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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1805**

In the Matter of:  
Suzanne K. Splinter and o/b/o Minor Child, petitioner,  
Respondent,

vs.

Jean Renee Strait,  
Appellant.

**Filed June 24, 2013  
Affirmed in part and remanded  
Smith, Judge**

Ramsey County District Court  
File No. 62-DA-FA-12-295

Jolene D. Baker Vicchiollo, Heather A. Chakirov, Edina, Minnesota; and

Christine Schmidt, Edina, Minnesota (for respondent)

Zachary B. Smith, Sara A. Daly, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Ross, Judge; and Hooten,  
Judge.

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

**SMITH**, Judge

Appellant challenges the district court's issuance of an order for protection (OFP) in favor of respondent, asserting that the district court erred when it (1) found that appellant domestically abused respondent, (2) issued an OFP on behalf of the minor child

without finding that appellant domestically abused the child, (3) took notice of findings from the recent custody proceeding, and (4) restricted respondent's parenting time. Because the district court did not err when it issued an OFP protecting respondent-parent and took judicial notice of the findings from the recent custody proceeding, we affirm in part. However, because the district court did not have the benefit of a recent Minnesota Supreme Court decision when the district court issued its order, we remand on the issue of the OFP on behalf of the child, and leave the issue of whether to reopen the record on remand to the discretion of the district court. We also remand for findings regarding whether unrestricted or unsupervised parenting time would endanger the child or appellant-parent.

## **FACTS**

Appellant Jean Strait and respondent Suzanne Splinter began a significant romantic relationship in 2005. The parties later purchased a house together and Strait adopted Splinter's minor son, K.C.S. After the Splinter-Strait relationship ended, their custody arrangement granted Strait time with K.C.S. at the house where Splinter and Strait formerly resided together. On Wednesdays, Splinter would leave the home at 4:00 p.m. and arrive back at 8:00 p.m., allowing Strait time alone with K.C.S. This arrangement enabled Splinter and Strait to avoid each other. The underlying facts of this case largely involve an incident that occurred as Strait's parenting time ended on Wednesday, March 21, 2012.

On March 22, Splinter petitioned for an OFP against Strait. Several hearings were held on this issue, and numerous witnesses—including Splinter and Strait—testified. The

testimony at the hearings demonstrated that the parties' recollections of the evening of March 21 significantly differ.

*Splinter's testimony*

Splinter reported that she drove her vehicle into the driveway at 7:56 p.m. Splinter stayed in her vehicle and called her father on her cellular telephone so that he could hear whether any incident occurred between Strait and Splinter when Strait left the house. Strait exited the house shortly after 8:00 p.m., entered her (Strait's) vehicle, and parked it in front of Splinter's vehicle, preventing Splinter from driving into the garage. Strait then approached Splinter's driver's side window, attempted to open the locked car door numerous times, and pounded on the window. Strait used her karate training to hit the window forcefully, in an unsuccessful attempt to break the window.

Strait next returned to her vehicle, backed it inside the garage, and returned inside the home, but soon returned to her vehicle again and parked it next to Splinter's vehicle. Splinter then ended the call with her father and called 911. Strait eventually left, so Splinter informed the emergency operator that she did not require an officer's assistance, but would call back if Strait returned.

When Splinter entered the house, she noticed that Strait had disconnected and removed the five house telephones. Although Splinter had a cellular telephone, she felt fearful without the landlines and left to purchase house telephones from a nearby store. When she returned to her house, an officer was waiting to speak with her. As she told him about the events, she learned that he was not responding to her 911 call, but instead to a call placed by Strait. The officer did not remove K.C.S. from the house because the

officer did not believe K.C.S. was in danger. Splinter's testimony of the March 21 events is consistent with the responding officer's testimony and the recording of her 911 call.

