NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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June 27, 2022

Ann M. Thayer
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Fairfax, VA 22030

John L. Bauserman
P.O. Box 1403
Fairfax, VA 22038

Re: *Boyd* v. *Boyd*, JA 2021-237

Dear Ms. Thayer and Mr. Bauserman:

This matter is before the court on Petitioner's *Motion to Reconsider* filed March 23, 2022. Respondent timely filed a response on April 8, 2022. For the reasons that follow, Petitioner's motion is DENIED.

BACKGROUND

On August 19, 2021, Respondent was charged by summons with speeding 78 mph in a 40 mph zone pursuant to § 70.03 of the Town of Occoquan Code of Ordinances, which made it unlawful for any person within the town to violate, *inter alia*, Code § 46.2-870;[1] the parties' daughter was a passenger in the vehicle. Respondent prepaid the summons on August 31, 2021.

[1] It is not clear to the court why Respondent was charged with speeding 78 mph in a 40 mph zone pursuant to Code § 46.2-870 because Code § 46.2-870 establishes, *inter alia*, that the "maximum speed limit shall be **55 miles per hour** on interstate highways or other limited access highways with divided roadways, nonlimited access highways having four or more lanes, and all state primary highways," that the "maximum speed limit on all other highways shall be **55 miles per hour** if the vehicle is a passenger motor vehicle," and that the "maximum speed limit shall be **70 miles per hour** [under certain circumstances] on (i) interstate highways; (ii) multilane, divided, limited access highways; and (iii) high-occupancy vehicle lanes if such lanes are physically separated from regular travel lanes."

OPINION LETTER

Based upon Respondent's speeding conviction, Petitioner orally petitioned, on behalf of her daughter, for a protective order, pursuant to Code § 16.1-253.1(A), in the Juvenile & Domestic Relations District Court on September 8, 2021. The oral petition for a preliminary protective order was denied and a full hearing was scheduled by the court for September 20, 2021. Respondent received the summons on September 14, 2021. On September 20, 2021, Petitioner appeared *pro se* and Respondent appeared with counsel. At the courthouse, Respondent's counsel served Petitioner with a motion to continue, a motion for a bill of particulars, and a motion for sanctions and ancillary relief; the court continued the matter.

On September 23, 2021, Petitioner, by counsel, filed a praecipe, remote cover sheet, and motion to withdraw and dismiss the case, which were served on Respondent's counsel. On September 25, 2021, Petitioner's counsel filed a bill of particulars and a motion to nonsuit; an agreed nonsuit order, reserving Respondent's sanctions motion, was entered on September 28, 2021. Respondent's sanctions motion was denied on October 14, 2021 and Respondent timely noticed an appeal to this court.

On March 10, 2022, this court held an evidentiary hearing on Respondent's motion for sanctions against Petitioner pursuant to Code § 8.01-271.1 at which both parties were represented by counsel; only the parties testified. The court found that Petitioner's oral request for a protective order was in violation of Code § 8.01-271.1(C) because it was not warranted by existing law. By order of March 10, 2022, Respondent was awarded attorney fees in the sum of $3,700. Petitioner timely filed a *Motion to Reconsider*.

ANALYSIS

Petitioner sought a protective order pursuant to Code § 16.1-253.1(A)[2] on behalf of her daughter as a result of the daughter being a passenger in Respondent's vehicle when he was speeding 78 mph in a 40 mph zone. Code § 16.1-253.1(A) authorizes the issuance of a preliminary protective order against a person who has "subjected" the petitioner, or any family or household member of the petitioner, to "family abuse . . . ." The term "family abuse" is defined by Code § 16.1-228 as:

> any act involving violence, force, or threat that results in bodily injury or places one in reasonable apprehension of death, sexual assault, or bodily injury and that is committed by a person against such person's family or household member.

Thus, for issuance of a preliminary protective order, Petitioner would have had to show that her daughter was subjected to an act by Respondent involving violence, force, or threat that either resulted in bodily injury or placed the daughter in reasonable apprehension of death, sexual assault, or bodily injury. Because there was no evidence that Respondent's speeding resulted in bodily

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[2] "Upon the filing of a petition alleging that the petitioner is or has been, within a reasonable period of time, subjected to family abuse, the court may issue a preliminary protective order against an allegedly abusing person in order to protect the health and safety of the petitioner or any family or household member of the petitioner. The order may be issued in an ex parte proceeding upon good cause shown when the petition is supported by an affidavit or sworn testimony before the judge or intake officer."

injury to the parties' daughter, or that Respondent committed an act of violence or the use of force against the parties' daughter, the only possible basis upon which a protective order could have issued was that Respondent's speeding involved a threat that placed his daughter in reasonable apprehension of death or bodily injury.[3] A threat, however, is a "statement of an intention to inflict evil, injury, or damage." *Merriam-Webster Dictionary.* There was no evidence offered that Respondent's speeding indicated an intention to inflict evil, injury, or damage on his daughter that would have put her in reasonable apprehension of death or bodily injury. It is undoubtedly for that reason that the Juvenile & Domestic Relations District Court denied Petitioner's oral petition.

