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:** RULE 59 AND RULE 60 MOTION(S) TO ALTER/ AMEND/RESCIND ALL ORDERS OCTOBER 2017 THROUGH AUG. 15, 2018 & ORDER DENYING SANCTIONS AGAINST GLA PETITIONERS, GLA ATTORNEY & JUDGE GILBERT

On August 29, 2018, the Respondents and Counter-Claimants, Daniel and Valery O'Connell (the O'Connells) filed a Motion to Alter, Amend or Rescind all the Court's orders from October 2017 through August 15, 2018. The Petitioners (the Association), filed and response. The time of the O'Connells to Reply has expired. Therefore, the Court enter this Order on the Motion.

BACKGROUND

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.) 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.) Each of the eight individual Board Members filed a signed, notarized affidavit describing the stalking and stating that the Member requested an Order of Protection based on that described behavior. (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.)

While the Individual Petitioners were present in the Courtroom for the hearing, two of the eight members were selected to testify regarding the incidents described in all Petitioner's affidavits. No subpoenas were issued by the O'Connells to the Petitioners for the November 8, 2017 hearing. (See Case file.) While the Individual Petitioners were present in the Courtroom, the O'Connells did not call any of them to testify, either as a witness or hostile witness. (See Court minutes and FOF, COL and Order.)

One issue that was raised during the hearing was the fact that on November 7, 2017, the O'Connells filed affidavits regarding this matter. The Board Members had not received copies of the affidavits before the hearing. The Board objected to the Affidavits, stating that they needed more time to review. The Court ordered that the Board Members has an additional 10 days to respond to the Affidavits. (November 9, 2018 Order.)

The Board Members responded to the Affidavits. According to the Association, both O'Connell affidavits dealt mainly with legal issues or factual issues with which Ms. Griffith has the most familiarity. Thus, along with the response, Ms. Griffith filed an affidavit.

On November 27, 2017, the O'Connells filed their 1st Motion for Sanctions. (See 1st Motion for Sanctions.) In this case, the motion was for sanctions against the Board Members and Ms. Griffith for allegedly lying on the stand and for Ms. Griffith's filing of an affidavit on behalf of the Board Members. No proof was given except the O'Connells own interpretation of the testimony given. The Board Members responded to the 1st Motion for Sanctions around December 12, 2017. The Board Members responded that their testimony was truthful and that Ms. Griffith did not violate any laws by filing the affidavit on behalf of her clients since she had the most knowledge of the history of the case and was best suited to filing the affidavit. The O'Connells' replied. On January 5, 2018, the Court entered an Order denying the O'Connells' 1st Motion for Sanctions.

Meanwhile, on December 22, 2017, the Court entered a Findings of Fact, Conclusions of Law and an Interim Order of Protection. In the Conclusions 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 Board Members were given 20 days to file a more detailed Proposed Protective Order outlining how the FOF, COL and Order might be best accomplished. On or around January 12, 2018, the Board Members filed this Proposal. However, the proposal most likely was not seen by the Court since around January 2, 2018, the O'Connells filed a Writ of Supervisory Control with the Montana Supreme Court and the file was sent to the Montana Supreme Court on January 17, 2018. To the best of the Board Member's knowledge, the case was transferred to the Montana Supreme Court until the Court rejected the O'Connells request for a Writ on January 30, 2018. At that time, the case was sent back to District Court.

On June 18, 2018, the O'Connells filed their response against the GLA's Proposed Protective Order. Also, on June 18, 2018, the O'Connells filed their 2nd Motion for Sanctions. The 2nd Motion for Sanctions was against the Board Members for losing the argument that the Board as a whole should also be given a Protective Order, even though the individual Board Members all received Protective Orders. On July 6, 2018, the Board Members responded to both motions. With regards to the 2nd Motion for Sanctions, the Board Members argued that based on the *Western Traditions Partnership* case, the Board had argued in good faith that the Association was a person with the right to ask for protection.

On July 9, 2018, instead of replying to the Board Member's response, the O'Connells filed their 3rd Motion for Sanctions. The 3rd Motion for Sanctions was filed against the Board Members, Ms. Griffith and Judge Brenda Gilbert. It alleged, once again, that the Board Members and Ms. Griffith provided false testimony. Once again, no proof was given except the O'Connells own version of the facts. Also included was the allegation that the O'Connells were criminally prosecuted for the crime of stalking without the authority of the County Attorney. The O'Connells also filed a "Counterclaim" against the Board Members, Ms. Griffith and Judge

Gilbert for allegedly criminally prosecuting the O'Connells for stalking.

Because this matter now included the Judge, Judge Gilbert referred the Counterclaim and 3rd Motion for Sanctions to the Montana Supreme Court around July 11, 2018. The Montana Supreme Court reviewed the matter as a motion to disqualify Judge Gilbert, and on July 23, 2018 issued an order denying the request. Specifically, it stated that "it is not necessary to assign a district judge to hear this matter." (See July 23, 2018 Order.)

