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FILED  
BY *Melley Swelley*  
CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT, STATE OF MONTANA, PARK COUNTY

The Board of Directors for Glastonbury )  
 Landowners Association, Inc., a Montana )  
 Non-profit Corporation, Dennis Riley, Daniel )  
 Kehoe, Regina Wunsch, Charlene Murphy, )  
 Newman Brozovsky, Gerald Dubiel, Richard )  
 Johnson, Leo Keeler, Kevin Newby, Charlotte )  
 Mizzi, Paul Rantallo, Mark Seaver, Individuals, )  
 )  
 Petitioners and Counter- )  
 Defendants, )  
 vs., )  
 Daniel and Valery O'Connell, )  
 )  
 Respondents and )  
 Counter-Claimants. )  
 )

Cause No. DV-17-135

**ORDER GRANTING  
SUMMARY JUDGMENT  
ON THE COUNTERCLAIM**

On July 9, 2018 Respondents and Counter-claimants filed a Counterclaim against the Petitioners (Board Members) alleging that by requesting a protective order based on the definition of "Stalking," the Board Members and their attorney violated Montana law by usurping the County Attorney's sole authority to bring criminal charges pursuant to M.C.A. § 7-4-2716. Furthermore, they allege that by granting the Order of Protection, Judge Gilbert violated Montana Law by entering criminal charges that were not properly before her.

The Board Members filed a Motion for Summary Judgment on all issues presented in the Counterclaim. The Respondents, Danial and Valery O'Connell (the O'Connells), filed and response. The Board Members replied. Therefore, this matter is ripe for a decision. The Court

enters this Order.

**MATERIAL FACTS NOT AT ISSUE**

Around October 8, 2017, the Board Members filed a Request for a Temporary Order of Protection and Request for Hearing (Petition) pursuant to M.C.A. § 40-15-201. (See Petition) Pursuant to M.C.A. § 40-15-102, a person may file for a petition for an order of protection if the person is a victim of stalking as defined in 45-5-220. M.C.A. § 40-15-102(2)(a).

M.C.A. § 40-15-102 specifically states that a petitioner does not need to report the abuse to law enforcement, there do not need to be charges filed by the state, and the petitioner does not need to participate in any criminal prosecution. M.C.A. § 40-15-102(5). In other words, criminal proceedings and order of protection proceedings are entirely separate proceedings.

In their Petition, the Board Members alleged that the O'Connells were stalking them and that as a result, the Board Members needed a Protective Order. (See Petition) The Board Members explained that pursuant to the Glastonbury Landowners Association, Inc.'s Covenants, all Board of Directors meetings were required to be open to all members, including the O'Connells. (See Petition) The Covenants contained no way to bar any members from those meetings. (See Petition) The Petitioners then described the O'Connells' behavior at those meetings, which included the continual harassment of the Board Members by the O'Connells at the open Board of Directors meetings, the escalating threats of violence by the O'Connells at those meetings towards the Petitioners and other members attending the meetings, and finally, the direct death threat made by Mr. O'Connell to the Petitioners on September 11, 2017. (See Petition)

The Board Members claimed that the O'Connell's behavior fit the definition of "stalking" for the purposes of requesting a Protective Order pursuant to M.C.A. § 40-14-102(2)(a). (See

Petition) Nowhere in the Petition do the Board Members attempt to bring criminal charges against the O'Connells. (See Petition)

The Justice Court issued a Temporary Order of Protection. (See Temporary Order of Protection.) Nowhere in the Justice Court's order does it state that criminal charges against the O'Connells were being considered or otherwise before the Court. (See Temporary Order of Protection.) The case was moved to District Court. (See Order Removing the Matter.) On October 19, 2017, the District Court set a hearing on the matter and continued the Temporary Order of Protection until one day after the hearing date. (See Order Setting Hearing on PO.) Nowhere in the District Court's order does it state that criminal charges against the O'Connells were being considered or otherwise before the District Court. (See Order Setting Hearing on PO.)

On November 8, 2017, the Court held a hearing on the Petition. (See Court Minutes.) The sole issue before the Court was whether to grant the Board Members a protective order preventing the O'Connells from attending meetings and otherwise harassing the eight individual Board Members remaining in the case based on the Protective Order Statute. (See Findings of Fact, Conclusions of Law and Order.) At no time was the crime of stalking, along with the punishment of up to one year in jail and not more than a one thousand dollar fine before the court. (See FOF, COL and Order.) The Court only looked at barring the O'Connells from Association meetings and other areas where the eight board members were present. (See FOF, COL and Order.)

On December 22, 2017, the Court entered a Findings of Fact, Conclusions of Law and an Interim Order of Protection. In the Conclusion of Law, the Court concluded that the O'Connells were stalking the Board Members for the purposes of granting an Order of Protection. (See FOF,

COL and Order.) Nowhere did the Court find the O'Connells guilty of stalking for committing the crime of Stalking. (See FOF, COL and Order.) The Court did not order the O'Connells to serve jail time and/or pay a fine pursuant to M.C.A. § 45-2-220. (See FOF, COL and Order.) Instead, the Court prohibited the O'Connells from attending Association meetings in person, and requested that the eight Board Members propose a way that the O'Connells could participate in the Association meetings without being present. (See FOF, COL and Order.)

The Association filed a proposed order, and the O'Connells filed this Counterclaim.

### **SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3). *Arnone v. City of Bozeman*, 2016 MT 184, ¶ 4, 384 Mont. 250, 376 P.3d 786.

### **DECISION**

**ISSUE 1: Did the Court Usurp the County Attorney's Authority to Prosecute Criminal Charges when the Court processed the Request for a Protective Order and Entered a Protective Order?**

The O'Connells argue that the Court prosecuted them and found them guilty of the crime of Stalking when it followed the Protective Order statute, found that the O'Connells had stalked the Board Members for the purposes of issuing a Protective Order and issued a Protective Order to the Board Members. However, that is not the case.

The Board Members, through Ms. Griffith, petitioned the Court for an Order of Protection pursuant to M.C.A. § 40-15-202. In order to qualify for an order of protection, if the victims are not related to the aggressor, the victim(s) must prove they are "(a) a victim of assault as defined in 45-5-201, aggravated assault as defined in 45-5-202, assault on a minor as defined

in 45-5-212, stalking as defined in 45-5-220, incest as defined in 45-5-507, sexual assault as defined in 45-5-502, or sexual intercourse without consent as defined in 45-5-503.” M.C.A. § 40-15-102.

In other words, the Protective Order statute relies on the definitions in the criminal statute to define the types of actions that allow a person to seek a Protective Order. The Court is tasked with applying these definitions to the actions alleged by the victims to find if the actions fall within one or more of the Protective Order definitions. The Board Members, through their attorney, alleged that they were victims of “stalking” for the purpose of receiving a Protective Order. At no time did the Board Members request that the Court prosecute the O’Connells for the crime of stalking, just that the Court apply that definition pursuant to the code in the process of determining if they warranted a protective order. After the hearing, the Court agreed and appropriately granted the Protective Order.

The O’Connells are clearly confusing the use of a criminal definition in a civil matter with criminal prosecution. They believe that by applying the criminal “stalking” definition as the Montana Code requires, it somehow turns a Protective Order petition and hearing into criminal prosecution. It does not.

“Criminal Prosecution” means “A criminal proceeding in which an accused person is tried.” *Black’s Law Dictionary, Tenth Edition*. This matter was not a criminal proceeding. It was a civil proceeding for a protective order. The O’Connells were not found “guilty” of a crime. The O’Connells have no criminal record as a result of the Findings of Fact, Conclusions of Law and Order granting the protective order. The O’Connells were never at risk of being punished with jail time or a fine.

Because this matter was not a criminal prosecution, the Court, the Board Members and

Ms. Griffith did not usurp the County' Attorney's authority pursuant to M.C.A. § 7-4-2716. Because the O'Connells entire counterclaim is based on the "fact" that the Board Members through their attorney requested the O'Connells be criminally prosecuted and the Court prosecuted them without the involvement of the County Attorney, summary judgment is **GRANTED** to the Board Members.

**ISSUE 2: Did the Court determine the O'Connells guilt or innocence with regards to the crime of Stalking?**

The O'Connells argue that the Court found them guilty of the crime of Stalking by issuing a protective order to the Board. The Board Members argue that while the Court properly used the definition of Stalking and applied it to a protective order, the O'Connells's were never found guilty of the crime of stalking. The Board Members are correct.

The terms "guilt" and "innocence" are not terms that are applied to the protective statutes. (See generally M.C.A. § 40-15-201 et seq.) These are terms that only apply to types of pleas or jury determinations under criminal law. (See generally, Title 46.) The O'Connells argue that the Court found them "guilty" of the crime of stalking. However, the O'Connell's guilt or innocence with regards to the crime of stalking was never at issue in the protective order hearing. Instead, the issue was whether their behavior was more likely than not stalking, so that the Board Members were entitled to a protective order. (See the Court's FOF, COL and Order, where no determination of guilt or innocence was made.) Therefore, as the O'Connell's guilt or innocence was not an issue before the Court, the criminal statutes were not triggered.

**ISSUE 3: Was the County Attorney required to filed criminal stalking charges before the Court was allowed to issue the Protective Order?**

The O'Connells argue that the Court must wait for the County Attorney to file criminal

stalking charges on any behavior for which a Protective Order is requested before a Court may issue a Protective Order. This assertion flies in the face of the law. M.C.A. § 40-15-102 specifically states that a petitioner does not need to report the abuse to law enforcement, there do not need to be charges filed by the state, and the petitioner does not need to participate in any criminal prosecution. M.C.A. § 40-15-102(5). In other words, criminal proceedings and order of protection proceedings are entirely separate proceedings.

Pursuant to M.C.A. § 40-15-102, no charges must be filed by the County Attorney before the Court enters an Order of Protection.

**ISSUE 4: Are all issues raised in the counterclaim disposed of by this Order granting Summary Judgment.**

The O'Connells argue that their counterclaim contained a number of claims that were not tied to the Board Members' Motion for Summary Judgment. However, not the case.

A motion for summary judgment can address, one, two or all claims in a counterclaim depending on the situation. Depending on how the Court rules, any remaining claims (if any) are then set for trial before the Court (as opposed to being conceded by a party). In this case, the Board Members have addressed all claims. Therefore, by granting the Board Members' motion for summary judgment, all issues raised in the Counterclaim are adjudicated.

**A. The O'Connells' Argument 1 under the "other counterclaim" section of their Response, which the Court finds deals with Claim 7, Page 6, cannot survive if the Court finds that the O'Connells were not criminally prosecuted.**

The O'Connells argue that their claim that a "hearing was held without a jury trial; without a defense attorney, in violation of O'Connells Civil Rights, and more under Federal & MT., Constitution Article II, Part II Section 24," will somehow stand-alone if they were not

criminally prosecuted. However, this is not true. The O'Connells are only entitled to a jury trial, defense attorney, etc., if they were criminally prosecuted. Because they were not criminally prosecuted, Claim 7 fails.

**B. The O'Connells' Claim 5 on Page 5 of the Counterclaim cannot survive if the Court finds that the O'Connells were not criminally prosecuted.**

The O'Connells argue that Claim 5 somehow does not rely on the argument that they were criminally prosecuted. However, Claim 5, in its entirety (which the O'Connells only cited a portion of, which was their attempt to change the nature of the claim) is as follows:

Both GLA attorney Griffith and Judge Brenda Gilbert did file or allow the filing of a GLA Petition (illegally brought by the GLA Corporation) that illegally requested Orders against O'Connells involving the public offense of "stalking" claim(s) against them under §45-5-220 MCA; which actions are without jurisdiction or state's authority for bringing such public offense claim(s) in direct violation of §7-4-2716, MCA (above).

(Underlined portion is the portion left out by the O'Connells). When read in its entirety, the O'Connells claim clearly relies on the assertion that they were criminally prosecuted. Therefore, if there was no prosecution, then Claim 5 fails. Because there was clearly no criminal prosecution, this argument fails.

**C. Claim 6 on Page 5, the "perjury" claim, is based on the assertion that the O'Connells were criminally prosecuted; therefore, Claim 6 cannot survive if they were not criminally prosecuted.**

The O'Connells argue that they Board Members' Motion for Summary Judgment failed to address their Perjury or their False Affidavit counterclaims. However, this is not the case. Claim 6, Page 5 states:

GLA Petitioners did perjured themselves (by false affidavit and testimony); and GLA Petitioners, with GLA Attorney Griffith, and Judge Brenda Gilbert did maliciously or



negligently act without authority and to bring “stalking” claims(s) against O’Connells in the face of clearly valid statutes that expressly deprive them of jurisdiction to do so (including §7-4-2416. MCA & §45-5-220 MCA & Civil Rights).

Based on the plain language of the claim, if the O’Connells were not criminally prosecuted, then the claim cannot proceed. Furthermore, this claim was already addressed and resolved by the Court in the January 5, 2018 Order addressing the O’Connells’ First Motion for Sanctions. That Motion for Sanctions included the same allegations and cites to the witnesses that were contained in the Counterclaim. As the matter has already been resolved, it is moot.

**D. The Remaining Arguments regarding the “other counterclaim” section of the O’Connells arguments are Prayers for Relief; therefore, they are not stand alone claims and cannot survive on their own merit.**

The O’Connells argue that their Prayers for Relief (which they named Claims for Relief) are all separate counterclaims against the Association. However, a Prayer for Relief is “A request at the end of a pleading; esp., a request for specific relief.” *Black’s Law Dictionary*, Edition 10. In other words, the Prayer for Relief, which a counterclaim must contain, is the type of relief sought based on the Claims contained in the Counterclaim. Put another way, Prayers for Relief flow from the legal claims and cannot survive without the separate legal claims.

The four “Claims of Relief” contained on Page 10 of the O’Connells Counterclaim are clearly all Prayers for Relief which flow directly from the Claims contained in the Counterclaims. Relief 1 is that Judge Gilbert recuse herself, Relief 2 is that the Order of Protection be quashed, Relief 3 is a request for damages based on the prior claims and Relief 4 is a request for expungement of the record. None of these are claims which stand on their own. Therefore, any argument that the Claims of Relief somehow survive the Motion for Summary Judgment is without merit.

**ORDER**

For Good Cause as stated above, the Court makes the following Orders:

1. Petitioners' Motion for Summary Judgment is **GRANTED**.

DATED this 26<sup>th</sup> day of October, 2018.

  
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BRENDA R. GILBERT, District Judge

cc: Alanah Griffith  
Valery O'Connell  
Daniel O'Connell

> mcl  
10-26-18  
mB