STATE OF MICHIGAN

COURT OF APPEALS

PATRICK CAVANAUGH, Petitioner-Appellee,	UNPUBLISHED April 23, 2009
v	No. 282147 Oakland Circuit Court
MELANIE SMITH, Respondent-Appellant.	LC No. 2007-738477-PH

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Respondent, Melanie Smith, appeals as of right from a personal protection order ("PPO") that prohibits her from stalking petitioner, Patrick Cavanaugh, and from "writing or communicating slanderous statements with petitioner's employer, community, & associates." Because the trial court did not abuse its discretion in issuing the PPO, we affirm.

Petitioner and respondent met when both were graduate students at the University of Rochester. After graduating in 2005, they moved to different states, but continued to maintain contact. In 2007, petitioner requested a personal protection order (PPO) against respondent, alleging that she was sending threatening emails, that she appeared unexpectedly at petitioner's football camp, and that she had made statements to petitioner's employer and others in the community regarding petitioner's personal relationship with his wife and respondent's belief that petitioner was immoral and dishonest. Following a hearing, the trial court granted petitioner's request for a PPO. Respondent appeals as of right.

Respondent first argues that the trial court erred procedurally by failing to comply with applicable statutes and court rules governing the issuance of a PPO, and also erred substantively because sufficient facts to prove stalking were not established. "A person may file an independent action in the family division of the circuit court to seek the entry of a PPO to restrain another person 'from engaging in conduct that is prohibited under section 411h [stalking][1] or 411i [aggravated stalking][2] of the Michigan penal code . . . .' MCL 600.2950a(1)."

[1] MCL 750.411h.

[2] MCL 750.411i.

Pobursky v Gee, 249 Mich App 44, 46; 640 NW2d 597 (2001). MCL 600.2950a(1) provides that "[r]elief shall not be granted unless the petition alleges facts that constitute stalking as defined in section 411h or 411i . . . ."

Respondent specifically asserts that the trial court failed to comply with MCL 600.2950a(4) because it did not state its reasons for granting the PPO at the hearing. MCL 600.2950a(4) provides:

> If a court refuses to grant a personal protection order, the court shall immediately state in writing the specific reasons for issuing or refusing to issue a personal protection order. *If a hearing is held, the court shall also immediately state on the record the specific reasons for issuing or refusing to issue a personal protection order.* [Emphasis added.]

The record discloses that the trial court stated on the record its reasons for issuing the PPO. The court explained that the evidence showed that respondent was "obsessed" with petitioner even though petitioner had not done anything that would lead a person to believe he was interested in continuing to communicate with that person. In addition, the court explained:

> And you have taken that obsession to the point of crossing the line between what is acceptable behavior and what is unacceptable behavior. You have gone from just communicating with him to slandering his name and libeling his name in public. You've done it on this record, you've done it in writing to his employer, to various officials. He communicated with you to stop and desist, do not bother him anymore, and you continue to do that.
>
> And it was after he basically flat out told you, don't bother me anymore, that you really stepped up your campaign. That's when you really got vicious.

This explanation of the court's reasons for issuing the PPO is sufficient to comply with MCL 600.2950a(4).

Respondent also argues that the trial court failed to comply with MCR 3.705(B)(6), which provides:

> At the conclusion of the hearing the court must state the reasons for granting or denying a personal protection order on the record and enter an appropriate order. In addition, the court must state the reasons for denying a personal protection order in writing, and, in a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order.

Our review of the record reveals that the trial court failed to comply with this rule because it did not separately state in writing the specific reasons for issuance of the PPO. However, an error by the trial court in a ruling or order is not a ground for granting a new hearing or disturbing an order unless refusal to take action appears to be inconsistent with substantial justice. MCR 2.613(A); *Zdrojewski v Murphy*, 254 Mich App 50, 64; 657 NW2d 721 (2002). Because the trial court stated its reasons for issuing the PPO on the record, in respondent's presence, we conclude that appellate relief is not warranted. Respondent was provided with clear notice of the trial

court's reasons for issuing the PPO. Under the circumstances, our decision not to disturb the trial court's order for failure to comply with MCR 3.705(B)(6) is not inconsistent with substantial justice.

Respondent also contends that the trial court erred when it refused to hear her motion to modify or terminate the PPO. MCR 3.707(A)(1)(b) provides that a respondent may move to modify or terminate a PPO after it has been entered. In addition, MCR 3.707(A)(2) provides:

> Hearing on the Motion. The court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion, except that if the respondent is a person described in MCL 600.2950(2) or 600.2950a(2), the court shall schedule the hearing on the motion within 5 days after the filing of the motion.

In this case, the trial court erred by failing to hold a hearing on respondent's motion to modify or terminate the PPO. The motion was filed within 14 days of the issuance of the PPO and, therefore, was timely. Under MCR 3.707(A)(1)(b) and (2), the trial court was required to hear the motion. Again, however, we conclude that appellate relief is not necessary. Respondent has raised in this appeal the same grounds for relief from the PPO that she raised in her motion to terminate or modify the PPO.[3] For the reasons set forth in this opinion, we conclude that respondent had not established a basis for terminating or modifying the PPO and, therefore, our decision not to disturb the PPO because of the trial court's failure to comply with MCR 3.707(A)(1)(b) and (2) is not inconsistent with substantial justice.

Respondent next argues that the trial court erred in issuing the PPO because the facts adduced at the hearing did not establish stalking. In *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002), this Court explained that

> [a] PPO is an injunctive order. MCL 600.2950(30)(c). The granting of injunctive relief is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Kernen v Homestead Dev Co*, 232 Mich App 503, 509-510; 591 NW2d 369 (1998).

Here, petitioner requested a PPO to restrain respondent from engaging in stalking under MCL 750.411h or MCL 750.411i. MCL 750.411h(1)(d) defines "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

---

[3] In addition to her arguments on appeal, respondent also sought to terminate or modify the PPO on the ground that she appeared at the original hearing without legal representation, an issue she does not pursue on appeal. Because a PPO proceeding is civil in nature, rather than criminal, respondent's pro se status, standing alone, did not present a valid basis for relief from the PPO.

> the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

"Harassment" is defined in MCL 750.411h(1)(c) 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. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

In addition, MCL 750.411h(1)(e) provides that "unconsented contact"

> means 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. Unconsented contact includes, but is not limited to, any of the following:
>
> (i) Following or appearing within the sight of that individual.
>
> (ii) Approaching or confronting that individual in a public place or on private property.
>
> (iii) Appearing at that individual's workplace or residence.
>
> (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.
>
> (v) Contacting that individual by telephone.
>
> (vi) Sending mail or electronic communications to that individual.
>
> (vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

MCL 750.411h(1)(a) further defines "course of conduct" as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose."

Thus, to find a person guilty of stalking, there must be evidence of two or more acts of unconsented contact that actually caused emotional distress to the victim and would also cause a reasonable person such distress. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005). MCL 750.411h(4) provides that if the victim asked a defendant to refrain from the unconsented contact, but the defendant continued to engage in repeated unconsented contact, a rebuttable presumption arises that such conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

In this case, the trial court refused to issue a PPO based on petitioner's ex parte petition because it found his factual allegations insufficient to establish stalking. However, the trial court agreed to conduct a hearing after respondent filed her answer. Respondent thereafter filed an

answer in which she made several factual admissions regarding her contacts and communications with petitioner. A party is bound by her pleadings. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 470; 717 NW2d 341 (2006). Respondent's admissions established a course of repeated contact and communication with petitioner. The contacts began with email communications after March 2005, but by June 2007, after petitioner had repeatedly declined respondent's requests to come to Connecticut where respondent lived, respondent's emails began to question petitioner's faith, character, and actions, and respondent also began making degrading comments about petitioner's wife. In July 2007, respondent appeared uninvited at petitioner's football camp in Michigan. In September 2007, respondent threatened petitioner that if he did not reform his life and become an honest person, she would reveal his "poor moral character" to others.

The facts admitted in respondent's answer established the accuracy of the allegations in the petition. Respondent admitted engaging in a course of conduct involving repeated contact with petitioner. Although respondent claimed that petitioner never clearly conveyed that he did not want her to contact him, the definition of "unconsented contact" is not limited to contact in disregard of an express desire that the contact be avoided or discontinued, but rather includes any contact that is initiated or continued without the individual's consent, including approaching the individual in a public place or sending the individual electronic communications. MCL 750.411h(1)(e)(ii) and (vi). The pleadings here established a course of unconsented conduct that included respondent's email communications and an appearance at petitioner's football camp. Respondent admitted that she was not invited to the football camp, and that in August 2007, petitioner accused her of saying bad things about his wife and spreading lies, and that he asked her not to email, text, or call him. In addition, respondent admitted that petitioner threatened her with litigation when respondent told him that she planned to contact his employer and others in the community to share her views of petitioner. These admitted facts support the trial court's determination that respondent engaged in a course of unconsented contact.