While speeding may possibly have endangered Respondent's daughter, possible endangerment is simply not what is required by Code § 16.1-253.1(A) for the issuance of a preliminary protective order. Whether Code § 16.1-253.1(A) should be extended to include possible endangerment is for the General Assembly to determine, not a court. Thus, the court concludes that there was no basis for the issuance of a preliminary protective order.

Petitioner asserts that the court "did not need to make a finding on the underlying issue as to whether a protective order would have been granted in deciding whether to grant a motion for sanctions." *Motion To Reconsider* ("*Motion*") 2. In support of that assertion, however, Petitioner merely contends that the court should apply an "objective standard of reasonableness" and that "the issue is could a *pro se* litigant 'after reasonable inquiry have formed a reasonable belief that the pleading was warranted by existing law or a good faith argument to extend the law,'" purporting to quote from *Gilmore* v. *Finn*, 259 Va. 448, 465 (2000).[4] Plainly, because the question is whether Petitioner could have had a "reasonable belief that the pleading was warranted by existing law," the court has to examine existing law -- just as the Court in *Gilmore* did. 259 Va. at 467. Petitioner's assertion is thus without merit.

Turning to the question of whether Petitioner "could have formed a reasonable belief" that the petition "was warranted by existing law," the court reiterates its finding that the oral petition was not warranted by existing law as no reasonable person, even a *pro se*, could have reasonably believed that Code § 16.1-228 encompassed speeding 78 mph in a 40 mph zone. The words "act involving violence, force, or threat" in their common meaning simply do not bring to mind speeding 78 mph in a 40 mph zone. And, because Code § 8.01-271.1 was enacted "[f]or the protection of the public from harassment by frivolous, oppressive, fraudulent or purely malicious litigation, the General Assembly has chosen to hold attorneys and *pro se litigants* to a high degree of accountability for the assertions they make in judicial proceedings." *Shipe* v. *Hunter*, 280 Va. 480, 484 (2010) (emphasis added). See also *Kondratenko* v. *Earhart*, 2010 WL 3394900, at *4 (Va. Ct. App. Aug. 31, 2010) ("a litigant appearing pro se 'is no less bound by the rules of procedure and substantive law than a defendant represented by counsel.' (Citation omitted).").

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[3] There was no suggestion that speeding would have placed the daughter in reasonable apprehension of sexual assault.

[4] The actual quotation and correct citation are: "whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that the pleading was warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Gilmore v. Finn,* 259 Va. 448, 466 (2000).

To support her contention that she acted reasonably in orally petitioning for a protective order, Petitioner asserts that speeding 78 mph in a 40 mph zone is, by "definition[,] reckless driving," quoting Code § 46.2-862: "a person is guilty of reckless driving who drives a motor vehicle on the highways in the Commonwealth at a speed of 20 miles per hour or more in excess of the applicable speed limit." *Motion* 8. Petitioner adds that Code § 46.2-852 defines reckless driving as "irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or *at a speed or in a manner so as to endanger the life, limb, or property of any person.*" *Motion* 8 (emphasis in *Motion*).[5]

Petitioner appears to be suggesting, since speeding 78 mph in a 40 mph zone is reckless driving and reckless driving is also driving at a speed "so as to endanger the life, limb, or property of any person," that speeding 78 mph in a 40 mph zone endangers the life, limb, or property of any person. This is a false equivalence. Rather, it is likely precisely because speeding 78 mph in a 40 mph zone does not necessarily endanger the life, limb, or property of any person that the General Assembly enacted Code § 46.2-862.[6] It is thus also likely that the police officer in this case, because he did not charge Respondent with a violation of Code § 46.2-852, concluded that there was not probable cause to believe that Respondent was driving at a speed so as to endanger the life or limb of Respondent's daughter.

Petitioner further argues that she made a reasonable inquiry because, before filing for the protective order, she:

> spoke to a supervising officer, listened to audio from the traffic stop, reached out to the arresting officer, confirmed her daughter was in the car at the time of this incident, consulted with her family law attorney, went to magistrate as instructed to by her attorney . . . .

Motion 9.

At the hearing, however, Petitioner did not call as a witness the

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[5] The penalties for reckless driving are set forth in Code § 46.2-868.

