THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Appellate Case No.: 2014-000141

William McFarland.....Appellant,

v.

Sofia Mazell, Michael Mazell, Pierceton Mazell, and Faith Mazell.....Respondents.

INITIAL BREIF OF APPELLANT WILLAIM MCFARLAND

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STATEMENT OF THE CASE

This appeal stems from a dispute between residents of the same neighborhood. On September 25, 2012, the Respondents, (hereinafter "the Mazells"), filed a motion for a restraining order against the Appellants, (hereinafter "Mr. McFarland"), based on staking and/or harassment. On October 12, 2012, the matter was heard by the magistrate. Following the hearing, the Magistrate issued a "Mutual Restraining Order." On October 22, 1012, Mr. McFarland timely filed a Motion for Reconsideration. The motion was heard on February 1, 2013, and an order denying reconsideration was issued on March 8, 2013.

On March 26, 2013, McFarland filed a Notice of Appeal with the Circuit Court. On November 12, 2013, the Circuit Court heard arguments on the appeal, and issued an order affirming the magistrate's order on December 10, 2013. Notice of Appeal to this Court was filed on January 13, 2014.

STATEMENT OF THE FACTS

McFarland and Respondents are residents of the same neighborhood, and in fact, live next door to one another. At the time, Mr. McFarland was the president of the neighborhood's homeowners association, ("HOA"), and two of the three alleged incidents in the complaint can be connected with HOA matters. (Circuit Court Trans.p.4, p.7). In September of 2012, the Respondents filed a motion for a restraining order against McFarland alleging harassment pursuant to S.C. Code Ann. §16-3-1700(a) and stalking under §16-3-1700 (B) or (C). Specifically, the motion alleged three incidents. The first involved a dispute over a check written by Respondent to the HOA, which was cancelled prior to presentment. The second incident involved a photograph taken by Mr. McFarland with his cell phone of Respondent while in a parking lot outside an HOA meeting. The third involved an incident in which the Respondent and Mr. McFarland exchanged words while on a shared property line. (Circuit Court Trans.p.7, 8,10). While it is clear that the parties are not friendly with one another, none of the incidents contained in the complaint rise to the level to meet the statutory definition of "Harassment" or "Stalking." As such, the restraining order should not have been issued.

ARGUMENT

I. THE RESTRAINING ORDER ISSUED AGAINST APPELLANT WAS IMPROPER IN THAT NONE OF THE INSTANCES MEET THE DEFINATION OF STALKING OR HARRASSMENT AS DEFINED BY S.C. CODE ANN. § 16-3-1700.

When acting in appellate capacity pursuant to S.C. Code Ann. §18-7-170, the circuit court has a broad scope of review. However, the Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show

the affirmance was influenced by an error of law. *Hadfield v. Gilchrist*, 343 S.C. 88 (S.C. Ct. App. 2000). However, the Court may reverse if there are errors of law. *Id.* In this case, both the magistrate and circuit court erred in holding that the three incidents alleged in the complaint satisfy the definitions of either "stalking" or "harassment." As such, the restraining order was improperly issued.

"Harassment" is defined as "a pattern of intentional, substantial and unreasonable intrusion into the private life of a targeted person that causes the person and would cause a reasonable person in his position to suffer mental distress." S.C. Code Ann. §16-3-1700(A). The code continues to describe examples of stalking as, "(1) following the targeted person; (2) visual, physical, verbal, written or electronic contact that is initiated, maintained, or repeated after a person has been provided notice that the contact is unwanted; (3) surveillance of or the maintenance of a presence near the targeted persons residence, place of work, school or another place regularly occupied by the targeted person, and (4) vandalism and property damage."

"Stalking" is defined as a pattern of words, conduct, written or electronic that is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's potion to fear:

(1) Death of the person or a family member;

(2) Assault upon the person or a member of his family;

(3) Bodily injury to the person or a member of his family;

(4) Criminal sexual contact on the person or a member of his family

(5) Kidnapping of the person or a member of his family; or

(6) Damage to the property of the person or a member of his family

S.C. Code Ann. §16-3-1700(B).

