

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RONALD MOELLER,

Petitioner-Appellee,

v

KEVIN JAMES LINDKE,

Respondent-Appellant.

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UNPUBLISHED  
November 20, 2018

No. 340208  
St. Clair Circuit Court  
LC No. 17-001904-PH

Before: M. J. KELLY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court’s order denying his motion to terminate the ex parte personal protection order (PPO) issued against him and obtained by petitioner. For the reasons stated in this opinion, we reverse.

**I. BASIC FACTS**

On July 20, 2017, petitioner filed a petition for a PPO against respondent, alleging that he was stalking petitioner, as the term “stalking” is defined in MCL 750.411h and MCL 750.411i. In a verified statement, petitioner alleged the following factual basis in support of his request:

[Respondent] has been ordered not to be on our property, but does. He went out to rental property that is on my property. When renter went into [the] bathroom she looked out [the] window and he was there—could have been window peeking. She got scared and told him to get off [the] property and he told her a lot of bad stories about us until she ran into house to call [the] police. He left.

Today [respondent] came 45 minutes early to pick up [O, his daughter]. When told his time was in 45 minutes he got angry and seen my hired man and started yelling and swearing so bad my man got so upset he went home for the rest of the day. Then [respondent] went out on [a] hiking trail that runs in [the] middle of my property and stood on it yelling and saying bad things at the top of his lungs so all around could hear.

When [respondent] is near all he wants to do is fight me. I am 77 years old and I don’t want to fight.

Petitioner also checked a box on the petition for PPO stating that he was requesting an ex parte PPO “because immediate and irreparable injury, loss, or damage will occur between now and a hearing or because notice itself will cause irreparable injury, loss, or damage before the order can be entered.”

On July 20, 2017, the trial court entered an ex parte PPO against respondent. Subsequently, on July 27, 2017, respondent filed a motion to terminate the PPO, alleging that it had been issued on the basis of false allegations.

The trial court held a hearing on the motion to terminate. At the hearing, the court asked petitioner if he wished to present information in addition to what was in the petition. In response, petitioner testified:

I don't appreciate him being on my property talking to my hired man and treating him the way he has. Or up in front to my renters that's on the property. He shouldn't be in their yard or looking around their house or asking them questions. And I just don't appreciate that. Or he goes down the bicycle trail that goes down the middle of our property. It might not be on my property, but it's just off of mine about 15 feet and then standing out there and yelling at my wife and little [O] or my hired man.

He upset my hired man the other day and he had to go home and take the rest of the day off. His nerves are shot, and [respondent] had no right to be hollering at him because of the history of my man happened 40 some years ago when he was getting a divorce. And [respondent] dug up the past, which was none of his business. He put it on Facebook and he's told people about it around the neighborhood and this is something that happened a long time ago and it's none of [respondent's] business.

Petitioner testified that respondent's behavior was very disruptive to his household, adding that on one occasion about a year earlier, respondent had come to his house and got very angry. Petitioner explained that on that occasion, respondent was “dancing around [petitioner's property] like a nut,” and was “spitting and foaming.” He stated that respondent was trying to show petitioner that “he was a tough guy.” Petitioner stated that he did not “appreciate it,” and that at his age he was sure that he wanted to “have a fist-to-cuffs with [respondent].” However, on questioning from respondent's lawyer, petitioner acknowledged that there has not been any confrontation between himself and respondent for a year. Petitioner explained that there were no confrontations because when respondent came out to petitioner's property he always stayed in his vehicle. He also stated that the two of them had not been near each other during the past year.

Petitioner also testified that he was prompted to file the PPO when respondent

started harassing my hired man a lot and the language he uses and then he put it on Facebook about him and told, went around to the neighbors houses telling them about things that was none of his business and most of it wasn't even the truth. And then when he was, [my renter] said she come home from work that

one day and went in the bathroom and looked out and he was standing there staring at the house with her kids and it upset me knowing what he did with [my hired man] and that. I didn't appreciate it, didn't want him around, and we already had the PPO on him. And why he was in her yard talking to her kids, how dangerous that [my hired man] was, was not right. [My hired man] has nothing, has had nothing to do with the law for quite a while.

Petitioner added,

I just don't want [respondent] around my place. He's nothing but trouble and you can't believe a word he says. And I need my hired man. I've got to have him on the farm helping and with him harassing and telling all the neighbors and that, [my hired man] has to use the bicycle trail to go back to where he's living and people are harassing him about things that happened and [my hired man] got all flustered. And the people found out because [respondent's] going off at the mouth to everybody that comes around there. He ought to mind his own business. I don't appreciate it and I don't want him around my place.

Based on the record before this Court, it appears that petitioner's hired man has two criminal sexual misconduct convictions. In both cases, respondent contends the victims were minor children.

The trial court denied the motion to terminate the PPO. However, rather than relying solely on the evidence presented, the judge referenced a contentious custody case between petitioner's granddaughter and respondent. The court explained that it had "gotten to the point where I am really attempting to take very stern control over what is happening because my experience with [respondent] has been that he does not observe appropriate boundaries in the interchanges or exchanges with other people." The judge stated that it also found respondent to "be verbally aggressive," and he also stated that he thought respondent "aggressively pursues what he perceives are his rights" and he did not think respondent cared "what other peoples' rights he tramples in the pursuit of that." Having made those comments, the court explained that because of respondent's behavior it had reached the point where parenting time had to be supervised by an agency.

With regard to petitioner's "hired man," the judge stated that "the issue has been addressed by me" and "CPS." The court explained that an order had been issued stating that the "hired man" was not to be alone with the minor child at any point, and—although the order had not ever been violated to the court's knowledge—respondent did not like it because he did not want the hired man to even be in his daughter's sight. The court further reasoned:

So what [respondent] is now attempting to do is to use whatever means are at his disposal to attempt to embarrass [the hired man] or to make [the hired man's] life difficult or to make [petitioner's] life difficult so that [the hired man] will voluntarily not be around [O]. That's not appropriate. And it has a negative impact on the [petitioner and his family], and that is why [petitioner] filed for this PPO. I don't know how else to say it.

So what I've got is [respondent] as part of this campaign approaching [petitioner's] renters that could cause a financial burden to [petitioner] if the renters decided that somebody looking at them or talking to them . . . is not appropriate and they don't want to live there anymore. [Petitioner's] going to have to find a new tenant. I'm pretty sure he doesn't want to do that.

He could lose his hired man. He's being confronted, and obviously that's not appropriate for [the hired man]. That's obviously I think what [respondent's] goal is, but that's not appropriate either. He should not be interfering in contractual relationship between [petitioner] and his hired employee. I believe that there have been periods where [respondent's] behavior have been inappropriate. And if the Sheriff had arrived and found him screaming into [petitioner's] property, that's at least disturbing the peace, it could be a trespass if [petitioner] ordered him to leave and he did not. There's all kinds of charges that could of happened. The problem is, and we all know this, is the Sheriff is going to have to be there at exactly the right moment in time to make anything happen. And they're not going to be there, I'm just going to tell you. By the time they're going to respond [respondent] is bright enough . . . to get himself away from the situation and that's really what I'm concerned about.

I also believe that there has been confrontations with [petitioner] on his property that's not appropriate, particularly when you're there for a parenting time exchange. And as I've said, that's happened more than once that I'm aware just from the custody action. So, for all those reasons I think that this was done in an effort to harass, annoy [petitioner], to stalk him, to implicate his financial interest in maintaining a relationship with his renters, and with [his hired man]. And so for all those reasons I believe there's a statutory basis for me to grant this PPO, and so I am going to deny the motion to terminate the PPO. The PPO will remain in full force and effect. I'm going to tell everybody part of the reason for that is obviously to give the Sheriff's Department a very easy way to enforce if there's any violation.

This appeal follows.

## II. MOTION TO TERMINATE

### A. STANDARD OF REVIEW

Respondent argues that the trial court abused its discretion by denying his motion to terminate the PPO. A trial court's decision whether to grant or deny a PPO is reviewed for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Id.* A trial court's findings in support of the decision are reviewed for clear error. *Id.* "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). The petitioner

bears the burden of proof in establishing stalking, MCL 750.411h, aggravated stalking, MCL 750.411i, or posting messages through an electronic medium without consent, MCL 750.411s. *Lamkin v Engram*, 295 Mich App 701, 706; 815 NW2d 793 (2012). Furthermore, the petitioner bears the burden “of establishing a justification for the continuance of a PPO at a hearing on the respondent’s motion to terminate the PPO.” *Hayford*, 279 Mich App at 326.

## B. ANALYSIS

MCL 600.2950a governs the issuance of PPOs in nondomestic matters, providing in pertinent part:

an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under section 411h, 411i, or 411s of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s. A court shall not grant relief under this subsection unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s, of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s.

MCL 750.411h(1)(d) and MCL 750.411i(1)(e) define “stalking” as “a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.” MCL 750.411h(1)(c) defines “harassment” as “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress.” However, the term harassment does not include “constitutionally protected activity or conduct that serves a legitimate purpose.” *Id.* As used in the definition of “harassment,” “unconsented contact” is defined to mean “any contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or discontinued.” MCL 750.411h(1)(e). Unconsented contact includes “[e]ntering onto or remaining on property owned, leased, or occupied by that individual.” MCL 750.411h(1)(e). There must be evidence of two or more separate noncontinuous acts of unconsented contact that caused the victim to suffer emotional distress and that would cause a reasonable person to suffer emotional distress. MCL 750.411h(1)(a); *Hayford*, 279 Mich App at 330. “ ‘Emotional distress’ means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.” MCL 750.411h(1)(b).

Here, petitioner had a number of reasons for seeking the PPO. However, his testimony made clear that the behavior complained of was, primarily, respondent’s decision to aggressively confront petitioner’s hired man. Respondent posted comments about the hired man’s history on Facebook, spoke to petitioner’s renter about him, notified people in the neighborhood about him, and, according to the trial court, also got the court and CPS involved. In that regard, the record very clearly reflects that respondent was campaigning against the hired man, likely in an effort to prevent him from having any contact with his daughter. However, respondent’s actions against

petitioner's hired man cannot form the basis for a PPO by petitioner against respondent. In *Patterson v Beverwyk*, 320 Mich App 670, 686 and 686 n 10 (2017), this Court explained that “[a] stalking victim must absolutely be the individual requesting a PPO, either personally or by way of a legally recognized representative,” such as a lawyer. In other words, petitioner cannot seek a PPO on behalf of his hired man, i.e., his employee, even if petitioner can establish that respondent is stalking his employee. See *id.* at 690. In the same way, respondent's conduct against petitioner's renter is likewise not actionable.

Further, although the record reflects that, on one occasion, respondent became very angry and was dancing around petitioner's property “like a nut” and “foaming and spitting,” that incident occurred one year before petitioner sought the PPO. At that time, petitioner did not call law enforcement, nor did he feel a PPO was required. Moreover, petitioner candidly admitted that there have not been any confrontations between him and respondent since then because they have not been near each other. In light of this, respondent's statement in the petition that whenever respondent is “near all he wants to do is fight,” does not reflect that respondent recently wanted to fight petitioner. In that regard, there is no evidence that respondent was, on an ongoing basis, threatening to inflict any physical harm on petitioner.

Although petitioner testified that he just did not “appreciate” respondent's actions, he never offered any testimony suggesting that he actually felt terrorized, frightened, intimidated, threatened, harassed, or molested by respondent. See MCL 750.411h(1)(d) and MCL 750.411i(1)(e). Nor did the court make such a finding. Instead, the court's ruling was premised on its finding that respondent was, essentially, a verbally aggressive man who was running a campaign against petitioner's hired man in an effort to keep the hired man away from his daughter. Although the court found respondent's conduct against petitioner's hired man to be wholly inappropriate, as explained above, that does not suffice to find that respondent was stalking petitioner.<sup>1</sup> See *Patterson*, 320 Mich App at 868. Thus, on the record before this Court, petitioner was unable to justify the continuation of the PPO, and the trial court abused its discretion in ruling otherwise.<sup>2</sup>

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<sup>1</sup> To the extent that the trial court referenced respondent's actions in a child-custody case before the judge, we note that a court may take judicial notice of its own files and records. *Knowlton v Port Huron*, 355 Mich 448, 452; 94 NW2d 824 (1959). Yet, the statements regarding respondent's action in the custody case do not suggest that respondent was stalking petitioner within the meaning of MCL 750.411h(1)(d) or MCL 750.411i(1)(e). Rather, they only serve to reinforce the inference that, having failed to obtain an order in the custody case to keep petitioner's hired man from having any contact with respondent's daughter, respondent decided to directly and indirectly confront petitioner's hired man. Thus, although the actions in the child-custody action would support a finding that respondent was stalking the hired man, they have no bearing on whether respondent was stalking petitioner.

<sup>2</sup> Respondent also argues that the trial court abused its discretion by granting an ex parte PPO in this case. However, given our resolution, we decline to address this issue further.

Reversed and remanded for entry of an order terminating the PPO. We do not retain jurisdiction.

/s/ Michael J. Kelly  
/s/ David H. Sawyer  
/s/ Jane E. Markey