[6] On November 30, 1953, the Supreme Court stated: "Speeding is not necessarily reckless driving." *Lamb v. Parsons,* 195 Va. 353, 358 (1953). At that time, the only form of reckless driving was to "[e]xceed a reasonable speed under the circumstances and traffic conditions existing at the time . . . ." Code § 46-209(7). In the 1954 session, the General Assembly added Code § 46-209.1, which defined reckless driving as driving "at a speed in excess of seventy-five miles per hour." *Acts of Assembly of 1954*, Chap. 401. In 1958, the General Assembly recodified Title 46 as Title 46.1 and modified the reckless driving provisions. In pertinent part, Code § 46.1-189 defined reckless driving as driving "at a speed or in a manner so as to endanger life, limb or property of any person" and Code § 46.1-190(i) defined reckless driving as driving "at a speed in excess of seventy-five miles per hour . . . ." *Acts of Assembly of 1958*, Chap. 541. In 1966, Code § 46.1-190(i) was amended to modify "in excess of seventy-five miles per hour" to "in excess of eighty miles per hour" and to include an additional definition of reckless driving: driving "at a speed of twenty or more miles per hour in excess of the applicable maximum speed limits . . . ." *Acts of Assembly of 1966*, Chap. 694. The General Assembly recodified Title 46.1 as Title 46.2 in 1989 and created Code § 46.2-852 and Code § 46.2-862 in substantially their current form. *Acts of Assembly of 1989*, Chap. 727.

supervising officer, the arresting officer, or her family law attorney, and did not subpoena the audio from the traffic stop, to support her assertion that she "could have formed a reasonable belief" that the protective order petition "was warranted by existing law . . . ." For all the court knows, the officers could have told her that they did not believe that her daughter was endangered -- indeed, the arresting officer did not charge Respondent under Code § 46.2-852, so it is a fair inference that he did not have probable cause to believe that Respondent was driving at a speed so as to endanger the life or limb of his daughter.[7] Similarly, her family law attorney could have told her that she had no basis for a protective order or that the attorney could not give her an opinion. Because the family law attorney was not called as a witness, that evidence was not before the court.[8]

Petitioner raises several other issues which the court will now address (using the argument numbers used by Petitioner).

2) Petitioner argues that the court "must take into consideration the parties' (*sic*) ability to pay sanctions and attorney fees" and that *Respondent* "failed to present any evidence of this factor . . . ." *Motion* 3. While Petitioner does not cite any authority for the proposition that the court must consider a party's ability to pay, assuming *arguendo* that ability to pay is a factor that the court must consider, the burden is on Petitioner to show her *inability* to pay, not on Respondent to show her *ability* to pay -- as she would have the relevant information -- and Petitioner did not offer any evidence of her inability to pay.[9]

3) Petitioner asserts that, "[i]n determining whether there should be sanctions, the Court should weigh out the equity in a case." *Motion* 3. The equities Petitioner requests the court to consider are that, when Respondent's counsel "handed the pro se Plaintiff several motions outside the courtroom right before the case was called on September 20, 2021, he could have asked if she was intending to proceed with the hearing that day." *Id.*

As Respondent aptly points out, however, Respondent was served on September 14, 2021 with a summons for a protective order hearing on September 20, 2021 and retained counsel to prepare for that hearing; that preparation and appearance involved 8.09 hours (@ $295/hour = $2,386). Thus, even if Respondent's counsel had some duty to inquire of Petitioner whether she was intending to proceed with

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[7] It is unclear to what the supervising officer could have testified because he was likely not a witness to Respondent's driving.

[8] The court notes that the Juvenile & Domestic Relations District Court publishes a *Family Abuse Protective Order Packet* in which the court lists "[e]xamples of family abuse" under Code § 16.1-228. A cursory review of that list would have shown Petitioner that speeding 78 mph in a 40 mph zone was not encompassed by Code § 16.1-228.

[9] Petitioner cited *Lynchburg Division of Social Services v. Cook*, 276 Va. 465, 484, 666 S.E.2d 361, 371 (2008). That case, however, concerned Code § 16.1-278.19 ("the court may award attorney's fees and costs on behalf of any party as the court deems appropriate based on the relative financial ability of the parties"), which is not the statute upon which the court awarded attorney fees in the instant case. Petitioner also cited *Advanced Marine Enterprises v. PRC Inc.*, 256 Va. 106, 126, 501 S.E.2d 148, 160 (1998) (recoverable costs are "limited only to those costs essential for prosecution of the suit, such as filing fees or charges for service of process"); as the court awarded only attorney fees, not costs, this case is inapposite.

the hearing that day, Respondent had already incurred attorney fees because Petitioner had initiated the protective order process -- a process which could have resulted in his relationship with his daughter being prohibited for as long as two years.

The remaining fees were incurred by Respondent in resolving Petitioner's nonsuit (.79 hours @ $295/hour = $233) and preparing and arguing the instant motion in the J&DR District Court, and appealing it to this court (2.19 hours @ $295/hour = $646), for a total of $3,265. Respondent did not, however, have a duty to Petitioner to inquire of Petitioner whether she was intending to proceed with the hearing; as Petitioner was the party who initiated the process, any burden to halt the process was hers and she could have informed Respondent's counsel that she did not intend to proceed with the hearing. Thus, the equities weigh in Respondent's favor.