Around July 18th, 2018, the Board filed its response to the 3rd Motion for Sanctions. Around July 25th, 2018, the Board filed a Motion for Summary Judgment on the Counterclaim. In both, the Board argued that while the definition of stalking was derived from the criminal code, it's only use in this proceeding was for the civil protections given under the Protective Order statues. Therefore, the O'Connells were not criminally prosecuted.

On August 7, 2018, the Court issued an Order denying the 2nd and 3rd Motions for Sanctions. On August 15, 2018, the Court issued an Order allowing the O'Connells to appear by telephone at the GLA meetings and a separate Final Order of Protection.

On August 29, 2018, the O'Connells filed their Motion to alter/amend or rescind all the Court's Orders from October 2017 until August 15, 2018. The O'Connells cite both M.R.Civ.P. Rules 59 and 60.

DECISION

a. Standard of Review: M.R.Civ.P. Rules 59 and 60.

In this case, the Court is bound by the M.R.Civ.P., Rules 59 and 60, which were cited by the O'Connells in their motion to alter/amend/rescind a prior order.

1. Rule 59.

The O'Connells generally request that the Court alter or amend the prior orders. Nowhere in

their motion are the O'Connells requesting a new trial. Therefore, it would seem the O'Connells are relying on M.R.Civ.P., Rule 59(e), Motion to Alter or Amend a Judgment which states, "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."

According to case law, a motion to alter or amend is "not intended merely to relitigate old matters nor are such motions intended to allow the parties to present the case under new theories." *Nelson v. Driscoll*, 285 Mont. 355, 360–61, 948 P.2d 256, 259 (1997), citing *Diebitz v. Arreola* (E.D.Wis.1993), 834 F.Supp. 298, 302. A motion to alter or amend should not present arguments which the court has already considered and rejected. *Nelson*, 285 Mont. 360–61, 948 P.2d 259 citing *Fuller v. M.G. Jewelry* (9th Cir. 1991), 950 F.2d 1437, 1442. A motion to alter or amend "cannot be used to raise arguments which could, and should, have been made before judgment issued." *Nelson*, 285 Mont. 360–61, 948 P.2d 259 citing *Beyah v. Murphy* (E.D.Wis.1993), 825 F.Supp. 213, 214; *F.D.I.C. v. World University Inc.* (1st Cir. 1992), 978 F.2d 10, 16. A motion made pursuant to Rule 59 "is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances." *Nelson*, 285 Mont. 360–61, 948 P.2d 259 citing *Dale & Selby Superette & Deli v. Dept. Of Agr.* (D.Minn. 1993), 838 F.Supp. 1346, 1348.

Accordingly, where a motion designated as one for reconsideration seeks to accomplish one or more of the matters referred to in this paragraph, we are more likely to conclude that it is not substantively a motion to alter or amend, but, rather, is in fact a motion for reconsideration." *Nelson v. Driscoll*, 285 Mont. 355, 360–61, 948 P.2d 256, 259 (1997). Motions for reconsideration are not one of the post judgment motions allowed under the M.R.Civ.P. *Nelson v. Driscoll*, 285 Mont. 355, 359, 948 P.2d 256, 258 (1997).

According to the Montana Supreme Court, a Rule 59 motion to alter or amend is not a motion for reconsideration if it is filed to accomplish one of the following four items: "1) to correct manifest errors of law or fact upon which the judgment was based; 2) to raise newly discovered or previously unavailable evidence; 3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or 4) to bring to the court's attention an intervening change in controlling law." *Nelson v. Driscoll*, 285 Mont. 355, 360, 948 P.2d 256, 259 (1997).

2. Rule 60

Like Rule 59, the O'Connells did not state with any specificity on which part of Rule 60 they rely. However, it appears that they are asking for relief from Judgments and Orders. Therefore, it would appear that the following applies to their motion, M.R.Civ.P., Rule 60(b) and (c):

> (b) Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. Motions provided by Rule 60(b) must be determined within the times provided by Rule 59 in the case of motions for new trials and amendment of judgment, and if the court shall fail to rule on the motion within the time frames set forth in Rule 59(f), the motion must be deemed denied. A motion filed under this rule shall follow the format set forth in Rule 59(b).

It appears that the O'Connells generally rely on M.R.Civ.P., Rule 60(b)(1), mistake, inadvertence, surprise and excusable neglect or Rule 60(b)(6), any other reason that justified relief. The case law for each of these issues will be discussed below, as appropriate.

b. The Court DENIES the O'Connells' Motion to Alter or Amend the Three August 2018 Orders because Judge Gilbert did not Act Under a Mistake of Law When She Entered the Orders.

The O'Connells argue that Judge Gilbert acted under a mistake of law when she entered the three August 2018 orders. However, this is not the case. On July 11, 2018, Judge Gilbert referred the issue of whether she could hear the 3rd Motion for Sanctions and the Counterclaim to the Montana Supreme Court. Therefore, the sole issue before the Montana Supreme Court was whether it needed to assign a District Court judge to hear these two matters. Judge Gilbert did not otherwise give up jurisdiction of this case. On July 23, 2018, the Montana Supreme Court ordered that the O'Connells' motion to disqualify Judge Gilbert was denied and the case was remanded back to Judge Gilbert to issue further orders. (See Order PR 06-0120, July 23, 2018.)

Therefore, based on the Montana Supreme Court's clear ruling, Judge Gilbert did have the authority to issue the three August Orders. The Court **DENIES** the Motion to Alter/Amend/Rescind the three August orders.

c. The Court DENIES the O'Connells' Motion to Alter or Amend the Three August 2018 Order because Judge Gilbert Did Not Recuse Herself from this Matter.

The O'Connells argue that Judge Gilbert voluntarily recused herself from this case. Therefore, she gave up any right to issue any orders. This is incorrect. Judge Gilbert's July 11, 2018 referral to the Montana Supreme Court was very clear. She requested that pursuant to

M.C.A. § 3-1-805, the Court determine whether she could proceed with the case or whether another district court judge should be brought in to oversee the case. On July 23, 2018, the Montana Supreme Court issued an order stating that Judge Gilbert should continue with the case. Therefore, because Judge Gilbert had the authority to issue the three August Orders, the Court **DENIES** the O'Connells' motion to amend/alter/rescind the three August Orders.

d. The Court DENIES O'Connells Request to Set Aside the August 15, 2018 Final Order because the Motion is a Motion for Reconsideration which is not an Appropriate Post Final Judgment Motion.

The O'Connells argue, again, that the Court is criminally prosecuting the O'Connells by issuing the Protective Order. As argued by the Board before and ruled on by the Court in the Order regarding the 3rd Motion for Sanctions, a Protective Order hearing is a civil hearing, not criminal prosecution. The O'Connells cited no new case law on this matter. While the O'Connells state that a criminal stalking conviction may harm their chances of future employment, the protective order is not a criminal stalking conviction. This is a protective order issued to protect the Board Members from future harassing behavior from the O'Connells.

Because the argument is simply a Motion for Reconsideration, the Court should deny the O'Connell's motion. Furthermore, there is good cause to deny the motion as the Court's analysis in its August 7, 2018 Order regarding the fact that the Protective Order was not a criminal stalking conviction was correct. Therefore, the Court **DENIES** the O'Connells Motion to Set Aside the August 15, 2018 Final Order.

e. **The Court DENIES the O'Connells' Motion to Alter or Amend all Orders because Judge Gilbert Was Not Under a Mistake of Law When She Found That Using the Definition of Stalking from the Criminal Code, as Directed by the Civil Statutes**

Defining the Behaviors Which Trigger a Protective Order, Was Not a Criminal Prosecution of the O'Connells.

The O'Connells argue, again, that the Court was mistaken when it used the definition of Criminal Stalking to issue the Protective Order. The Court was not. 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 M.C.A. § 45-5-220. M.C.A. § 40-15-102(2)(a). In other words, the Protective Order civil statutes simply borrow the criminal definition of stalking, and other crimes, to aid in processing whether a person's behavior rises to the level of triggering a protective order. It has nothing to do with the criminal code or criminal prosecution, except that it borrows definitions from the criminal code. 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 Rule 60(b)(1), the Court was not under a mistake of law when it found that sanctions were not warranted in the 3rd Motions for Sanctions because there was no criminal prosecution involved. The Court **DENIES** the motion to alter/amend/rescind the August 7, 2018 order denying the motions for sanctions and the August 15, 2018 Final Order.

f. **The Court DENIES the O'Connells Motion to Alter or Amend all the Orders because Judge Did Not Usurp the County Attorney's Authority When Issuing the Protective Order.**

Again, the O'Connells are reiterating an argument already made. As stated in M.C.A. § 40-15-102, the process of issuing a protective order based on certain behavior is entirely separate

from a criminal prosecution of the same behavior. The two are not tied together, for good reason. When issuing the protective order, the Court uses the same definitions found in the criminal code, like stalking, to assess whether a protective order should be issued. No criminal charges are brought, the O'Connells are not subject to fines or jail time and there is no criminal record. Instead, a protective order is issued in the civil case which gives the protected person certain protections under the law. That is all.