Respondent presented no evidence in the complaint or in the subsequent testimony that would satisfy any of the above elements of stalking. The only possible section upon which the restraining order could be issued is S.C. Code Ann. §16-3-1700(A). This section requires a person to show ". . . a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose . . ." Each alleged incident is discussed below, and accordingly, the Respondent failed to show that the alleged "intrusion" constituted a pattern as defined by S.C. Code Ann. §16-3-1700(D).

A. September 20, 2012 – Worthless Check Investigation

As stated above, Respondents alleged that the Defendant somehow engaged in stalking and/or harassment as defined by S.C. Code Ann. §16-3-1700 as a result of the First Circuit Solicitor's Office sending a letter concerning a worthless check. (See Exhibit A to Memorandum in Support of Motion for Reconsideration).

Initially, the contact with Respondent was initiated by the First Circuit Solicitor's Office, and did not involve visual or physical contact by McFarland. S.C. Code Ann. §16-3-1700 does not contemplate contact by third-parties. The letter received by the Respondents was from the First Circuit Solicitor's Office and only referenced a dishonored check to "Live Oak Village HOA," who is not a party to this action.

Not only does this alleged incident not involve visual or physical contact by McFarland, but McFarland also had a legitimate purpose as contemplated by S.C. Code Ann. §16-3-1700. Mr. McFarland, as HOA board president was seeking to deposit HOA dues when he presented the check for payment. While there is a dispute about when or how the check was received by McFarland on July 21, and why there was a delay in presentment, what is clear is that Mr. Mazell stopped payment on the check on July 27, 2012. (Hearing Transcript, p.58, lines 14-16).

Yet, Respondent was emailing Mr. McFarland on September 5, 2012, 40 days after the stop payment was issued, that his check for HOA dues check had not cleared. There is nothing improper about Mr. McFarland's actions in reporting the check to the worthless check division after receiving the email informing him that the Respondent's check had not yet cleared, and accordingly presenting the check for payment.

The subsequent letter from the worthless check division does not meet the criteria or the definition of harassment and/or stalking, nor does it constitute an intrusion into the private life of Respondents.

B. September 12, 2012 – Cell phone picture of Respondents' vehicle

The Respondents alleged that she was taking her daughter to dance, when Mr. McFarland approached her vehicle and began taking pictures of her. (Complaint; Hearing Transcript p.8, lines 10-25). However, a review of the transcript, including the testimony of Respondent's own witness, reveals otherwise.

This incident took place in a parking lot outside the public library where a duly noticed meeting of the HOA was scheduled, a meeting at which Respondent knew that Mr. McFarland would be present at this location at that specified time. Respondent even admitted that she had notice of the meeting and knew that Mr. McFarland would be at this location during this time frame. (Hearing Transcript, p.16, lines 10-24).

As explained, by Mrs. McFarland's testimony, she and Mr. McFarland where present at the library for a meeting. (Hearing Transcript, p. 105, lines 1-14). After dropping Mrs. McFarland off at the door, Mr. McFarland had to park in the adjacent parking lot as the library parking lot was full. (Hearing Transcript, p.106, line 1). According to both Mrs. McFarland and Respondent's witness, the adjacent parking lot (where Respondent was parked), is used as

overflow parking when the library lot is full. (Hearing transcript, p.36, lines 2-10; p.105, lines 15-25).

After seeing Respondent in the parking lot from the library conference room, Mr. McFarland went outside to ascertain whether Respondent was coming to the meeting. (Hearing Transcript, p.109, lines 1-2). In the past, Respondents had expressed concern about attendance at the meetings. (Hearing Transcript p.6-11). Mr. McFarland did take a photograph to document that Respondent was present at the library and could have attended the meeting to prevent any future claim by Respondents that they were not given proper notice of the meeting. (Hearing Transcript, p.110, lines 1-6; see also Exhibits D and E to Memorandum in Support of Reconsideration).