4) Petitioner contends that the court erred in excluding certain testimony of Petitioner because it was admissible as exceptions to the hearsay rule under Rule 2:803(3) ("statement of the declarant's then existing state of mind, emotion, sensation, or physical conditions (such as intent, plan, motive, design, mental feeling, pain, and bodily health)").[10] According to Petitioner, none of the excluded statements were offered "for the truth of the matter but solely to show Plaintiff's state of mind and plan she formed for the next steps she took which lead (*sic*) to her filing of this petition." *Motion* 6.

At page 5 of her Motion, Petitioner sets out the statements that she appears to assert were not admitted as evidence; in fact, the statements which related to actions she took were admitted. It was only statements of others which the court barred:

> her family attorney "advised her to go try to get a protective order from the magistrate"
>
> "the magistrate directed her to go to the court to file a protective order"
>
> "the attorney advised she could go forward or nonsuit it"
>
> "various mailings and pamphlets with Defendant's name on it from attorneys handling reckless driving and traffic matters"

Petitioner appears to have a fundamental misunderstanding of Rule 2:803(3). The "declarant" referred to in Rule 2:803(3) is not the person testifying; it is a person who is *not* testifying, but whose statement is being reported by the witness who *is* testifying. And it is the "then existing state of mind" of the "declarant" -- not of the witness -- to which the witness is testifying. Thus, the "declarant" here would not be Petitioner, but would be Petitioner's family attorney, the magistrate, or the statements on the mailings and pamphlets. Plainly, their states of mind (*e.g.*, anger, fear) are wholly irrelevant here. If Petitioner wishes to elicit testimony concerning *her* state of mind, *she* would be the one to do so. If Petitioner wished to offer testimony of her family attorney or the magistrate, she should have subpoened them.

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[10] Notably, despite the plentitude of cases concerning the hearsay exception for state of mind, Petitioner does not cite a single case supporting her view of Rule 2:803(3).

Moreover, each statement was offered to show what Petitioner was told by someone else. And each was thus plainly offered for the truth of the statement, *i.e.*, to prove what Petitioner was told. The statements were thus inadmissible hearsay.

5) Petitioner argues that the court:

> did not consider that Virginia Code § 8.01-271.1 Section B also says "to the best of her knowledge, information, and belief formed after reasonable inquiry" before the language the court cited for making its ruling that the pleading was not "well grounded in fact or existing law or a good faith argument for the extension, modification, or reversal of existing law."

Motion 7.

According to Petitioner, she "testified to the various actions and reasonable inquiry she took before filing the petition for a protective order." Motion 7.

The court did consider that Code § 8.01-271.1(C)[11] provides that Petitioner's oral motion constituted a representation by her that, "to the best of [her] knowledge, information and belief formed after reasonable inquiry," the petition was "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ."[12]

As this language makes clear, Petitioner's knowledge, information, and belief must be formed after "reasonable inquiry . . . ." While Petitioner testified about what *she did* before requesting the petition, she offered no evidence concerning what information she obtained which justified requesting the petition: she did not have the police officer testify about Respondent's actual driving behavior and she did not have her attorney testify about what he told her. Thus, the court does not know whether her inquiry was reasonable. Moreover, Petitioner had an alternative avenue if she believed that her daughter was unsafe with Respondent; she could have filed for modification of the controlling orders of custody and visitation.

Petitioner argues that "[g]ranting sanctions under these circumstances has a chilling effect on any parties seeking to protect themselves or someone else that may be in harm." *Motion* 9. Petitioner is correct; sanctions are being granted here precisely to discourage abuse of the protective order process that the General Assembly has seen fit to enact. *See Shipe, supra.* Protective orders are limited to acts involving "violence, force, or threat" that result in "bodily injury or place[] one in reasonable apprehension of death, sexual assault, or bodily injury . . . ." For circumstances such as in the case at

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[11] Code § 8.01-271.1(B) does not apply here as it concerns "the signature of an attorney or party," whereas Code § 8.01-271.1(C) concerns an "oral motion made by an attorney or party . . . ."

[12] Petitioner asserts that her petition was "well grounded in fact as the act itself did occur." *Motion* 8. To the extent that the court's order of March 10, 2022 was based upon the petition not being well grounded in fact, the court will modify the order as the basis of the order is that the petition was not warranted by existing law.

bar, Petitioner had a mechanism available to her to challenge what she viewed as unsafe situation for her daughter; she could have filed for modification of the controlling orders of custody and visitation. She elected to seek a protective order and will thus be held to a "high degree of accountability . . . ." *Shipe, supra.*

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge