IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

DEAN EDWARD MURISET,
Plaintiff/Appellee,

v.

KENNETH ROBERT POWER,
Defendant/Appellant.

No. 2 CA-CV 2023-0054
Filed September 15, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Maricopa County
No. CV2022014698
The Honorable Mary C. Cronin, Judge Pro Tempore

AFFIRMED

COUNSEL

Law Offices of March & March, Scottsdale
By Robert A. March
Plaintiff/Appellee

Law Office of Shannon Peters, Phoenix
By Shannon L. Peters
Defendant/Appellant

MEMORANDUM DECISION

Judge O'Neil authored the decision of the Court, in which Vice Chief Judge Staring and Judge Sklar concurred.

O' N E I L, Judge:

¶1 Kenneth Power appeals the trial court's order continuing an injunction against harassment in favor of his late sister's former husband, Dean Muriset. We affirm.

Background

¶2 "We view the evidence in the light most favorable to upholding the trial court's ruling." *Mahar v. Acuna*, 230 Ariz. 530, ¶ 2 (App. 2012). In August 2022, Muriset's former wife died in a car accident that also caused injuries to T.M., their daughter in common. On September 25, 2022, Power called Muriset because he wanted to take T.M. to see her siblings during fall break, and he "just felt like [Muriset] was always trying to prevent her from coming with [Power] and her grandmother to see her siblings." In addition to the conversation about fall break, Power challenged Muriset's custody of T.M., accused Muriset of not having T.M.'s best interests in mind, and warned Muriset against challenging Power's pursuit of conservatorship for T.M. Muriset "felt intimidated and threatened" during the call.

¶3 Power then sent six text messages to Muriset on September 26, questioning whether he "had [T.M.]'s best interests in mind" and whether he was "cutting off all future visitation" with her siblings and family. On September 27, Power, whom Muriset described as "irate," called from a different phone number and threatened to take T.M. to Canada. Power sent two additional text messages to Muriset the next day.

¶4 On October 9, Muriset told Power not to communicate with him or T.M. But Power sent more text messages to Muriset on October 26 and October 31 concerning pickup information that he had received for T.M.'s medical prescriptions.

¶5 Days later, Muriset petitioned for an injunction against harassment. The trial court granted the injunction, prohibiting Power from contacting Muriset and T.M. for one year. At the conclusion of a contested

hearing that Power had requested, the court continued the injunction. Power appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(5)(b). *See Wood v. Abril*, 244 Ariz. 436, ¶ 5 (App. 2018).

Discussion

¶6 Power argues the trial court lacked sufficient evidence to find harassment, and he asserts that his communications with Muriset served legitimate purposes, "which w[ere] to check in on his niece" and "communicat[e] [her] medical information to . . . Muriset." He further argues that the court violated his right to due process by considering the September 27 phone call as an instance of alleged harassment because Muriset did not "specifically allege[]" it in the petition. Finally, Power asserts the court abused its discretion by including T.M. as a protected person because Muriset had not alleged that Power directed any acts at T.M.

I. Sufficiency of Evidence

¶7 We review a trial court's grant of an injunction for an abuse of discretion. *LaFaro v. Cahill*, 203 Ariz. 482, ¶ 10 (App. 2002). We will vacate an injunction if the record "is devoid of competent evidence to support the decision." *Savord v. Morton*, 235 Ariz. 256, ¶¶ 14, 24 & 10 (App. 2014). Section 12-1809(T)(1)(a), A.R.S., defines "harassment" as "[a] series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose."

¶8 The trial court found that during the September 25 phone call, Power challenged Muriset over "whether he had custody of his daughter" and "continually pushed" for "no purpose other than to antagonize" Muriset, and Muriset "felt threatened." Power concedes that the seventy-minute conversation "became slightly tense, due to their disagreement" and that he and Muriset "talked in circles," but Power otherwise characterizes the phone call differently. He asserts that "the majority of the phone call was cordial" and describes the conversation as "an emotional one" in which "the parties had an entirely civil, reasonable disagreement." But the trial court was in the best position to judge the credibility of the witnesses and weigh the conflicting evidence. *See Cardoso v. Soldo*, 230 Ariz. 614, ¶ 17 (App. 2012). "We will not reweigh evidence on appeal." *Merkens v. Fed. Ins. Co.*, 237 Ariz. 274, ¶ 24 (App. 2015). Competent evidence supports the finding that Power harassed Muriset during the September 25 phone call. Power correctly points out that according to § 12-1809(T)(1)(a),

an act constitutes harassment only if it "serves no legitimate purpose." But the record supports the court's determination that the call "served no purpose other than to antagonize" and "to annoy" Muriset.

¶9 In the series of text messages the day following the call, after Muriset informed Power that T.M. would not visit Power during fall break, Power asked Muriset to "[p]lease explain how cutting off access to her siblings and the rest of her family is beneficial to her." When Muriset said he "d[id]n't have to explain," Power asked Muriset to explain whether he was "cutting off all future visitation to her as well." Muriset answered that he was "[n]ot cutting anyone off" and would "consider supervised visitation," but he did not want "anything over night for now." Power pressed the issue further, and Muriset replied, "That is all for now. Thank you." Power responded with another message requesting a "visitation schedule." Before announcing its ruling, the trial court noted that Muriset was "trying to . . . deal with the trauma that [T.M. wa]s going through after being involved in a horrific car accident that resulted in the loss of her mother." Under those circumstances, the day after a seventy-minute conversation on the same topic that had left Muriset feeling threatened and intimidated, the court could reasonably have found that the September 26 text messages amounted to another act of harassment. Again, Power argues that his texts concerning fall break and visitation served a legitimate purpose "to check in on his niece, as his sister had asked that he look after her." But even assuming without deciding that "check[ing] in" on T.M. was a legitimate purpose for Power as her uncle, Power has not shown that the content of these texts served that purpose. The record supports a finding that the messages did not serve a legitimate purpose.

¶10 The record also supports the trial court's finding that Power harassed Muriset during the phone call on September 27 by essentially threatening to abduct T.M. and abscond to Canada with her. Muriset admitted that he did not recognize the phone number as belonging to Power. But he testified that Power was the one who had spoken to him during the brief call, noting that he had not been answering calls from Power's usual number. Having heard Power's testimony that he did not make the phone call, the trial court found Muriset credible. That court was in the best position to resolve this conflicting evidence, *see Cardoso*, 230 Ariz. 614, ¶ 17, and we will not reweigh the evidence on appeal, *see Merkens*, 237 Ariz. 274, ¶ 24.

¶11 Finally, Power continued to send text messages on two separate dates after Muriset had told Power not to contact him. Power argues that these messages, which related to T.M.'s prescription medications, served a legitimate purpose. But Power has not demonstrated

that his personal relationship with T.M. conferred any legitimate interest in either T.M.'s medical information or Muriset's management of T.M.'s healthcare, and Power sent the messages after Muriset had asked him to stop. The court could reasonably have found that Power did not send those messages for any legitimate purpose.

¶12 The record supports more than the minimum two incidents required for an injunction against harassment. *See LaFaro*, 203 Ariz. 482, ¶ 14; Ariz. R. Protective Order P. 25(b). The trial court did not abuse its discretion by continuing the injunction.

II. Due Process

¶13 The scope of a contested protective order hearing must be limited to the allegations of the petition. Ariz. R. Protective Order P. 36(a). Due process requires notice that is "reasonably calculated to apprise [the defendant] of the action in order to adequately prepare [an] opposition." *Savord*, 235 Ariz. 256, ¶ 16. Muriset's petition alleged that on approximately September 26, Power had "indicated that he would come get [T.M.] and take her to Canada if needed," an allegation that appears to align with Muriset's testimony describing the September 27 call from a different number. Power suggests that something more was required, arguing that Muriset "failed to allege the phone call or the 928-area-code phone number."

¶14 Although a petition "must allege a series of specific acts of harassment," Power cites no authority to suggest that a plaintiff must plead facts with the particularity his argument would necessarily demand. Ariz. R. Protective Order P. 25(b); *see* § 12-1809(C)(3). However, because the record would contain sufficient evidence to support the injunction even without the September 27 call, we need not decide this issue. *See County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, ¶ 12 (App. 2010) (due process error not reversible absent prejudice).

III. Protected Person

¶15 By raising the issue for the first time on appeal, Power has waived his argument concerning T.M.'s inclusion in the injunction as a protected person. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 15 (App. 2004) (arguments raised for first time on appeal untimely and deemed waived). Even absent waiver, Power has shown no error. Power has not alleged any legal relationship with T.M. Muriset is her father. As Rule 5(b)(2), Ariz. R. Protective Order P., provides, "[i]f the defendant and the child have no legal relationship, the judicial officer, upon request, may prohibit the defendant's contact with the child based on danger to the

plaintiff." The court therefore had discretion to include T.M. as a protected person based on Power's acts directed at Muriset.

Disposition

¶16 We affirm the trial court's order continuing the injunction against harassment. In our discretion, we decline Muriset's request for attorney fees pursuant to A.R.S. §§ 12-349(A)(2) and 12-1809(P). As the prevailing party, however, Muriset is entitled to recover his costs upon compliance with Rule 21, Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.