Again, this action by Mr. McFarland does not meet the definition of harassment and/or stalking. Moreover, Mr. McFarland had a legitimate purpose in 1) being at the library for the duly notice HOA meeting, and 2) documenting via the photograph that Respondent was present in the area and could have attended the meeting, to prevent any future claim to the contrary.

C. July 11, 2012 – dispute at the mutual property line

This incident occurred after Respondent approached Mr. McFarland at their mutual property line and was "repeatedly asked questions by the McFarlands." (Hearing Transcript p.12, 5-8; p.26, lines 10-11). Again, S.C. Code Ann. §16-3-1700, does not contemplate such a situation. In this incident, the Respondent left her home, walked across her yard and approached Mr. McFarland on the shared property line. Mr. McFarland clearly has a "legitimate purpose" to be present on his own property. Even the complaint that Respondent demanded from the police department lists Respondent, Mrs. Mazell, as the "subject" and Mrs. McFarland as the "victim." (Exhibit F Attached to Memorandum in Support of Reconsideration).

As with the previously described instances, none rise to the circumstances encompassed by S.C. Code Ann. §16-3-1700, nor does the behavior of either party meet the statutory definition of harassment or stalking[1]. Instead, we see a pattern in which Respondent has continually and intentionally put herself in situations in which she knew Mr. McFarland would be present.

II. THE ISSUE OF MOOTNESS IS NOT APPLICABLE.

The fact that the restraining order has since expired should not prevent a court from overturning an improperly granted order from a lower court. As it stands, there now is a court record that Mr. McFarland was subject to an order involving stalking and harassment, even though, Respondent failed to prove that any of the incidents rose to the level of behavior contemplated by S.C. Code Ann. §16-3-1700, or even met the statutory definition of stalking and/or harassment.

To the extent the court considers the issue moot, the situation meets the exceptions as outlined in *Curtis v. State*, 345 S.C. 557, 567,549 S.E.2nd 591 (S.C. 2001). In the civil context, there are three general exceptions to the mootness doctrine. "First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review." *Id.* "Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Id.* "Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.* (internal citations omitted).

[1] Additionally, the order is defective on its face as it does not comport with S.C. Code Ann. §16-3-1750(E), which requires that a restraining order remain in effect for "not less than one year."

In the present case, exceptions one and two are satisfied by the fact that S.C. Code Ann. §16-3-1700 et al, contemplates criminal actions for harassment and stalking and are not meant to be used by next door neighbors who are not getting along. Allowing the restraining order to stand based on the behavior described herein invites abuse by others to file for restraining orders for alleged behavior that falls well below the harassment and stalking threshold, and amounts to petty disputes. Additionally, this will place a burden on the court system to deal with these types of disputes rather than the behavior contemplated by the statue.

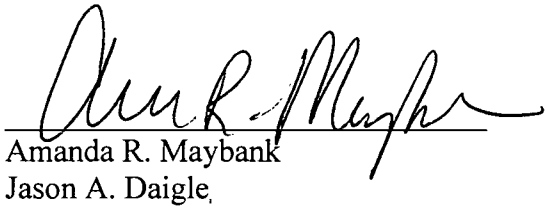
The third exception is met in that this order, even though expired, will affect future events and have collateral consequences for Mr. McFarland. Mr. McFarland is in business, and is frequently "checked out" by potential customers. (Memorandum in Support of Motion for Reconsideration, p. 3). He also travels internationally. Having a restraining order on record for stalking and/or harassment can both affect his ability to travel internationally and the ability to develop new customers if they become aware of this order.

Accordingly, while the restraining order is expired, it is not a moot issue. It still is a court record which can have long term affects on Mr. McFarland and could encourage others to engage the court system for petty disagreements that are not contemplated by S.C. Code Ann. §16-3-1700.

CONCLUSION

The restraining order was improperly issued as the behavior described by all parties involved did not rise to the level contemplated by S.C. Code Ann. §16-3-1700, nor did the behavior meet the definitions of stalking and/or harassment as defined by the code. A reading of the transcript and the record demonstrates that the order was improperly issued. According, the lower court should be reversed and the order vacated.

Respectfully Submitted,



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