When discussing Strait, Splinter reported that she is afraid for her own physical safety because Strait had physically abused her previously and because Strait has karate training. Before the Splinter-Strait relationship deteriorated, Strait told Splinter about a previous breakup, during which Strait felt the need to be careful because Strait's karate skills could cause severe injury. Splinter testified that Strait threatened her numerous times since the custody hearing, specifically with telephone messages threatening repercussions for Splinter limiting Strait's access to K.C.S, as well as threatening to call the judge and media to reveal that Splinter is a threat to K.C.S. Splinter reported that because Strait's aggression is increasing in both frequency and intensity, Splinter has an "increasing level of fear about [K.C.S.] with [Splinter] and what actions [Strait] is willing and capable to take." Even so, Splinter reported that she thinks that Strait should have parenting time with K.C.S., and consequently has fully complied with the district court's order regarding Strait's parenting time.

### ***Strait's testimony***

Strait also testified about the March 21 parenting exchange. Strait testified that when she arrived for her parenting time with K.C.S., all the house telephones were lying on the kitchen table, and K.C.S. informed her that Splinter had disconnected them. Strait then placed some of the telephones and equipment in her bedroom, which was difficult to access because the bedroom door was defective and could not be opened using the doorknob.

Strait recalled that Splinter arrived at the house at approximately 7:35 p.m., 25 minutes before the scheduled exchange. After Splinter arrived, Splinter began flashing her vehicle's headlights and honking her vehicle's horn. Strait, alarmed, decided to ask what Splinter needed. When Strait went outside, Splinter said "[g]et the 'F' out my house" and indicated that she had documents for Strait to sign. Strait followed Splinter to her car to retrieve the documents, but Splinter then entered her car, locked the doors, and ignored Strait. This prompted Strait to knock on the vehicle's driver's side window, but Strait denied using any karate strikes on the window.

Strait then returned to the home, where she stayed until 8:00 p.m., at which time she attempted to drive away from the house, but Splinter prevented her departure by standing in the driveway. This prompted Strait to call 911 to report that Splinter had threatened her, and Splinter then relented and returned to her vehicle.

Some of the hearing testimony was inconsistent with Strait's hearing testimony and her previous statements. During her 911 call, Strait said "I just went out to try to talk to [Splinter] about some things," but Strait testified that Splinter had beckoned her and told her to sign some documents. Similarly, a responding law enforcement officer testified that Strait reported that she wanted to speak with Splinter and that Splinter ignored her because of a previous court order, so Strait then knocked on the car window to get Splinter's attention. The officer also testified that when he spoke with K.C.S. and asked whether he had seen any exchange between Splinter and Strait, the child answered in the negative, explaining that he had been watching television in a different part of the house. However, Strait testified that her son had encouraged her to approach Splinter in

order to investigate why Splinter was honking the horn and flashing the headlights of her vehicle.<sup>1</sup>

Strait denied ever doing anything to hurt K.C.S., but revealed that she fears Splinter will hurt their son.

***Other information from the OFP hearing***

The hearing also revealed that later in the evening of March 21, Strait sent Splinter a message through their electronic custody-management program. In the message, she reported that she was frightened by Splinter's behavior and that Splinter had been threatening K.C.S. Although Strait is permitted to write to Splinter through their electronic custody-management program only one time daily, this was Strait's second contact with Splinter through the program that day. Splinter believed the message was sent to give a different portrayal of the events that had transpired earlier that evening.

As the hearing on the OFP concluded, the district court discussed the recent custody judgment and decree, noting that the judgment and decree was "important to understand the context under which the [OFP] was sought in this case." The district court highlighted the observations of various mental health professionals included in the judgment and decree's findings, in particular that Strait's "tendency to fabricate may be pathological" and "Strait's behavior . . . [is] demonstrated to be untrustworthy and self-serving." The district court also quoted the finding that Strait's "credibility about [Splinter] is seriously damaged . . . the way she [presented Splinter] is now shown to be

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<sup>1</sup> Information from the hearing revealed that the police report did not contain any information about Splinter honking the horn or flashing the headlights of her vehicle.

lacking credibility and likely distorted for her own purposes. She could only be suspected of doing something similar in any future allegations.”

