

2025 IL App (2d) 240613-U
Nos. 2-24-0613 & 2-24-0614 cons.
Order filed July 11, 2025

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JAMESON EISENMENGER,	)	Appeal from the Circuit Court
	)	of Kane County.
Petitioner-Appellee,)	
)	
v.	)	No. 22-OP-41
)	
DAVID A. BERTHA,	)	Honorable
	)	Jennifer L. Johnson,
Respondent-Appellant.	)	Judge, Presiding.

ASHLEY HAIN,	)	Appeal from the Circuit Court
	)	of Kane County.
Petitioner-Appellee,)	
)	
v.	)	No. 22-OP-42
)	
DAVID A. BERTHA,	)	Honorable
	)	Jennifer L. Johnson,
Respondent-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE KENNEDY delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* On appeal from the issuance of plenary stalking no-contact orders (SNCOs), we reject respondent's arguments that (1) the proceedings were tainted because petitioners were represented for a time by the Kane County State's Attorney; (2) the proceedings were tainted when a local judge participated in the

proceedings, in violation of a reassignment order; (3) the conduct that was the subject of the SNCOs was protected under the Citizen Participation Act; and (4) the absolute litigation privilege applied.

¶ 2 In these *pro se* appeals, which we have consolidated for decision, respondent, David A. Bertha, seeks reversal of stalking no-contact orders (SNCOs) entered on July 25, 2024, in favor of Jameson Eisenmenger (case No. 2-24-0613) and Ashley Hain (case No. 2-24-0614). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 14, 2022, Eisenmenger and Hain filed separate petitions in the circuit court of Kane County for SNCOs against Bertha. Eisenmenger alleged that he worked for a business called Performance Health (Performance) and that Bertha sent him an e-mail making vulgar and insulting references to his wife, Kane County State’s Attorney Jamie Mosser. Bertha also sent the e-mail to Performance’s board chairman, its chief executive officer (CEO), and two members of its executive staff. Eisenmenger received additional unwanted e-mails from Bertha.

¶ 5 Hain’s petition alleged that she had “loosely worked with [Bertha] in a professional capacity fulfilling his [Freedom of Information Act] requests from the Kane County Sheriff’s Office.” She alleged that she received a harassing e-mail from Bertha insulting her and her husband, the Sheriff of Kane County. Bertha also sent the e-mail to many of Hain’s professional colleagues as well as members of the Kane County Board. Hain subsequently received harassing e-mails from Bertha making insulting and vulgar references to Mosser and Eisenmenger.

¶ 6 The same day the petitions were filed, a Kane County judge entered emergency SNCOs in both cases. On January 27, 2022, at the request of the chief judge of the Sixteenth Judicial Circuit, our supreme court ordered the chief judge of the Twenty-Third Judicial Circuit to assign a judge from that circuit to preside over both cases. Judge Joseph Pedersen received the assignment. On

February 4, 2022, Judge Pedersen entered plenary SNCOs in both cases. The plenary SNCOs expired on February 2, 2024.

¶ 7 In April 2024, Eisenmenger and Hain again filed separate petitions in the circuit court of Kane County for SNCOs against Bertha. Each petition identified Jamie Mosser as attorney for the petitioner. Mosser was the Kane County State’s Attorney, but she did not purport to represent petitioners in that capacity. Each petition was docketed under the case number assigned to the original corresponding petition filed in 2022 (nothing in the record suggests that those case numbers were used except for administrative convenience).

¶ 8 Eisenmenger’s petition alleged that he was married to Mosser and that, after the expiration of the prior plenary SNCO, Bertha posted two videos that contained photographs of Eisenmenger and his children, as well as information about his employment. According to the petition, the videos falsely accused both Eisenmenger and Mosser of lying, racism, and perjury. Eisenmenger alleged that “[o]ne of the videos ha[d] cartoon characters with guns and [Bertha] sa[id] that he is more dangerous than a N*** with a gun, he is [a] N*** with [an] education.” After Bertha said those words, “cartoon characters with guns and shooting sounds” appeared.

¶ 9 Hain’s petition alleged that, on April 11, 2024, Bertha posted a video to YouTube and sent links to the video to several people. The video featured pictures of Hain and her children and was “disparaging and harassing toward [Hain] and [her] husband.” The video included scenes of cartoon characters holding or shooting guns. Hain alleged that, on April 15, 2024, Bertha posted an additional video. The video was “very similar in that it ha[d] pictures of [her] and [her] family along with the harassing, disturbing[,] and alarming comments.”

¶ 10 The same day the petitions were filed, after a hearing, a Kane County judge entered emergency SNCOs (due to expire on May 7, 2024). Thereafter, McHenry County Judge Jennifer L. Johnson presided over proceedings on the petitions.

¶ 11 On May 1, 2024, Bertha filed in each case a “Motion to Vacate Stalking No Contact Orders, Dismiss with Prejudice[,] and Unseal Court Records” (motions to vacate and dismiss). Bertha argued, *inter alia*, that (1) neither Eisenmenger nor Hain alleged facts supporting their claims that Bertha stalked them and (2) Bertha was entitled to immunity under the Citizen Participation Act (735 ILCS 110/1 *et seq.* (West 2022)).

¶ 12 On May 6, 2024, Eisenmenger and Hain, still represented by Mosser, filed responses to the motions to vacate and dismiss.

¶ 13 On May 7, 2024, Bertha filed a motion to “discharge” Mosser as counsel for Eisenmenger and Hain. On May 24, 2024, Mosser moved to withdraw as Eisenmenger’s counsel. On June 6, 2024, the trial court granted both Mosser’s motion and Bertha’s motion to discharge Mosser as Hain’s counsel. The court continued the matter for Eisenmenger and Hain to obtain new counsel. Attorney David Camic subsequently entered appearances as counsel for both Eisenmenger and Hain.

¶ 14 On July 5, 2024, the matter came before the trial court for hearings on (1) Eisenmenger’s and Hain’s petitions for SNCOs and (2) Bertha’s motions to vacate and dismiss. At the hearing, Bertha indicated that he intended to present evidence to support his motions. He agreed that his motions and the petitions could be heard simultaneously.

¶ 15 Eisenmenger and Hain called Bertha as a witness. Bertha acknowledged that he had been a lawyer at one time but had lost his license to practice law. He testified that he was aware that Hain’s husband was the Kane County sheriff. Bertha recalled that, on June 24, 2022, when the

February 4, 2022, plenary SNCOs were in effect, he sent an e-mail titled “something to the effect of Malcom X shoots Kane County Karen.” On that same date, he attended an event at which Mosser and Hain’s husband were speaking. He could not recall everything he said at that event, but he admitted that he “might have” made disparaging remarks about Hain at that event. He admitted that, on August 8, 2022, he posted a video and forwarded it to 70 to 80 people, including Hain. The purpose of the video was to “spread word of misconduct in Kane County.” Bertha acknowledged that, on April 15, 2024, he posted a video describing himself as “a lot more dangerous than a n*** with a gun”; he was “a n*** with an education.” Bertha acknowledged that he posted videos or contacted Hain on at least two occasions after the February 2022, plenary SNCOs expired and before the April 2024 emergency SNCOs were entered.

¶ 16 Admitted into evidence at the hearing were e-mails dated April 11, 2024, and April 15, 2024, from Bertha to numerous recipients, including many Kane County government employees. The April 11 e-mail stated:

“To Whom It May Concern:

I filed my civil rights lawsuit in federal court on January 12th. The U.S. Marshals are coming soon to serve summonses.

I’m much more dangerous than a n*** with a gun. I’m a n*** with an education. Find a video that some may find informative, clever, and insightful below.

King David”

The e-mail included a link to a video titled “KKKane County Illinois: Sheriff JAILS YouTuber.”

¶ 17 The April 15 e-mail stated:

“To Whom It May Concern:

My lawsuits are filed, and my YouTube videos are back up.

Who wants WAR???

King David”

The e-mail included links to two videos titled “KKKane County Illinois: Sheriff JAILS YouTuber” and “KKKane County, Illinois: RACIST Prosecutor EXPOSED.” Bertha testified that he sent each e-mail to over 300 people.

¶ 18 Hain testified that she was married to Kane County Sheriff Ron Hain. She was employed by the Kane County Sheriff’s office and, at one point, served as a Freedom of Information Act (FOIA) Officer. In January 2022, she received FOIA requests from Bertha. At some point in 2022, Bertha posted a video titled “Malcom X [S]hoots Kane County Karen.” Hain testified that Bertha talked about her, and her picture appeared, throughout the three-minute video.

¶ 19 The videos linked to the April 11, 2024, and April 15, 2024, e-mails were admitted into evidence and played in court. Both videos were narrated, in part, by an altered animated image of Bertha, who at times was flanked by two cartoon characters, at least one of which appeared to be holding a rifle. The April 15 video also contains cartoon characters aiming or firing rifles.

