

STATE OF MICHIGAN
COURT OF APPEALS

TAMMY R. AUSTIN,
Plaintiff-Appellee,

UNPUBLISHED
October 11, 2012

v

JAMES RANDALL BRUMLEY,
Defendant-Appellant.

No. 306335
Oakland Circuit Court
LC No. 2011-787761-PH

Before: MURRAY, P.J., AND CAVANAGH AND STEPHENS, JJ.

PER CURIAM.

Defendant, James Randall Brumley, appeals as of right a personal protection order granted to plaintiff, Tammy R. Austin. We affirm.

Defendant argues the trial court abused its discretion in issuing a personal protection order against defendant. We disagree.

A trial court’s decision to enter a personal protection order is reviewed for an abuse of discretion. *Pickering v Pickering*, 253 Mich App 694, 700-701; 659 NW2d 649 (2002). “An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

“The petitioner bears the burden of establishing reasonable cause for issuance of a [personal protection order].” *Kampf v Kampf*, 237 Mich App 377, 385-386; 603 NW2d 295 (1999). Before issuing a personal protection order, the trial court must find the defendant committed harassment by committing “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 & Assocs Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005). The court may also issue a personal protection order if it finds the defendant committed stalking by committing “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.” *Id.* (citing MCL 750.411h(1)(d)). Conduct that is constitutionally protected or serves a legitimate purpose cannot constitute harassment or stalking. *Id.* “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.*

The trial court did not abuse its discretion in finding defendant's conduct would cause a reasonable person emotional distress and the conduct actually caused plaintiff emotional distress. The evidence established several instances of conduct by defendant that would cause a reasonable person emotional distress. Defendant admitted he struck a rock when plaintiff was present, causing rock chips to fly around her. Defendant called plaintiff lewd names, told her she is a loser, and made weird faces and noises at her. Defendant called plaintiff's daughter a whore and a bitch, and has tape recorded plaintiff's four-year-old granddaughter while she played in plaintiff's backyard. Defendant threatened to kick plaintiff's dog in the head, and threw rocks through her storm door. He often gave plaintiff and her company the middle finger. Plaintiff stated defendant makes her feel very uncomfortable, she does not trust him, and she "wouldn't put it past him to maybe burn my house or something." This evidence established a course of behavior by defendant that would cause a reasonable person emotional stress, and established plaintiff actually felt emotionally distressed.

Defendant argues the trial court erred in relying on his conduct of videotaping plaintiff's property and defendant posting pictures in his yard facing plaintiff in issuing the personal protection order. Defendant claims this behavior is constitutionally protected and serves a legitimate purpose. Defendant, however, does not explain how his behavior is constitutionally protected. Although defendant's tape recording of his property may have served a legitimate purpose in detecting and deterring property crimes against him, we question whether the tape recording served a legitimate purpose in this case, when defendant appears to have been tape recording plaintiff's behavior even when plaintiff was home, and went so far as to tape record plaintiff's four-year-old granddaughter while she played in the back yard. However, even disregarding the evidence of defendant tape recording, the trial court's decision did not amount to an abuse of discretion. Because there was other ample evidence to find defendant committed a course of prohibited behavior causing plaintiff emotional distress, we uphold the trial court's grant of a personal protection order against defendant.

Defendant next argues he was denied due process of law because the trial court judge harbored bias against him. We hold defendant has waived this issue. We alternatively hold defendant has failed to demonstrate the judge was biased.

A party must pursue a claim of disqualification before the trial court to preserve the issue for appeal. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). A party may waive the issue by failing to move for disqualification, or by failing to provide an affidavit supporting the motion. *In re Forfeiture of \$53*, 178 Mich App 480, 497; 444 NW2d 182 (1989); *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988). However, waiver is not absolute, and this Court may consider whether a trial court should be disqualified when the disqualifying circumstances were not apparent to the parties or when the judge would have difficulty discarding previously expressed views regarding the case. *People v Dixon*, 403 Mich 106, 109; 267 NW2d 423 (1978). Disqualification may be considered on appeal absent a trial court motion when the disqualifying circumstances were not apparent to the parties. *People v Gibson (On Remand)*, 90 Mich App 792, 796; 282 NW2d 483 (1979). Further, this Court may remand a case to a different judge if the original judge would have difficulty discarding previously expressed views or findings, reassignment is advisable to preserve the appearance of justice, and reassignment would not entail excessive waste. *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).