The district court issued its order on May 29, noting that the March 21 incidents—including Strait’s disablement of the telephones, her attempt to enter Splinter’s occupied vehicle, and her physically threatening gestures—constituted domestic abuse. The district court noted that “mental-health professionals warned that [Strait’s] willingness to engage in inappropriate conduct might escalate if the custody outcome was not in her favor.” Strait was awarded weekly parenting time through a parenting center. Splinter was directed to post a message regarding K.C.S.’s welfare on their electronic custody-management program each Friday by 7:00 p.m., and Strait was directed not to respond. Finally, the district court ordered Strait to (1) refrain from acts of domestic abuse against Splinter or K.C.S., (2) have no contact with Splinter or K.C.S. except during Strait’s parenting time with K.C.S., (3) refrain from entering Splinter’s residence, (4) stay at least one block away from Splinter’s residence, (5) have no contact with Splinter’s workplace, and (6) stay away from K.C.S.’s school.

Strait subsequently requested reconsideration pursuant to Minn. R. Gen. P. 115.11. The district court denied the request. This appeal followed.

## **D E C I S I O N**

We review a district court’s decision to grant an OFP for an abuse of discretion. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 926-27 (Minn. App. 2006). “A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law.” *Id.* at 927. We review the record in the light most favorable to the

district court's findings, and will not reverse those findings unless we are "left with the definite and firm conviction that a mistake has been made" in reaching those findings. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005).

Strait contends the district court erred because (1) the evidence was insufficient to establish that she domestically abused Splinter, (2) the district court issued an OFP on behalf of K.C.S. without finding that Strait domestically abused him, (3) the district court improperly took notice of the findings from Splinter and Strait's recent custody dispute, and (4) her parenting time with K.C.S. was restricted.

### I.

Strait argues that there is insufficient evidence to support a finding that she domestically abused Splinter. Specifically, she contends that the record does not support the finding of present harm or an intent to do imminent harm, and therefore the district court erred by granting the OFP.

The Minnesota Domestic Abuse Act authorizes a district court to issue an OFP to "restrain the abusing party from committing acts of domestic abuse." Minn. Stat. § 518B.01, subd. 6(a)(1) (2012). Domestic abuse is defined as the infliction of physical harm or the infliction of fear of imminent bodily harm against a family member or housemate. *Id.*, subd. 2 (2012). The statutory definition of domestic abuse "require[s] either a showing of present harm, or an intention on the part of [the abusing party] to do present harm." *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984). Therefore, the district court may issue an OFP if the abusing party "manifests a present intention to inflict fear of imminent physical harm, bodily injury, or assault." *Pechovnik v.*

*Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009). Such present intent may be inferred from the totality of the circumstances. *Id.*

Strait acknowledges that the intent to inflict fear may be inferred from the totality of the circumstances, including past abusive behavior, but denies a history of domestic abuse or threats of violence between the parties. But Splinter testified to the contrary when she said that Strait had physically abused her in the past, including pushing her down, and noted that “I know that [Strait] can hurt me.” Splinter also identified that Strait had threatened her numerous times since the custody proceedings, including telling her that Splinter would suffer repercussions for limiting Strait’s access to K.C.S. Regarding the increase in the frequency and intensity of Strait’s aggressiveness, Splinter said, “I know that things get out of control and are acted upon impulsively, and it scares me.”

The evidence of domestic abuse supports the findings when viewing the evidence in the light most favorable to the district court’s order. There was testimony that, if believed, could lead a reasonable fact finder to conclude that Strait intentionally caused fear of imminent bodily harm to Splinter. During the March 2012 incident, Strait approached Splinter’s vehicle, attempted to enter it numerous times, pounded on the vehicle’s window forcefully while Splinter was seated in the vehicle, and removed the telephones from Splinter’s residence. Splinter reported being scared for her physical safety as Strait pounded on her window. Splinter also testified to a history of threats, physical abuse, including Strait pushing her to the ground, as well as Strait discussing how “she had to be careful with her last breakup, because she could really hurt somebody

with karate.” In Strait’s reply brief, she attempts to downplay the importance of removing the telephones from the house. But the cases cited discuss criminally interfering with an emergency call, which is not at issue here. *See, e.g., State v. Hersi*, 763 N.W.2d 339, 342-43 (Minn. App. 2009). A reasonable fact finder could find that the March 21 episode, especially in light of the history between Splinter and Strait, caused Splinter to fear imminent bodily harm. *See* Minn. Stat. § 518B.01, subd. 2(a).

Strait’s actions also support the conclusion that Strait intended to cause fear of imminent harm in Splinter. Although Strait provided a different account of the events and told the responding officer that she feared Splinter, the district court disbelieved Strait’s testimony and found Splinter’s account valid, because it granted the OFP. Indeed, at the conclusion of the hearing, the district court stated that Strait’s account of the March 21 incident “strike[s] me to be on [its] face unreliable.” The district court’s reasonable credibility determinations and weighing of the evidence will withstand challenge on appeal. *See Magnuson v. Cossette*, 707 N.W.2d 738, 744 (Minn. App. 2006) (“This court will not reverse the district court merely because we view the evidence differently.”). Factual findings based on those determinations will be reversed only if we have a “definite and firm conviction that a mistake has been made.” *Chosa*, 693 N.W.2d at 489. Because the record supports the district court’s factual finding that Strait’s actions constituted domestic abuse, we are not persuaded that the district court erred by determining that domestic abuse occurred and issuing the OFP on behalf of Splinter.

## II.

Strait next contends that the district court erred by issuing an OFP on behalf of K.C.S. without finding that she abused K.C.S. The Minnesota Domestic Abuse Act provides that an OFP petition may be filed by “any family or household member personally or by a family or household member . . . or, if the [district] court finds that it is in the best interests of the minor, by a reputable adult age 25 or older on behalf of minor family or household members.” Minn. Stat. § 518B.01, subd. 4(a) (2012).

To support her assertion of error, Strait relies on *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523, 525 (Minn. 2012). *Schmidt* involved a father petitioning for an OFP on behalf of his son after his son witnessed his grandfather abuse the son’s mother. 818 N.W.2d at 525. There was no finding that the child had been the victim of domestic abuse. *Id.* *Schmidt* examined whether an OFP may be issued to a non-victim of domestic abuse. *Id.* at 526-27. After this court concluded that Minnesota law does not require the family or household member on whose behalf the OFP petition was initiated to have suffered abuse, the supreme court reversed this court and held that “an OFP may be granted only to a victim of domestic abuse.” *Id.* at 529.

Splinter did not have the benefit of *Schmidt*’s guidance when filing the OFP petition, nor did the district court when it granted the OFP on behalf of K.C.S. The district court filed the OFP on May 29, 2012, and *Schmidt* was not released until August 8, 2012. *See* 818 N.W.2d at 523. We require additional findings to determine whether Strait abused K.C.S. Consequently, we remand to the district court to determine whether

the OFP on behalf of K.C.S. is appropriate.<sup>2</sup> We leave the issue of whether to reopen the record on remand to the discretion of the district court.

### III.

Strait next contends that the district court erred by referencing the findings from the custody dispute in its OFP.

As a preliminary matter, Strait waived her challenge to this issue by not objecting at the hearing. At the conclusion of the hearing, the district court discussed the findings of fact contained in the judgment and decree extensively. At that time, Strait did not object to the district court's consideration of the judgment and decree. This district court also noted in its written order: "As stated on the record, in the parties' recent custody dispute, mental-health professionals warned that [Strait's] willingness to engage in inappropriate conduct might escalate if the custody outcome was not in her favor." When Strait sought reconsideration pursuant to Minn. R. Gen. P. 115.11, she again did not object to the district court taking notice of the findings of the judgment and decree, but instead asked him to consider additional psychological evaluations.<sup>3</sup> Because this court generally will not consider matters not argued to and considered by the district court, we

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<sup>2</sup> We note, however, that the reversal and remand to the district court does not disturb the OFP issued for Splinter's protection.

<sup>3</sup> Even if she had raised the issue in her request for reconsideration under Minn. R. Gen. Prac. 115.11, however, this court would still deem the issue waived. The comment to Rule 115.11 notes that "[m]otions for reconsideration will not be allowed to expand or supplement the record on appeal." Minn. R. Gen. Prac. 115.11 1997 advisory comm. cmt. (internal quotation marks omitted). Therefore, raising the issue in her request for reconsideration would not preserve the argument for appeal.

decline to consider Strait's judicial notice argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

We note, however, that Strait's judicial notice argument also fails on its merits. Evidentiary rulings will not be disturbed absent an abuse of discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). Minnesota law permits the district court to take judicial notice of adjudicative facts: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Minn. R. Evid. 201(b). Although the rules do not define the phrase adjudicative facts, the committee comment does: "Adjudicative facts generally are the type of facts decided by juries. Facts about the parties, their activities, properties, motives, and intent, the facts that give rise to the controversy, are adjudicative facts." Minn. R. Evid. 201 1989 comm. cmt. A district court may take judicial notice even if it has not been requested by the parties to do so. Minn. R. Evid. 201(c). This notice may be taken at any stage of the proceeding. Minn. R. Evid. 201(f).

Strait attempts to align the present facts with a civil commitment case, *In re Zemple*, 489 N.W.2d 818 (Minn. App. 1992). *Zemple* holds that a district court may take judicial notice of adjudicated findings in a prior proceeding, but not of testimony from that proceeding. *Id.* at 820. But Strait's reliance on *Zemple* is misplaced. Here, the

district court relied on the judgment and decree findings.<sup>4</sup> *Zemple* is, therefore, distinguishable.

Strait cites no authority that persuasively identifies why we should disregard the language of Minnesota Rule of Evidence 201. Instead, this is precisely when judicial notice is appropriate—the district court took judicial notice of the findings of fact in the judgment and decree, to the extent they were relevant to the present dispute. Therefore, the district court did not abuse its discretion by doing so.

#### IV.

Strait argues that because there was no evidence of domestic abuse against K.C.S., the district court misapplied the law when it restricted her parenting time with him. The OFP granted Strait weekly parenting time with K.C.S. at a parenting center.

Strait contends that restricting her parenting time is contrary to the language of the Domestic Abuse Act because, she asserts, there were no direct findings to support that K.C.S. or Splinter would be endangered from keeping the parenting time as-is. The pertinent statute provides:

If the court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted parenting time, the court shall condition or restrict parenting time as to time, place, duration, or supervision, or deny parenting time entirely, as needed to guard the safety of the victim and the children.

Minn. Stat. § 518B.01, subd. 6(a)(4) (2012). By defining the trigger as the safety of the victim *or* the children, the statute establishes that a finding of danger to a non-child victim as a result of unsupervised or unrestricted parenting time is sufficient to permit the

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<sup>4</sup> All the references are quotations of the findings or readily gleaned from the findings.

district court to restrict parenting time. Section 518B.01, subdivision 6(a)(4) authorizes a district court to grant relief with “primary consideration to the safety of the victim and the children.” *Id.* In light of our decision regarding the OFP on behalf of K.C.S., we remand to the district court for findings on whether unsupervised or unrestricted parenting time endangers the safety of Splinter or K.C.S.

**Affirmed in part and remanded.**