¶ 20 In the April 11 video, Bertha called Mosser “corrupt” and stated that Eisenmenger was fired from his job because Mosser “thought it was a good idea” for Eisenmenger and Hain to file false “police reports” accusing Bertha of stalking them. Bertha stated in the video that Eisenmenger lied on his 2022 petition for a SNCO and at Bertha’s trial in December 2022. Bertha did not elaborate on the accusation that Eisenmenger and Hain filed false police reports. However, he stated that, in December 2022, Eisenmenger falsely testified that he was currently employed by Performance when, in fact, he had been fired by that company in April 2022 and had obtained new employment in June 2022. During the video, a transcript of Eisenmenger’s purportedly false testimony was read aloud. In the transcript, Eisenmenger identified an exhibit as the February 4,

2022, plenary SNCO in favor of Eisenmenger. Asked what the purpose of the SNCO was, Eisenmenger responded, “It says *** Mr. Bertha cannot contact me, my CEO, my board of directors, or other employees of [Performance], and my children.” Although Eisenmenger was referring to an order entered in February 2022, the video suggested that the statement was false testimony that Eisenmenger was employed by Performance as of December 2022.” In the transcript, Eisenmenger also testified that, in July and August 2022, e-mails were sent to people at his workplace, including the CEO of his company. However, it is unclear whether he was referring to Performance or his new employer.

¶ 21 In the April 15, 2024, video, Bertha again accused Eisenmenger of furnishing false information in his petition for a SNCO and of committing perjury.

¶ 22 Eisenmenger testified that he was “part of” an April 11, 2024, e-mail in which Bertha mentioned lawsuits and stated that he was “much more dangerous than a *** n*** with a gun.” Eisenmenger found the e-mail to be very “disturbing,” “[s]cary,” and “[i]ntimidating,” and he was concerned for his children. Along with numerous other recipients, Eisenmenger received an e-mail from Bertha on April 15, 2024, asking, “[W]ho wants war?”

¶ 23 The April 11, 2024, video was played again during Eisenmenger’s cross-examination. Eisenmenger testified that the video’s assertion that he filed a false police report was untrue. At one point, Bertha attempted to ask Eisenmenger about the portion of the video where Bertha accused him of committing perjury by claiming he received an e-mail at Performance in December 2022. The trial court would not allow the inquiry because it pertained to a collateral matter and so was an improper basis for challenging Eisenmenger’s credibility.

¶ 24 After closing arguments, the trial court asked Bertha whether findings that his conduct was not protected speech and that Eisenmenger and Hain were entitled to SNCOs would dispose of

Bertha's immunity argument under the Citizen Participation Act, as brought in his motions to vacate and dismiss. Bertha agreed that such findings would dispose of his immunity argument.

¶ 25 On July 25, 2024, the trial court entered a written order granting plenary SNCOs in favor of Eisenmenger and Hain. Regarding Bertha's motions to vacate and dismiss, the court denied the portion of the motions seeking dismissal. The case was continued to August 7, 2024, for argument on any other relief Bertha sought in his motions. In its decision, the court reviewed in depth the case law differentiating conduct protected by the first amendment to the United States Constitution (U.S. Const., amend. I) from conduct that may be deemed "stalking" under the Stalking No Contact Order Act (740 ILCS 21/15(1) (West 2022)). The court explained that the question hinged on whether the conduct amounted to a "true threat" (see *People v. Bona*, 2018 IL App (2d) 160581, ¶ 23 (one "class of unprotected speech is threats, so long as they are 'true threats' and not mere political hyperbole"). The court concluded that the gun imagery in Bertha's April 11, 2024, and April 15, 2024, videos, considered in light of his prior e-mail referencing "Malcolm X shooting Kane County Karen," qualified as a true threat unprotected by the first amendment.

¶ 26 On August 6, 2024, Bertha filed motions to vacate the plenary SNCOs. He raised, for the first time, the absolute litigation privilege. See *Goodman v. Goodman*, 2023 IL App (2d) 220086, ¶ 25. On August 29, 2024, the trial court entered an order (1) denying the motions to vacate and dismiss in their entirety and (2) setting the August 6 motions for a hearing on September 12, 2024. On September 12, 2024, the court denied the August 6 motions. On October 11, 2024, Bertha filed his notices of appeal in both cases. We ordered the appeals consolidated for decision.

¶ 27

II. ANALYSIS

¶ 28 At the outset, we note that neither Eisenmenger nor Hain has filed an appellee's brief. However, because the record is straightforward and the issues can readily be decided without the

aid of responsive briefs, we will consider the merits of the appeal on Bertha's briefs only. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 29 Bertha first argues that, by initially representing Eisenmenger and Hain, Kane County State's Attorney Mosser engaged in the private practice of law in violation of section 4-2001(b) of the Counties Code (55 ILCS 5/4-2001(b) (West 2022)). We need not address whether Mosser's representation was improper, because she voluntarily withdrew from representing Eisenmenger—and the trial court discharged her as Hain's attorney—before the hearing on Eisenmenger's and Hain's April 2024, petitions for SNCOs. Any issues arising from Mosser's participation in securing the emergency SNCOs based on those petitions became moot once those orders expired. The only arguably significant role Mosser played in securing the plenary SNCOs was in filing the initial petitions and the responses to Bertha's motions to vacate and dismiss. Even to the extent that doing so could somehow be viewed as tainting the proceedings leading to the issuance of the plenary SNCOs, Bertha had a potential remedy readily at hand: he could have moved to strike the petitions and the responses to his motions or otherwise objected to them. His failure to do so amounts to acquiescence in the trial court's consideration of the responses and its ultimate rulings on the petitions and his motions to vacate and dismiss. A party who acquiesces in the manner in which the trial court proceeds will not be heard to complain on appeal that the court's actions were erroneous. *People v. Hernandez-Chirinos*, 2024 IL App (2d) 230125, ¶ 76.

¶ 30 Bertha also argues that it was error for a Kane County judge to issue emergency SNCOs based on Eisenmenger's and Hain's April 2024, petitions, given our supreme court's January 27, 2022, order that the proceedings on the petitions filed earlier that month be heard by a judge from the Twenty-Third Judicial Circuit. We disagree. The April 2024, petitions commenced new original actions to which the January 27, 2022, order did not apply. As noted, simply for

administrative purposes, the petitions were docketed under the corresponding case numbers assigned to the petitions filed in 2022. In any event, because the Kane County judge did nothing of substance beyond granting the emergency SNCOs, any issues arising from his involvement in the case became moot when those orders expired on May 7, 2024.

¶ 31 Bertha next argues that he did not direct any e-mails toward Eisenmenger in 2024 and did not direct any e-mails at all toward Hain. Section 15(1) of the Stalking No Contact Order Act (740 ILCS 21/15(1) (West 2022)) provides that, when relief is not available under the Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 *et seq.* (West 2022)), a petition for a SNCO may be filed by, *inter alia*, “any person who is a victim of stalking[.]” “To obtain a plenary [SNCO], the petitioner must prove stalking by a preponderance of the evidence.” *Coutant v. Durell*, 2021 IL App (3d) 210255, ¶ 72. We will not disturb the trial court’s ruling on a petition for a SNCO unless it is against the manifest weight of the evidence. *Id.*

¶ 32 “ ‘Stalking’ ” means:

“[E]ngaging in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety *** or suffer emotional distress. Stalking does not include an exercise of the right to free speech or assembly that is otherwise lawful ***.” 740 ILCS 21/10 (West 2022).

As pertinent here, “ ‘course of conduct’ ” means:

“[Two] or more acts, including but not limited to acts in which a respondent directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, or *threatens a person*, workplace, school, or place of worship, *engages in other contact*, or *interferes with or damages a person’s property or pet*. *** A

course of conduct may also include contact via electronic communications.” (Emphasis added.) *Id.*

As we have observed, “in its ordinary sense, the word ‘or’ expresses an alternative, indicating that the various parts of the sentence that it connects are to be taken separately. *** That disjunctive connotes two different alternatives.” *Matteo Construction Co. v. Teckler Blvd Development Site, LLC*, 2020 IL App (2d) 190766, ¶ 20. As used in the emphasized portion of the above block quotation, “or” signifies that the acts described (*i.e.*, threats, contact, or interference with or damage to property or pets) are alternative ways of engaging in a “course of conduct” for purposes of the definition of “stalking.” Also, the respondent may act directly or through a third party. Even if the April 2024 e-mails with links to posted videos were not addressed to Eisenmenger or Hain, Bertha could reasonably anticipate that notice of the e-mails would come to Eisenmenger and Hain from the numerous Kane County employees included in the e-mails. Therefore, the trial court properly found that Bertha’s videos threatening Eisenmenger and Hain satisfied the “course of conduct” requirement.

¶ 33 Next, Bertha argues that he is immune under the Citizen Participation Act from the relief granted to Eisenmenger and Hain. He further notes that the trial court did not comply with the statute’s procedural requirements. Section 15 of the Citizen Participation Act (735 ILCS 110/15 (West 2022)) provides:

“This Act applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party’s rights of petition, speech, association, or to otherwise participate in government.

Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome.”

A motion governed by section 15 must be heard and decided within 90 days after notice of the motion is given to the opposing party. *Id.* § 20(a). Moreover, “[t]he court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.” *Id.* § 20(c).

¶ 34 Bertha’s motions to vacate and dismiss were sufficient to invoke the Citizen Participation Act’s requirements. In his motions, he claimed that the petitions for SNCOs were based on conduct undertaken “in furtherance of his right to petition the government for favorable action in response to his complaints of official misconduct.” The trial court did not formally rule on Bertha’s motion within the requisite 90-day period. However, within that time frame, the court held a hearing on the petitions and issued plenary SNCOs, finding in its written order that Bertha made “true threats” that were outside the scope of his first amendment rights. See *Bona*, 2018 IL App (2d) 160581, ¶ 23 (one class of unprotected speech is threats, so long as they are “true threats” and not mere political hyperbole). Significantly, at the conclusion of the hearing, Bertha agreed with the court that a decision in favor of Eisenmenger and Hain on their petitions would be tantamount to a denial of his motions to dismiss under the Citizen Participation Act.

¶ 35 We acknowledge that the trial court did not indicate whether the evidence that Bertha made true threats was clear and convincing. In any event, however, Bertha did not establish a right to immunity under the Citizen Participation Act. Immunity under the statute depends not on the

exercise of a protected right in itself, but on the exercise of a protected right “genuinely aimed at procuring favorable government action, result, or outcome.” 735 ILCS 110/15 (West 2022). A party seeking immunity bears the burden of showing that “an objective person would find [his or her] acts were reasonably calculated to elicit a favorable government action or outcome.” *Glorioso v. Sun-Times Media Holdings, LLC*, 2024 IL 130137, ¶ 67.

¶ 36 In videos posted online and disseminated to various individuals in April 2024, Bertha aired grievances related to the 2022 petitions for SNCOs, which had already expired. Bertha accused Eisenmenger and Hain of filing false police reports against him. He also accused Eisenmenger of lying on his 2022 petition for a SNCO and at the hearing on the petition. The only conceivable government action such statements might have elicited were investigations for obstruction of justice or perjury against Eisenmenger and Hain, although Bertha never specifically suggested that he posted the videos for that reason. In any event, however, the videos offered no details regarding the allegedly false police reports and false statements in Eisenmenger’s petition. To the extent that Eisenmenger’s testimony, as quoted in the April 11 video, suggests that he worked for Performance in December 2022, the video does not explain how that testimony was material to any issue in the proceeding. See *People v. Acevedo*, 275 Ill. App. 3d 420, 423 (1995) (“To sustain a conviction of perjury, the State must establish that[] *** [false] statements [under oath or affirmation] were material to the issue or point in question at the proceeding in which the false statements were made.”) Thus, no objective person could find that statements in the videos concerning Eisenmenger and Hain were reasonably calculated to elicit a favorable government action or outcome. To the extent the trial court used an evidentiary standard lower than proof by clear and convincing evidence, the error was harmless.

¶ 37 Finally, Bertha contends that, based on the absolute litigation privilege, he is immune from enforcement of the plenary SNCOs because he filed lawsuits against Eisenmenger and Hain. In support of the argument, Bertha cites, *inter alia*, *Goodman*, 2023 IL App (2d) 220086. In *Goodman*, we explained:

“ ‘The absolute-litigation privilege immunizes certain statements and conduct by attorneys in the course of litigation.’ [Citation.] The purpose of the privilege is to allow attorneys ‘the utmost freedom in their efforts to secure justice for their clients.’ ” [Citation.] The privilege is based on section 586 of the Restatement (Second) of Torts, which provides that an attorney is ‘absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.’ [Citation.] Under section 587 of the Restatement (Second) of Torts, a private party to the litigation ‘enjoys the same privilege.’ (Internal quotation marks omitted.)” *Id.* ¶ 25.

¶ 38 The absolute litigation privilege is an affirmative defense. *Bedin v. Northwestern Memorial Hospital*, 2021 IL App (1st) 190723, ¶ 39. “ ‘Generally, in order to avoid surprise to the opposite party, an affirmative defense must be set out completely in a party’s answer to a complaint and failure to do so results in waiver of the defense.’ ” *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 375 (2007) (quoting *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 53-54 (2003)). Alternatively, a party may raise an affirmative defense in a motion to dismiss under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2022)). Bertha did not raise the absolute litigation privilege until after the plenary SNCOs were issued. Accordingly, that defense was forfeited.

¶ 39

III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgments of the circuit court of Kane County.

¶ 41 Affirmed.