Defendant waived this claim by failing to raise this issue before the trial court or file an affidavit supporting his claim of judicial bias. Because the alleged bias would have been apparent to defendant at the trial court level, and because there is nothing to indicate the trial court could not set aside past views or findings regarding this case, we hold defendant waived this issue.

We alternatively hold that defendant has failed to demonstrate judicial bias requiring removal of the trial court judge from this case. Reassignment to an alternative judge is typically required only if the original judge has demonstrated favoritism or antagonism toward a litigant that would preclude the judge's ability to render a fair judgment. *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996). A case should be assigned to an alternative judge if it would be unreasonable to expect the original judge, due to familiarity with and handling of the case, to set aside previously expressed findings without substantial difficulty. *Ireland v Smith*, 214 Mich App 235, 251; 542 NW2d 344 (1995). The mere fact that a judge rules against a litigant, even if the rulings are erroneous, is insufficient to require disqualification or reassignment. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001).

Defendant has failed to show the trial court judge harbored bias against him. The judge appears to have made evidentiary rulings favoring both sides, admonished both parties for the ongoing problems between them, and even stated that she was ruling on the evidence before her, rather than relying on evidence from any past proceedings. The trial court attempted to assist defendant in presenting his evidence, and did not allow plaintiff's witness to testify regarding hearsay. Although the judge also stated she was familiar with the prior proceedings between the parties, a full reading of the transcript shows she merely warned both parties that their behavior was unacceptable and needed to stop, rather than displaying bias against defendant or insinuating she decided the case based on prior proceedings. Because the trial court's comments do not demonstrate actual bias against defendant, we reject defendant's claim and refuse to transfer this case to an alternative judge.

Defendant further argues the trial court erred in not sua sponte terminating the personal protection order against him at plaintiff's show cause hearing regarding whether defendant violated the order. Defendant's claim fails because he has failed to provide any factual predicate to support his claim that the trial court should have terminated the personal protection order. See *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998) ("A party may not leave it to this Court to search for a factual basis to sustain or reject its position.") Defendant has failed to point to any factual findings to support his claim that plaintiff abused the protection order, and this claim, therefore, must fail.

Defendant finally argues this Court should consider this case even though the personal protection order expired on September 9, 2012. We agree.

Whether an issue is moot presents a question of law this Court reviews de novo. *Leemreis v Sherman Twp*, 273 Mich App 691; 731 NW2d 787 (2007).

"An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). An issue is not moot if it will

continue to affect a party in a collateral way. *In re Dodge Estate*, 162 Mich App 573, 583-584; 413 NW2d 449 (1987). This Court should only review a moot issue if it is publicly significant and “is likely to recur, yet also is likely to evade judicial review.” *In re Martin*, 237 Mich App 253, 254; 602 NW2d 630 (1999). This exception applies to prevent a case from being moot when ““(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.”” *Illinois State Bd of Elections v Socialist Workers Party*, 440 US 173, 187; 99 S Ct 983; 59 L Ed 2d 230 (1979) (quoting *Weinstein v Bradford*, 423 US 147, 149; 96 S Ct 347; 46 L Ed 2d 350 (1975)).

Because this exception applies to this case, we hold this issue is not moot. We believe this issue is publicly significant to ensure trial courts do not issue personal protection orders without the necessary statutory bases. Personal protection orders subject citizens to restrictions on their rights, and provide for criminal punishment, including incarceration, if they are violated. Due to the short nature of most personal protection orders, they would generally be insulated from review if not considered under this doctrine. In this case, the parties have attempted to secure personal protection orders against each other several times over the past few years. It appears both parties have taken alleged actions against each other that could provide the bases for seeking a personal protection order against the other. Unfortunately, it also appears the parties have not resolved their differences and are likely to continue this behavior in the future. The parties have shown they are very willing to bring law enforcement and the judicial system into their dispute. It therefore appears likely plaintiff will continue to seek personal protection orders against defendant in the future. Yet, the protection order in this case issued only for one year, and the trial court initially indicated it would only issue the order for six months. Because this Court typically requires more time than this to review a case and issue an opinion, this case presents a situation where the issue is likely to reoccur between the parties while evading review.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens