STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1885

Sarah B. Janecek, petitioner,
Appellant,

vs.

Lee Aaron Rosenthal,
Respondent.

Filed June 12, 2017
Reversed and remanded
Jesson, Judge

Hennepin County District Court
File No. 27-CV-16-14779

Joseph P. Tamburino, Caplan & Tamburino Law Firm, P.A., Minneapolis, Minnesota (for appellant)

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Considered and decided by Jesson, Presiding Judge; Ross, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

Appellant Sarah Beth Janecek challenges the district court's denial of her petition for a harassment restraining order against her neighbor, respondent Lee Aaron Rosenthal. Because the district court erred by dismissing Janecek's petition without holding an evidentiary hearing, we reverse and remand.

FACTS

Sarah Beth Janecek and Lee Aaron Rosenthal have been next-door neighbors for several years in Minneapolis's Lowry Hill neighborhood, where they share a driveway. In recent years, the relationship became acrimonious and deteriorated to the point where Rosenthal installed several security cameras outside of his home, pointing toward Janecek's home. Janecek filed a petition for an ex parte harassment restraining order (HRO) against Rosenthal in October 2016. In her petition and affidavit, Janecek alleges that Rosenthal has constantly videotaped her home 24 hours a day for the last six years. The petition states:

> Mr. Rosenthal has had multiple cameras attached to his home pointing toward my home in an extraordinary effort to record me and my actions on a daily basis. None of the cameras are aimed at a point of entrance into the Rosenthal home. Instead, the cameras are aimed toward my property and record me on both public and my private property.

Janecek then lists the various areas of her home that are videotaped, noting that "additionally, I have seen on occasion the cameras pointed toward the windows of my home. This has caused me to keep my shades and curtains closed. I feel that I have no real sense of privacy . . . ." The petition alleges that Rosenthal reviews all the videos and uses them to try and press criminal and civil charges against her.[1] Janecek attached to her petition three pages from a trial transcript in which Rosenthal was cross-examined about

[1] In a separate but related pending appeal before this court regarding the parties' ongoing conflict, Janecek challenges the sufficiency of the evidence to sustain her conviction of disorderly conduct and littering for tipping over Rosenthal's trash cans. *See State v. Janecek*, No. A16-1838.

his cameras and recording practices, including his practice of forwarding videos to law enforcement.

In her petition for an HRO, Janacek asks the court to issue an ex parte restraining order that includes a directive to Rosenthal to stop video recording her home. She also petitions that "if the court denies my request for a restraining order because the court finds there is no immediate and present danger of harassment, then . . . I want . . . a court hearing."

The district court dismissed Janecek's petition for lack of merit, concluding that Rosenthal's conduct did not constitute harassment. There was no hearing on the matter. Janecek appeals.

D E C I S I O N

This court reviews the district court's decision whether to grant a harassment restraining order for an abuse of discretion. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). An abuse of discretion occurs if the district court makes findings that are unsupported by the evidence or improperly applies the law. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009). While this court reviews a district court's factual findings for clear error, when the case presents a question of law, this court reviews the district court's decision de novo. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008).

Harassment restraining orders allow a person who has been threatened, harassed, or stalked on two or more occasions to seek an order prohibiting contact. Minn. Stat.

§ 609.748 (2016).[2] To do so, an individual must file a petition that includes the names of the alleged victim and respondent and facts sufficient to show that the respondent engaged in harassment. *Id.*, subd. 3. Courts are directed to provide simplified forms and assistance to help with petition filing and to "advise the petitioner of the right to request a hearing." *Id.* The statute further provides that, upon receipt of a petition and request for a hearing, "the court shall order a hearing."[3] *Id.* But nothing in the harassment statute requires "a hearing on a matter that has no merit." *Id.*

Because the district court dismissed Janecek's petition without a hearing, based upon its lack of merit, the question before us is whether the petition sets forth a legally sufficient claim for relief; in short, could the alleged facts, if proven, constitute harassment under Minnesota Statutes section 609.748? We review this legal question de novo. *Peterson*, 755 N.W.2d at 761.

In examining this issue, as in our review of a motion to dismiss pursuant to rule 12.02 of the Minnesota Rules of Civil Procedure, we consider only the facts alleged in the petition. We accept those facts as true and construe all reasonable inferences in favor of the petitioner. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).[4] When doing so, in order to decide whether the petition sets forth a legally sufficient

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[2] HROs are also available to individuals who have experienced a single incident of physical or sexual assault, stalking, or nonconsensual communications of sexual images. Minn. Stat. § 609.748, subd. 1(a)(1).

[3] The court may also order a temporary restraining order pending the hearing when the petition alleges "an immediate and present danger of harassment." Minn. Stat. § 609.748, subd. 4.

[4] We observe that, while the statute governing the issuance of HROs, Minnesota Statute section 609.748 is located in the chapter containing criminal statutes, HRO proceedings

claim for relief, we first consider the language of the harassment statute itself. We then turn to our previous interpretations of the statute, as well as guidance from caselaw addressing the reasonable expectation of privacy. Applying the statutory language and the principles behind the right to privacy, we conclude that the petition sets forth a narrow claim for relief under the harassment statute. Thus, the district court erred in not holding a hearing.

Harassment, as defined by Minnesota Statute section 609.748, includes "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." Minn. Stat. § 609.748, subd. 1(a)(1). We note that the plain language of the statute defines harassment to include repeated intrusive or unwanted acts intended to have a substantial adverse effect on the *privacy* of another. *Id.* And this court has upheld the constitutionality of the harassment statute in the face of a First Amendment challenge, focusing on the state's ability to regulate conduct that invades another's privacy. *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. App. 2006), *review denied* (Minn. March 28, 2006). In doing so, the court stated:

> Thus, the language of the statute is directed against constitutionally unprotected "fighting words" likely to cause the average addressee to fight or protect one's own safety, security, or privacy; "true threats" evidencing an intent to commit an act of unlawful violence against one's safety, security or privacy; and speech or conduct that is *intended to*

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are civil in nature. *Dunham v. Roer*, 708 N.W.2d 552, 568 (Minn. App. 2006) (noting that HRO matters are civil in nature), *review denied* (Minn. March 28, 2006).

> *have a substantial adverse effect, i.e., is in violation of one's right to privacy.*

Id. at 566 (emphasis added) (quotations omitted).

Much of Janecek's petition addresses Rosenthal's videotaping of areas that, while perhaps irritating, do not implicate privacy concerns, such as recording pictures of her front sidewalk and the boulevard where she sets out her trash. But the allegation that she has seen cameras pointed toward the windows of her home, leading her to fear being videotaped within her home, raises the question whether Rosenthal's videotaping of these areas amounts to intrusive or unwanted acts intended to have a substantial adverse effect on Janecek's privacy—in short, whether these are acts of harassment.

We find no direct and binding authority concerning whether videotaping a home, in the fashion alleged by Janecek, rises to the level of an intentional violation of privacy protected by the harassment statute. The district court, in dismissing the case, relied upon an unpublished decision of this court, *Johnson v. Michels Prop. Grps., LLC*, No. A09-2315, 2010 WL 3545820, at *1 (Minn. App. Sept. 14, 2010). In *Johnson*, one neighbor installed video cameras for security purposes following numerous acts of vandalism, to the dismay of neighbors who sought an HRO. *Id.* The neighbors testified that some of the cameras were directed toward private areas of their home and that the continuous videotaping substantially affected their privacy. *Id.* The district court denied the HRO after a hearing and this court affirmed, noting that the cameras recorded events that an observant neighbor could view. *Id*. at *2.

But we note that our unpublished decisions are not precedential, Minn. Stat. § 480A.08, subd. 3 (2016). Further, other unpublished opinions that address taking videos and pictures in the harassment setting reach differing results, depending on the facts and circumstances of those cases. *See, e.g.*, *Safstrom v. Morin*, No. A15-1879, 2016 WL 4954541, at *3 (Minn. App. Sept. 19, 2016) (upholding district court's HRO, issued after a hearing, based upon intrusive yelling incidents, but not filming, which "without more, does not constitute harassment as described in the statute"); *Sammon v. Halvorson*, No. A15-1261, 2016 WL 1175197, at *1-*2 (Minn. App. Mar. 28, 2016) (upholding district court's HRO based on finding that taking photos of a family in a pasture amounted to objectively unreasonable conduct in the circumstances); *Vancamp v. Vancamp*, No. A14-1926, 2015 WL 2468970, at *4 (Minn. App. June 1, 2015) (upholding HRO based, in part, on the factual finding that taking pictures established an act of harassment). In all of these cases, the district court held a hearing to take testimony from the parties to gain an appreciation for the context of the dispute.

Because Minnesota precedent has not addressed this precise issue in the harassment context, we turn to persuasive authority from the principles of privacy in tort recognized in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998). In *Lake*, the Minnesota Supreme Court recognized three torts constituting invasion of privacy: intrusion upon seclusion, appropriation, and publication of private facts. *Id.* at 235. Relying upon the Restatement (Second) of Torts, § 652B (1977), the supreme court held that intrusion upon seclusion occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would

be highly offensive to a reasonable person." *Id.* at 233 (quotation omitted). Quoting the seminal law review article by Samuel Warren and Louis Brandeis, the court noted that "'the right to life has come to mean the right to enjoy life—the right to be let alone.'" *Id.* at 234 (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890)). And this right is, the supreme court noted, at the heart of our liberty. *Id.* at 235.

While the facts in *Lake* differ from those before us,[5] the Restatement upon which the supreme court relies further describes the "intrusion upon seclusion" central to the right to privacy adopted in *Lake.* In doing so, the Restatement notes that "[t]he intrusion may be . . . by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars." Restatement (Second) of Torts, § 652B cmt. b (1977).

Relying upon this Restatement provision, the Supreme Judicial Court of Massachusetts recently held that homeowners stated a cause of action for invasion of privacy where they alleged that a neighbor, in order to cause them extreme discomfort, installed video cameras directed at their property that recorded on a continuous basis, including recording through the windows of their home. *Polay v. McMahon*, 10 N.E.3d 1122, 1125 (Mass. 2014). The court stated that, even when an individual's conduct is

[5] In *Lake*, two friends gave five rolls of film to a Wal-Mart photo lab to develop vacation pictures, which included a nude photograph. 582 N.W.2d at 232-33. After learning that store employees had circulated the photograph in the community, the friends filed a lawsuit alleging invasion of privacy. *Id.* The district court granted Wal-Mart's motion to dismiss, concluding that invasion-of-privacy torts were not yet recognized in Minnesota. *Id.*

observable by the public, that person "still may possess a reasonable expectation of privacy against the use of electronic surveillance that monitors and records such conduct for a continuous and extended duration." *Id.* at 1127.

And, while not controlling in this civil matter, we further observe that the Fourth Amendment has long upheld the sanctity of the home, generally requiring a search warrant for the interior of the home except where exigent circumstances exist. *Kyllo v. United States*, 533 U.S. 27, 31-34, 121 S. Ct. 2038, 2042-43 (2001). In fact, the Supreme Court has held that not only the home itself, but the area immediately surrounding the home, including the front porch, is part of the home because it "is intimately linked to the home, both physically and psychologically." *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013) (quotation omitted); *see State v. Luhm*, 880 N.W.2d 606, 616-17 (Minn. App. 2016) (describing a home's curtilage for Fourth Amendment purposes).

Addressing the legality of videotaping through a neighbor's window, Rosenthal contends that the district court did not err in dismissing the petition because the only evidence for the allegation that his cameras are pointed into her windows is Janecek's "self-serving" petition and attachment. But our standard of review requires us to assume that the statements in the petition, and any reasonable inferences from them, are true for purposes of determining whether a petition is "without merit." *Bodah*, 663 N.W.2d at 553. When a petition states a legally sufficient claim for relief, a hearing must be held.

Given the assessment of the Restatement of Torts that surveillance may form the basis for an invasion-of-privacy tort claim and the historically protected status of the interior of the home, we conclude that Janecek's petition sets forth a legally cognizable

claim of harassment when it claims that video cameras, which were constantly recording, were pointed at the windows of her home. The right to privacy, as the supreme court noted in *Lake*, is an integral part of our liberty. 582 N.W.2d at 235. With this in mind, and taking the allegations in the petition as true, the district court should properly have held a hearing to determine whether, in context, the videos amounted to "objectively unreasonable conduct" intended to have a substantial adverse impact on Janecek's privacy. *See Kush*, 683 N.W.2d at 844 (considering the broader context in which the alleged harassment took place).

We therefore reverse the district court's dismissal of the petition and remand for further proceedings.

Reversed and remanded.