

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

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RS,

Petitioner-Appellee,

v

AH,

Respondent-Appellant.

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UNPUBLISHED  
November 19, 2020

No. 350119  
Wayne Circuit Court  
Family Division  
LC No. 19-107303-PH

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right the trial court’s decision to grant a personal protection order (PPO) to petitioner. Finding error warranting reversal, we vacate the PPO and remand for proceedings consistent with this opinion.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

On June 17, 2019, petitioner, a deputy chief with the Detroit Fire Department (DFD), filed a petition for a nondomestic PPO against respondent, a freelance photographic journalist. The petition alleged that, in his professional capacity, petitioner directed fire station E-35 that it was not to allow respondent on the station property or equipment. On June 17, 2019, petitioner alleged that respondent posted a “challenge” for the men to meet at Sindbads, a local restaurant, on Facebook. Petitioner also represented that respondent posted a video of respondent driving by petitioner’s home as well as video of a barrel on fire in the middle of the afternoon in the area behind petitioner’s Dearborn home. Petitioner indicated that he filed an incident report with the Dearborn police, but it was suggested that he pursue a PPO. The ex parte petition was denied, and a hearing was scheduled.

On July 18, 2019, the hearing was held on the PPO request. Petitioner proceeded *in propria persona*, but respondent was represented by counsel. Petitioner testified that he is the deputy chief of DFD. In early June 2019, petitioner was directed by Deputy Fire Commissioner Dave Fornell to “shut down” activity in which respondent was bringing beer to and hanging out at firehouses as well as riding the rigs and apparatus. Although respondent was not a firefighter, he apparently

was friends with some firefighters. Consequently, petitioner instructed the firefighters at two firehouses that respondent was not allowed on the firehouse property or the apparatus. Shortly thereafter, petitioner was informed by other DFD employees that respondent posted a letter on his Facebook page known as Southeast Michigan Fire and Weather. The letter stated:

[A]ttention [petitioner]. I am pretty sure you will see this. First of all, I'm flattered you think about me so much. I'll throw this out there, since you like to run around behind my back, talking about me, calling me the eastside serial killer. Why don't we chat? Sin[d]bads at 9:15 p.m. Sunday night. I'll even buy your first drink if you are man enough to show. I will meet you by valet booth. I'll assume since the valet has spotted you there, you know where – where I'm referring to.

Petitioner believed that letter was posted June 13, 2019. He learned of a second Facebook post purportedly by respondent that stated:

I accidentally deleted the post, attention [petitioner]. I know [you] will read this or hear about it. That being said, I know the things you say behind my back. You have taken a lot from me, but you can't hurt me anymore. All you can do is stop me from going to firehouses to see my friends. But, you can't stop them from coming to see me. Why don't you be a man, meet me at Sin[d]bads valet booth this Sunday at 9:15 p.m. at the valet booth. We can go in, grab a drink, or food on me, and chat. This is in no way implying any form of physical altercation, unless of course, you're afraid of a little buff. I will assume you know where it is \* \* \* seeing as the valets have spotted you there while I'm at work. I'm done being picked on by you. I'm only a civilian. Shame on you to use your powers to bully me.

Petitioner also played two videos for the court that he thought were recorded by respondent.<sup>1</sup> As described by petitioner, the first video showed respondent driving in Dearborn, near petitioner's home. However, petitioner learned from the Dearborn police that respondent lived in St. Clair Shores. The video also showed a barrel on fire in an alley "almost directly behind [petitioner's] house." The second video showed respondent waiting for petitioner at Sindbads, captioned with: "I am a man of my word."

Petitioner testified that, to his knowledge, he had never met respondent nor had respondent ever contacted him directly. He asserted that there was no indication that respondent had any business on his residential street. Petitioner was not aware that respondent was a "fire buff," a person who shows up at fire scenes to take pictures. Respondent's counsel inquired how petitioner interpreted the Facebook postings when respondent expressly stated that he had no intention of physical harm. Petitioner testified, "I didn't give it much thought at all, I just know that this is very odd, and this is very concerning to me that he's posting anything about me, and driving down my street." However, petitioner had no evidence or knowledge that respondent had stepped foot on or near petitioner's property despite the barrel fire. Also on cross-examination, petitioner

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<sup>1</sup> Petitioner apparently played the videos for the court on his cellular telephone. There is no indication that they were preserved in the lower court record. Despite our request, respondent did not submit the videos with this appeal.

testified that he never met, talked, e-mailed, telephoned, or sent a direct Facebook post to respondent. Petitioner testified that he did not employ respondent and could not tell him what to do. Rather, his orders were given to fire officers in the DFD. Again, petitioner denied that his order to his firefighters had any bearing on the PPO. He testified, “We’re here because [respondent] has given me reason to be concerned. That’s why we’re here right now about me.” When asked if petitioner was alleging that respondent harassed and threatened him, petitioner replied, “No, I claimed exactly what I stated her[e].” Petitioner had no indication that respondent had ever approached him in public or private and stated, “Not that I’m aware of. I’d like to keep it that way, that’s why I’m here.” Petitioner was unaware if respondent violated the order regarding his presence at the firehouses, stating that he trusted his officers to follow the order.

Respondent testified that he is a freelance journalist. He takes photographs and videos of accidents, crime scenes, and fires, and sells them to news organizations. Approximately two years before the PPO proceeding, the firefighters’ union sent respondent photographs of petitioner at a bar, while on duty, with a city vehicle, and asked respondent to release them to the press. Respondent did not know petitioner’s title at the time, but he knew petitioner’s name and that petitioner was depicted in the photographs with “a chief’s vehicle and a city car.” According to respondent, the men had not met at that time, but they met about a year later (a year before the instant case) at the scene of a fire that respondent was photographing. Respondent did not have any personal contact with petitioner after that meeting, but respondent, respondent’s wife, and respondent’s mother saw petitioner driving in respondent’s neighborhood.

Respondent testified that he never contacted petitioner directly because he did not have a phone number or e-mail address. However, he did acknowledge the public appeal to petitioner on Facebook. Respondent testified that the purpose of the Sindbads meeting was to advise petitioner that the photograph and information regarding petitioner’s use of a city vehicle at a bar was provided by the union. He claimed that he wanted petitioner’s “harassment” to stop, including being followed by “undercover cars,” and he also made clear that a physical threat was not at issue. Respondent opined that petitioner’s request for a PPO was in retaliation for the release of the photograph of petitioner at the bar while on duty to the media. Respondent claimed that he was approached by a total stranger and advised to leave petitioner alone because he was “vindictive.”

Respondent also admitted to being near petitioner’s home and filming the burning barrel, but denied starting the fire. Earlier that day, respondent “had a[n] interview with a different fire department.” A vehicle followed respondent to the interview, and the same vehicle followed him when he left. Respondent drove to the Dearborn area to see whether it was petitioner following him. Respondent saw petitioner near the barrel in the alley, but he kept driving because petitioner “makes [him] very uncomfortable.” When respondent drove back around the block, the barrel was on fire, so he stopped and filmed the fire from his vehicle. Respondent had never been near petitioner’s home before, nor did he ever return. He did not leave his vehicle and never entered petitioner’s property. Respondent believed petitioner set the barrel aflame on purpose, knowing respondent would film it.

The trial court granted petitioner’s request for a PPO. The court noted that a PPO can be issued to restrain stalking and cyber stalking. The court stated that “this is exactly what the [PPO] statute addresses” because respondent made multiple posts online about petitioner, even though the posts did not contain threatening language. Rather, the court noted that “there was [sic] some

really odd occurrences in this case,” because respondent was near petitioner’s house when a barrel caught fire. On July 18, 2019, the court issued the PPO that prohibited respondent from stalking petitioner or posting a message online about petitioner for one year.

## II. SUFFICIENT EVIDENCE TO ISSUE THE PPO

Respondent contends the trial court erred in granting petitioner a PPO because there was insufficient evidence of a continuous course of threatening conduct that qualified as stalking. We agree.

A trial court’s decision to issue 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.* The trial court’s factual findings are reviewed for clear error. *Id.* “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed.” *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 579; 939 NW2d 705 (2019) (quotation marks and citation omitted).

There are three types of PPOs under Michigan law: domestic relationship, sexual assault, and stalking. *TM v MZ*, 501 Mich 312, 315-316; 916 NW2d 473 (2018). Only the stalking type of PPO, MCL 600.2950a(1), is implicated here. To obtain a stalking PPO, “the petitioner must allege[ ] facts that constitute stalking as defined in [MCL 750.411h or MCL 750.411i], or conduct that is prohibited under [MCL 750.411s].” *Id.* at 316, quoting MCL 600.2950a(1) (quotation marks omitted; alterations in original). 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). A “course of conduct” is “a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.” MCL 750.411h(1)(a). “Harassment” means “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.” MCL 750.411h(1)(c). “Unconsented contact” is not limited to physical contact; electronic communications are included as well. MCL 750.411h(1)(e). Under MCL 750.411s(1)<sup>2</sup>:

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:

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<sup>2</sup> MCL 750.411s is sometimes called the “cyberstalking” statute. *TM*, 501 Mich at 316.

(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 individual petitioning the trial court for a PPO bears the burden of proof.” *Berryman v Mackey*, 327 Mich App 711, 718; 935 NW2d 94 (2019) (quotation marks and citation omitted).

In light of the record, we conclude that petitioner failed to meet his burden of proof for obtaining the PPO. Specifically, in order to demonstrating stalking, MCL 750.411h(1)(d), petitioner had to show harassment that included “repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim emotional distress.” MCL 750.411h(1)(c). The stalking must actually cause the individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(1)(d). However, when petitioner was questioned on cross-examination regarding how the Facebook written and video posts impacted him, he testified, “I didn’t give it much thought at all, I just know that this is very odd, and this is very concerning to me that he’s posting anything about me, and driving down my street.” More importantly, when petitioner was expressly asked whether respondent harassed and threatened him, he replied, “No, I claimed exactly what I stated her[e].” Petitioner expressly acknowledged that respondent had never approached him in public or in private and stated, “Not that I’m aware of. I’d like to keep it that way, that’s why I’m here.” Although petitioner testified that there was a barrel fire behind his home, there was no evidence that respondent ever got of his car and approached petitioner’s premises on foot. Rather, petitioner testified that he filed an incident report with the police regarding respondent’s written and video Facebook posts, and he was advised by the Dearborn police and members of DFD’s fire command to file a PPO. However, a lack of evidence to warrant a criminal charge does not equate with the issuance of a stalking PPO. Petitioner readily admitted that respondent’s Facebook posts were merely of “concern” and expressly denied feeling harassed and threatened. Under the circumstances, the trial court erred in issuing the PPO.<sup>3</sup>

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<sup>3</sup> In light of our conclusion regarding the harassment requirement, we do not address the other requirements, including continuous acts, for purposes of stalking.

Although the PPO expired on July 18, 2020<sup>4</sup>, we vacate and remand to the trial court to ensure that legal ramifications of the PPO are removed. See *TM*, 501 Mich at 319-320 (concluding that expiration of a PPO does not render the issue moot and the practical legal ramifications of rescission must be addressed).

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Kirsten Frank Kelly

/s/ Douglas B. Shapiro

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<sup>4</sup> It is unclear from the record if the PPO has been extended.