Because the Court did not usurp the County Attorney's authority when issuing the Protective Order, the Court **DENIES** the motion to alter/amend/rescind the Final Order of Protection.

g. **The Court DENIES the O'Connells motion to Alter or Amend all orders for failing to Follow Proper Procedure because The Court Held a Hearing Pursuant to M.C.A. § 40-15-201 and Then Issued an Interim and Permanent Order Pursuant to M.C.A. § 40-15-202.**

The Court properly issued a temporary order granting the Request for a Temporary Order of Protection pursuant to M.C.A. § 40-15-201. This matter was filed in Justice Court. Justice Court granted the motion and set a hearing within 20 days, for November 1, 2017. The Justice Court then transferred this matter to the District Court, apparently due to the long history of the parties in the District Court. Pursuant to M.C.A. § 40-15-202(1), the District Court, for good cause, reset the hearing for November 8, 2017 (the time and day set for the Justice Court hearing was already filled on the District Court's calendar) and extended the Temporary Order until the hearing. (See October 19, 2017 Order Resetting Hearing.)

The Court held the hearing on November 8, 2017. Because the O'Connells filed affidavits the day before the hearings, and the Board Members were unable to review those before the hearing, the Court granted a response period after the hearing and extended the temporary order

during the briefing schedule pursuant to M.C.A. § 40-15-202(1) ("At the hearing, the Court shall determine whether good cause exists for the temporary order of protection to be *continued*, amended or made permanent." Emphasis added.)

Once the briefing was completed, the Court issued its Findings of Fact, Conclusions of Law and Order. The Order was made pursuant to M.C.A. § 40-15-202(1). The Order was a continuance and amendment of the temporary order, which would be made final upon receiving additional, practical input from the parties regarding how best the O'Connells could attend the GLA meetings without being present. This is consistent with the language in M.C.A. § 40-15-202(1). Once the Court had the information, the Court made the Order permanent pursuant to M.C.A. § 40-14-201(1). Pursuant to the FOF, COL and Order, the Judge made the Final Order permanent because of the long history of harassment it has seen by the O'Connells towards the Board Members during the extensive filings in the O'Connells multiple cases against the GLA. The Judge's orders were all proper under Montana law.

The O'Connells argue that pursuant to the "Jurisdiction statute," the Court may only issue temporary orders of protection for 40 days. The O'Connells failed to cite the specific statute to which they were referring. The Court fines that the O'Connells are referring to M.C.A. § 40-15-301. However, nowhere in that statute is 40 days referenced. 45 days is referenced as the time in which a Court shall hold a hearing, but once again, the Court can set it out further for good cause. M.C.A. § 40-15-301(2). Therefore, the Court was still well within its rights to issue the Orders that the O'Connells want the Court to set aside.

The Court properly issued all the orders since October 2017. Therefore, the Court **DENIES** the O'Connells' motion to alter/amend/rescind those orders.

h. **The Court DENIES the Remaining issues because it the Issues were already**

Addressed by the Court in Other Orders.

The O'Connells packed a substantial number of issues into their last Argument Section. However, all the arguments have already been decided by the Court. For example, the O'Connells again raise the request for sanctions against the Association for requesting that a corporation be included in the order. While the Court denied that request, the Court granted the Protective Order for the remaining petitioners. When asked for sanctions against the petitioners for including the Association, the Court properly denied the sanctions. As the O'Connells do not raise any new issues, law, etc., this argument is clearly an improper Motion for Reconsideration and should be denied.

Regarding the amount of evidence presented, all the Board Members signed the verified petition. All the Board members were present at the hearing. As the O'Connells' behavior contained in the Petition was limited to Meetings at which all the Board Members attended, it would have been repetitive and a waste of Court's time for every single Board member to testify. Furthermore, if the O'Connells wished to question every Board Member, they could have simply called them as witnesses, as they were present for the hearing. However, the O'Connells did not call them as witnesses. This was their decision. The Board Members, through the witnesses that they did call and through the verified petition, presented more than sufficient evidence to support the Protective Order for all the Board Members.

Regarding the Evidence presented, the O'Connells have also argued in their motions for sanctions that the Court did not properly interpret the evidence before it. Once again, they point to the same testimony in an attempt to show that they were not stalking the Board Members. However, the Court is the fact finder in this case. After weighing all the evidence, the Court determined that the O'Connells had stalked the Board Members for the

purposes of triggering the Protective Order. The proper way to object to the Final Order is to appeal the Order, not waste the Court's time with this motion, which overall is clearly a motion for reconsideration, which is not allowed by Montana Law. Therefore, the Court **DENIES** all remaining issues.

ORDER

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

Respondent's Motion to Alter/Amend/Rescind all Orders issued from October 2017 through August 15, 2018 is **DENIED.**

DATED this 26th day of October, 2018.

Brenda R. Gilbert
BRENDA R. GILBERT, District Judge

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

mlcl
10-26-18
MB