Respondent also contends that she did not engage in conduct that would cause a reasonable person to feel terrorized, frightened, intimidated, harassed, or threatened, or that petitioner was actually emotionally distressed by her conduct. Regardless of whether respondent's motivation was petitioner's personal salvation as she claims, or some other vengeful purpose, respondent's continuing unconsented contact with petitioner, her involvement of petitioner's spouse into her communications, and the expansion of her communications to petitioner's employer and other portions of the public sector would cause a reasonable person to feel terrorized, intimidated, or threatened, and to experience emotional distress. In addition, respondent's admission that petitioner threatened her with litigation if she persisted with her course of conduct indicates that petitioner actually felt threatened and distressed by respondent's conduct.

We also disagree with respondent's argument that the trial court improperly issued the PPO on the basis of, and improperly enjoined, constitutionally protected activity or conduct that serves a legitimate purpose. In order to find that a person engaged in stalking, there must be evidence of two or more acts of unconsented contact that caused emotional distress to the victim and that would also cause a reasonable person such distress. *Nastal, supra* at 723. However, MCL 750.411h(1)(c) specifically provides that "[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." Thus, conduct that is constitutionally protected or serves a legitimate purpose cannot constitute harassment and, hence,

stalking. *Id*. Accordingly, a person who engages in constitutionally protected free speech does not engage in stalking. Further, in *Nastal,* the Court relied on the plain meanings of "serve" and "legitimate" to conclude that "the phrase 'conduct that serves a legitimate purpose' means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute." *Id.* at 723.

Respondent argues that her communications to petitioner's employer and other public officials concerning petitioner's moral character was protected free speech and also served a legitimate purpose, because petitioner is a public school teacher, and, therefore, those communications could not constitute stalking. As previously discussed, respondent's uninvited appearance at petitioner's football camp and the pattern of email communications was sufficient alone to establish two series of noncontinuous acts with a continuity of purpose to constitute stalking. MCL 750.411h(1)(a). In addition, however, the trial court found that respondent had also "gone from just communicating with him to slandering his name and libeling his name in public." Accordingly, in addition to enjoining respondent from stalking petitioner, the court also enjoined her from "writing or communicating slanderous statements with petitioner's employer, community, & associates." Speech that is slanderous is not constitutionally protected, nor does it serve a legitimate purpose. Thus, the trial court neither issued the PPO on the basis of, nor improperly enjoined, activity that was constitutionally protected or conduct that served a legitimate purpose.

Similarly, because the PPO only enjoins respondent from making "slanderous statements" about petitioner within the community, and slanderous statements are not constitutionally protected, it does not constitute an improper prior restraint on speech. *Van Buren Charter Twp v Garter Belt, Inc,* 258 Mich App 594, 622-623; 673 NW2d 111 (2003).

Respondent also argues that the PPO is unenforceable because the provision prohibiting her from "writing or communicating slanderous statements with petitioner's employer, community & associates" is impermissibly vague and ambiguous, because it does not provide fair notice of the conduct proscribed and invites arbitrary enforcement because it is not clear what the term "community" denotes. See *People v Carl White,* 212 Mich App 298, 308-313; 536 NW2d 876 (1995).

The meaning of "slanderous" is not vague, but rather has a clear meaning and would be understandable to a person of reasonable intelligence. Also, the meaning of this provision may be ascertained by reference to the conduct that led to inclusion of this provision. The evidence showed that in addition to communicating with petitioner, respondent also sent communications to petitioner's employer and various other officials, which the trial court found involved "slandering his name and libeling his name in public." Petitioner asked the trial court to enjoin similar correspondence to "the same institutions, government bodies, . . . periodicals, [and] individuals," which the court agreed to do. It is apparent that the court's order was simply intended to require respondent to stop doing what she had been doing. The court's order prohibiting "slanderous" statements to members of petitioner's "community" is not so vague or ambiguous that it is unenforceable.

For these reasons, the trial court did not abuse its discretion in issuing the PPO and, accordingly, we affirm. Having found no basis for either appellate relief or remand for further

proceedings, it is unnecessary to address respondent's argument that this case should be reassigned to a different judge in the event of a remand.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio