court issued its findings and interim order of protection, the O'Connells filed a counterclaim against the Petitioners, alleging that by requesting a protective order based on the definition of *stalking*, the Petitioners violated Montana law by usurping the county attorney's sole authority to bring criminal charges. The Petitioners filed a motion for summary judgment on the counterclaim. In August 2018, the District Court issued a final order of protection. It also granted Petitioners' motion for summary judgment on the basis that criminal charges do not need to be filed before a court can enter an order of protection. The O'Connells appeal the District Court's final order of protection and the court's order granting summary judgment to the Petitioners on the O'Connells' counterclaim. The O'Connells argue three issues on appeal, which we address in turn.

¶12 The O'Connells vehemently dispute the facts presented by the Petitioners throughout the proceedings. However, the fact finder—here, the District Court—was in the best position to judge the credibility of testimony and the allegations before it. *Nielsen v. Hornsteiner*, 2012 MT 102, ¶ 13, 365 Mont. 64, 277 P.3d 1241 (citing *In re Adoption of K.P.M.*, 2009 MT 31, ¶ 28, 349 Mont. 170, 201 P.3d 833). We will not disturb findings of fact on appeal unless they are clearly erroneous. "A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been committed." *Jordan v. Kalin*, 2011 MT 142, ¶ 19, 361 Mont. 50, 256 P.3d 909. We will not overturn a

district court's decision to make an order of protection permanent absent an abuse of the court's discretion. *Jordan*, ¶ 19.

¶13 Where victim and aggressor are not related, the victim may file for an order of protection if he is a victim of stalking, as defined in § 45-5-220, MCA (2017). Section 40-15-102(2)(a), MCA (2017).[1]

> A 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 . . . harassing, threatening, or intimidating the stalked person, in person or by mail, electronic communication . . . or any other action, device, or method.

Section 45-5-220(1)(b), MCA (2017). The court may issue a permanent order of protection when it determines a permanent order is necessary to avoid further injury or harm based on "the respondent's history of violence, the severity of the offense at issue, and the evidence presented at the hearing . . . ." Section 40-15-204(1), MCA.

¶14 After reviewing the hearing transcript and District Court record in this case, we conclude the District Court's findings of fact were not clearly erroneous. All eight Petitioners swore, under oath, they felt they were in immediate danger of harm and needed protection from the O'Connells. Testimony from the November 2017 hearing established the O'Connells' behavior had escalated since the District Court's order declaring them vexatious litigants; they became more harassing, threatening, and abusive. The O'Connells

[1] In 2019, the Montana Legislature revised §§ 40-15-102 and 45-5-220, MCA (2017), which included substantial revisions to the definition of "stalking." Due to the applicable timeline in this case, however, we apply the 2017 versions of the respective statutes.

deny their conduct posed any harm to the Petitioners, but the record supports the District Court's findings that the Petitioners were fearful of the O'Connells and felt threatened with bodily harm. The O'Connells' harassing behavior toward the Petitioners and other members of the Board and Association became so alarming that the Board voted to hire armed guards for Association meetings. One Board member began asking Association members with concealed carry permits to attend Board meetings, and another member began looking into a concealed carry permit for himself. Substantial evidence supports the District Court's findings, the court did not misapprehend the effect of the evidence, and our review of the record has not clearly convinced us the court made a mistake. Therefore, the District Court, which was in the best position to judge the credibility of each party's version of events, did not abuse its discretion when it issued a permanent order of protection against the O'Connells in favor of the Petitioners based on its findings of fact.

¶15 The O'Connells argue Mr. O'Connell's statement to the Board in September 2017 about having a plan to kill everyone he meets is constitutionally protected free speech, and thus, cannot amount to an instance of stalking under § 45-5-220(2), MCA (2017). We have long held that "free speech does not include the right to cause substantial emotional distress by harassment or intimidation," as "such utterances are no essential part of any exposition of ideas" and are of "slight social value." *State v. Cooney*, 271 Mont. 42, 48-49, 894 P.2d 303, 307 (1995); *see St. James Healthcare v. Cole*, 2008 MT 44, ¶ 29, 341 Mont. 368, 178 P.3d 696; *State v. Nye*, 283 Mont. 505, 512-13, 943 P.2d 96, 101 (1997); *see also Virginia v. Black*, 538 U.S. 343, 359-60, 123 S. Ct. 1536, 1547-48 (2003) (holding that the First

Amendment does not protect *true threats*—those statements intended to communicate a serious expression of an intent to commit an act of unlawful violence against a particular individual or group). Although the O'Connells allege Mr. O'Connell took portions of his statement from a quote from a prominent political figure, the District Court found the Petitioners who heard the statement interpreted it as threatening them with bodily harm or death. Further, Petitioners reacted by voting to hire an armed guard, and one Petitioner even considered arming himself. Mr. O'Connell's threatening statement is not a constitutionally protected activity that the stalking statute does not apply to. *See* § 45-5-220(2), MCA (2017).

¶16 Next, the O'Connells argue the District Court violated their due process right to a fair and impartial hearing. "Due process requires notice and the opportunity to be heard at a meaningful time and in a meaningful manner." *Steab v. Luna*, 2010 MT 125, ¶ 22, 356 Mont. 372, 233 P.3d 351 (internal quotations omitted). Before entering an order of protection, a court must hold a hearing where it "shall determine whether good cause exists for the temporary order of protection to be continued, amended, or made permanent." Section 40-15-202(1), MCA.

¶17 The District Court held a hearing on the order of protection. It gave the Petitioners and the O'Connells one hour each to present their respective cases, and the District Court allowed each side to use their time as they saw fit. The District Court also allowed the O'Connells to cross-examine the Petitioners' witnesses, which the O'Connells chose to

allocate most of their time to.[2] They ran out of time to testify themselves, but the District Court allowed them to submit affidavits in lieu of testifying, which affidavits the District Court considered before issuing its findings of fact and interim order of protection. The District Court gave the O'Connells an opportunity to be heard at a meaningful time and in a meaningful manner.

¶18 The O'Connells also cite several objections they made during the hearing to alleged hearsay that the District Court overruled. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M. R. Evid. 801(c). In the O'Connells' examples of purported hearsay, either the witnesses based their testimony on their own perceptions of others' conduct and behavior or the Petitioners did not offer the statements to prove the truth of the matter asserted. The District Court correctly overruled each of the O'Connells' hearsay objections. The court did not deny the O'Connells their due process right to a fair and impartial hearing.

¶19 Finally, the O'Connells argue the District Court erred by denying their various motions for summary judgment, sanctions, and altering, amending, or rescinding existing orders. With few exceptions, the O'Connells based their motions primarily on alternative

[2] The O'Connells object to the District Court's decision to limit who could ask questions on cross-examination to one representative from each party for each witness. Doing so is a widely-accepted practice under M. R. Evid. 611, which allows a court to exercise reasonable control over the mode and order of examining witnesses. The O'Connells were free to cross-examine each of the Petitioners' witnesses, and they had ample opportunity to compare notes and otherwise ensure both of their questions were answered. This argument is without merit.

findings of fact than those the District Court established. We have already concluded the District Court's findings of fact were not clearly erroneous; the District Court did not err by denying the O'Connells' motions based on their factual disputes. Otherwise, the O'Connells argue the District Court lacked "legal jurisdiction to issue a 'permanent' order of protection" because the county attorney never filed stalking charges against them and the District Court issued the permanent order of protection without a hearing or a motion asking for a permanent order. These propositions are patently false: § 40-15-102(5), MCA (2017), states that a petitioner is eligible for an order of protection whether or not the petitioner reports the abuse to law enforcement, charges are filed, or the petitioner participates in a criminal prosecution; the District Court held a hearing on the order of protection; and there is no requirement under § 40-15-204, MCA, that a petitioner must explicitly request a permanent order of protection before the court may enter one—the statute is permissive. The District Court did not err by denying any of the motions the O'Connells made on these grounds.

¶20 The District Court's findings of facts were not clearly erroneous, the court did not abuse its discretion by issuing an order of protection against the O'Connells in favor of the Petitioners, the court did not violate the O'Connells' due process right to a fair and impartial hearing, and the court did not err by denying the O'Connells' motions for summary judgment, sanctions, and altering, amending, or rescinding existing orders. We affirm.

¶21 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR