

STATE OF MICHIGAN  
COURT OF APPEALS

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TONYA S. FIELDS,

Petitioner-Appellee,

v

DENISE R. KETCHMARK,

Respondent-Appellant.

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UNPUBLISHED

May 23, 2017

No. 329669

Genesee Circuit Court

LC No. 2015-104824-PH

Before: BECKERING, P.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Respondent, Denise Ketchmark, appeals as of right the trial court’s issuance of an ex parte personal protection order (PPO) at the request of petitioner, Tonya Fields, and its denial of respondent’s motion to terminate the PPO.<sup>1</sup> We affirm.

I. FACTUAL BACKGROUND

On May 20, 2015, petitioner filed a request for a PPO (nondomestic) ex parte against respondent pursuant to MCL 600.2950a. Petitioner alleged that respondent was engaging “in a continuous pattern of deceit, misrepresentation and harassment” designed to bring petitioner into conflict with Ernestine Hayman (Ernestine), the wife of Archie Hayman (Hayman). Specifically, petitioner alleged that respondent, among other acts: (1) sent a fake wedding invitation, which

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<sup>1</sup> Initially, we note that the PPO at issue expired on June 2, 2016, while this matter was pending on appeal, but we decline to find that the matter is moot. “As a general rule, an appellate court will not decide moot issues.” *B P 7 v. Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). “An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief.” *Id.* A PPO may be entered into the Law Enforcement Information Network (LEIN). See MCL 600.2950a(16) and (17). Although a PPO may expire, it may remain entered in the LEIN because there is no statutory provision for the removal of an expired PPO. However, if we were to vacate the PPO, the LEIN would be updated to reflect that the order has been rescinded, terminated, or modified. MCL 600.2950a(19) and (20). Thus, it is possible for this Court to provide some remedy, as respondent, a lawyer, has specifically requested this remedy, and the issue is not moot. See *B P 7*, 231 Mich App at 359.

purported to entail the marriage of petitioner and Hayman, to members of Hayman's family; (2) sent correspondence claiming to be from petitioner to Ernestine's place of employment; (3) created an imposter Facebook page in 2014 in the name of petitioner and Hayman, was still operating the Facebook page, and had continuously posted on the page in the previous 10 months, causing petitioner to experience "severe emotional distress, humiliation, embarrassment, fright and shock"; (4) made threatening telephone calls to Ernestine's niece in which she falsely identified herself as petitioner; (5) invited Ernestine's friend(s) from church to view the imposter Facebook page; and (6) sent photographs that had been altered to put petitioner's face on Ernestine's wedding photograph to Ernestine's place of employment. Petitioner sought the PPO prohibiting respondent from stalking her under MCL 750.411h (stalking) and MCL 750.411i (aggravated stalking), and from posting a message through the use of any medium of communication, including the Internet, under MCL 750.411s (cyberstalking). On June 2, 2015, the trial court entered an ex parte PPO against respondent.

On June 15, 2015, respondent filed an answer to the petition and an affidavit seeking to terminate the PPO. Respondent claimed that the allegations in the petition were false and alleged that petitioner and Hayman were engaged in a conspiracy against her.<sup>2</sup> Respondent also filed a supplemental affidavit.

On June 25, 2015, the trial court held a hearing on respondent's motion to terminate the PPO. Hayman testified as a witness at the hearing. The hearing continued on August 6, 2015, where Hayman gave additional testimony. The trial court called petitioner to testify over respondent's objection, and respondent also testified at the hearing. At the conclusion of the hearing, the trial court ruled that stalking had occurred in the form of harassment based on at least two letters sent to Ernestine in order to adversely affect petitioner and Hayman, with whom respondent was clearly upset. The trial court stated that it could reasonably conclude that respondent sent the letters and that petitioner satisfied her burden of proof to establish entitlement to a PPO pursuant to MCL 750.411h. The trial court found that a reasonable person would be distressed if the wife of a married man received a document saying that the person was having an illicit affair with that man, and it found credible petitioner's testimony that she was actually distressed by the conduct. The trial court entered an order denying respondent's motion to terminate the PPO.

Respondent filed a motion for reconsideration, which the trial court denied.

## II. ISSUANCE OF THE PPO EX PARTE

Respondent contends on appeal that the trial court erred in issuing the PPO ex parte because the court failed to find an imminent risk of harm justifying entry of the order without prior written or oral notice to respondent. We disagree.

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<sup>2</sup> Respondent alleged, as background, that both petitioner and respondent are former girlfriends of Hayman, and also detailed the prior lawsuits involving the parties, beginning with respondent's paternity action against Hayman in 2012, and including Ernestine's petition for a PPO against respondent in 2014, which was denied.

This Court reviews a trial court's determination whether to issue a PPO 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.* This Court reviews for clear error a trial court's findings of fact and reviews de novo questions of statutory interpretation. *Id.*

MCL 600.2950a(12) provides:

An ex parte personal protection order shall not be issued and effective without written or oral notice to the individual enjoined or his or her attorney unless it clearly appears from specific facts shown by verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action before a personal protection order can be issued.

As noted above, petitioner attached a document to her Verified Statement wherein she identified her reasons for seeking a PPO. Those reasons included mailings that respondent was allegedly sending in petitioner's name to Ernestine and to Ernestine's place of employment, and the imposter Facebook page that respondent was allegedly actively operating in the names of petitioner and Hayman. Petitioner alleged that respondent was trying to cause conflict between petitioner and Ernestine, and that respondent's conduct had caused her severe emotional distress, humiliation, embarrassment, fright, and shock. The facts in petitioner's document supported a finding that respondent continued to operate and post on the Facebook page and that such conduct was causing petitioner immediate and irreparable injury in the form of emotional distress. Accordingly, we conclude that the trial court's decision to issue the PPO ex parte did not fall outside the range of principled outcomes and, therefore, was not an abuse of the court's discretion. *Hayford*, 279 Mich App at 325.

### III. CONTINUANCE OF THE PPO

Respondent argues that the trial court erred by continuing the PPO on the basis of findings involving respondent's conduct toward Ernestine—a third party who did not testify at the hearing—rather than conduct directed at petitioner, and without finding that petitioner had satisfied her burden of proof to sustain the PPO. We disagree. As noted above, this Court reviews a trial court's decision to issue a PPO for an abuse of discretion. *Id.*

Petitioner sought the PPO under MCL 600.2950a(1), which provides, in relevant part:

[A]n 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. Relief under this subsection shall not be granted 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. Relief may be sought and granted under this subsection whether or not the individual to be restrained or enjoined has been charged or

convicted under section 411h, 411i, or 411s of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s, for the alleged violation.

Under MCL 750.411h and MCL 750.411i, “stalking” is defined 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)(d); MCL 750.411i(1)(e). “Harassment” is

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. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. [MCL 750.411h(1)(c); MCL 750.411i(1)(d).]

MCL 750.411s(1) provides:

A person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim’s consent, if all of the following apply:

(a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.

(b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

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. “The trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts.” *Id.*

Respondent’s assertions that the trial court did not make findings about petitioner or findings relative to petitioner having met her burden of proof are without merit. The trial court found that stalking had occurred in the form of harassment under MCL 750.411h based on at least two letters sent to Ernestine by respondent. The trial court observed that the letters were made to appear as if petitioner had sent them and indicated that petitioner and Hayman were having an illicit affair, but stated that it could reasonably conclude that respondent actually sent

the documents. Although respondent's letters were not directed to petitioner, with whom respondent was clearly upset, respondent's conduct was "directed toward" petitioner in an effort to cause her emotional distress from the fallout caused by the letters. Stated differently, petitioner was the victim, as she was the "target of respondent's willful course of conduct involving repeated or continuing harassment." MCL 750.411h(1)(f). The trial court further found that a reasonable person would be distressed if that person were named in a letter sent to the wife of a married man stating that such person was having an illicit affair with him, and that petitioner was actually distressed. While petitioner did not specifically use the term "emotional distress," she testified that after Ernestine received the letters, petitioner was worried about retaliation.<sup>3</sup> Thus, contrary to respondent's argument, the trial court made findings related to petitioner. Additionally, the trial court expressly stated that petitioner had met her burden of proof to prove a violation of MCL 750.411h.

Respondent also contends that the evidence was insufficient to support the PPO because the letters were two years old and because another court in a prior proceeding—Ernestine's petition for a PPO against respondent—had found them to lack credibility. Respondent contends that the use of such evidence violated her right to due process. We note that MCL 600.2950a(1) does not have a temporal requirement. With regard to the credibility issue, the trial court in this case, after hearing the testimony of Hayman, petitioner, and respondent, found the evidence in support of the PPO to be credible. This Court "respect[s] the trial court's superior position to assess the credibility of the witnesses before it and will not revisit those assessments in this forum" *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011).

Finally, respondent raises several arguments that she did not set forth in her statement of questions presented. Although we may properly deem these waived, *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000), we nevertheless will address them briefly. Respondent first claims that the trial court ignored evidence supporting a finding that she did not send the letters. However, despite respondent's evidence, the trial court found it implausible that Hayman and petitioner sent the letters to Ernestine. Instead, the court found that the "easiest answer" was that respondent sent the letters because she had the opportunity and motive—she was clearly upset with Hayman and petitioner, as illustrated in a 56-page letter.<sup>4</sup> To the extent that the court's ruling involved issues of credibility, we defer to the court's judgment. *Shann*, 293 Mich App at 307.

Respondent next contends that the trial court erred by continuing the PPO under MCL 750.411h and MCL 750.411s when the letters to Ernestine do not fulfill the requirements of the

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<sup>3</sup> Respondent contends that the trial court acted as petitioner's attorney and engaged in questioning to support the outcome that it was seeking, but "[t]he trial court may question witnesses in order to clarify testimony or elicit additional relevant information." *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992).

<sup>4</sup> The title of the document states that Hayman is "NOT THE MAN YOU THINK HE IS (IT APPEARS TO BE NEARLY TWO DECADES OF LIES, CHEATING, WOMANIZING, ADULTERY, INFIDELITY AND INDISCRETIONS)."

latter statute. In its opinion and order denying respondent's motion for reconsideration, the trial court explained that MCL 750.411s, the so-called "cyberstalking" statute, refers to "any medium of communication," and opined that this phrase was broad enough to include letters sent To Ernestine via traditional postal service. Without deciding whether the Legislature intended MCL 750.411s to apply to traditional postal mail, we note that petitioner presented no evidence that respondent knew or had reason to know that sending the letters would cause "2 or more separate noncontinuous acts of unconsented contact with [petitioner]." MCL 750.411s(1)(a). Likewise, petitioner presented no evidence of any conduct arising from the sending of the letters, let alone conduct that would cause a reasonable person, and did cause petitioner, "to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411s(1)(c) and (d). Therefore, petitioner did not meet her burden of establishing that respondent violated MCL 750.411s when she mailed the letters at issue to Ernestine. Nevertheless, as discussed above, petitioner's evidence that respondent violated MCL 750.411h provided proper grounds for the trial court to continue the PPO. However, if the LEIN shows that the PPO was continued based on violations of MCL 750.411s, and respondent believes that she is prejudiced by the LEIN record, she may seek relief in the trial court.

#### IV. EXCLUSION OF IMPEACHMENT EVIDENCE

Respondent argues that she was denied due process by the exclusion of evidence that would have impeached Hayman's testimony. We disagree. We review a trial court's evidentiary rulings for an abuse of discretion. *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 541; 854 NW2d 152 (2014). "Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of a party is affected or unless failure to do so would be inconsistent with substantial justice." *Id.*

Respondent claims the trial court prevented her from impeaching Hayman's testimony with phone calls and text messages between Hayman and petitioner, a recorded conversation in which Hayman threatened harm to respondent; and a recorded conversation in which Hayman stated that petitioner was mentally unstable.<sup>5</sup> Respondent asserts that the phone calls and messages would have established a conspiracy between petitioner and Hayman. However, the record shows that the trial court narrowed the issue to whether respondent made it appear that petitioner had sent the two letters at issue to Ernestine, and properly exercised its discretion to exclude evidence that was irrelevant to the issue at hand or cumulative.<sup>6</sup> MRE 402; MRE 403. Respondent argues that her impeachment evidence would have rendered Hayman's testimony as a whole completely non-credible. But even if the trial court erred by excluding any of respondent's evidence, any error was harmless because the trial court was aware of respondent's arguments and evidence, from both the hearing and her pleadings, and it rejected as simply not believable her claim that petitioner and Hayman framed her.

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<sup>5</sup> In the statement of facts section of her brief, respondent mentions other impeachment evidence that the trial court excluded, but she fails to present any argument regarding such evidence.

<sup>6</sup> At the August 6, 2015 hearing the court indicates more than once that respondent had impeached Hayman, and that the court "gets it."

## V. RES JUDICATA AND COLLATERAL ESTOPPEL

Finally, respondent argues that the trial court violated her right to due process by failing to apply the doctrines of res judicata and collateral estoppel to bar relitigation of the issues in this case. We disagree. Both of these issues come to the Court unpreserved. Nevertheless, we may review them because they involve questions of law for which the relevant facts are available. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). This Court reviews unpreserved errors for plain error affecting a party's substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). Additionally, the Court reviews de novo the application of legal doctrines, such as res judicata and collateral estoppel. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

“The doctrine of res judicata bars a subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.” *Id.* at 585. The doctrine of res judicata “bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Collateral estoppel “requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.” *Estes*, 481 Mich at 585.

The doctrine of res judicata is inapplicable in the instant case because the question of whether petitioner was entitled to a PPO against respondent was not and could not have been resolved in the first action, which involved Ernestine's petition for a PPO against respondent. Petitioner was not a party to that case and Ernestine, the petitioner in the prior case, could not have raised petitioner's claim for a PPO. In addition, respondent's contention that petitioner and Ernestine are in privity because they are both in a relationship with Hayman is meritless. “To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.” *Id.* at 122. There is no basis to find privity between Hayman's wife and his alleged girlfriend.

Likewise, the doctrine of collateral estoppel is inapplicable because a question of fact essential to the judgment in this case, which involves respondent's conduct toward petitioner, was not litigated or determined in the first action, which involved Ernestine's petition for a PPO against respondent. Nor did petitioner have a full and fair opportunity to litigate in the prior case the issue of whether she was entitled to a PPO against respondent.

## III. CONCLUSION

We conclude that the trial court did not err in issuing a PPO (nondomestic) ex parte against respondent for alleged violations of MCL 750.411h and MCL 750.411s, and for continuing the PPO after petitioner met her burden of proof that respondent's conduct violated MCL 750.411h. We also conclude that the trial court did not commit reversible error by excluding evidence respondent maintains would have impeached Hayman, nor did it commit plain error affecting respondent's substantial rights by not applying the doctrines of res judicata

or collateral estoppel to bar petitioner's claim. Having found no error, we conclude that the trial court did not violate respondent's right to due process.

Affirmed.

/s/ Jane M. Beckering

/s/ Douglas B. Shapiro

/s/ Michael J. Riordan