

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

31417

KAYDEN KURSAVE,

Plaintiff and Appellant,

v

TERTIUS VAN DER MESCHT,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
CUSTER COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI LINNGREN
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed March 16, 2026

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PRELIMINARY STATEMENT

In this brief, Appellant, Kayden Kursave is called “Kursave or Petitioner.” Tertius Van Der Mescht is called “Van Der Mescht or Respondent.” References to documents are as follows:

References to the settled record will be referred to as SR. Exhibits will be referred to by Exhibit Number. References to the hearing transcript will be referred to as HT with page number.

JURISDICTIONAL STATEMENT

The Honorable Heidi Linngren, Custer County Circuit Court Judge, filed an Order Dismissing an Ex Parte Protection Order on March 12, 2026. SR: 27.

Kursave filed a Notice of Appeal on March 16, 2026. SR: 45. This Court has jurisdiction to hear this Appeal under SDCL § 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE COURT'S FINDINGS ARE CLEARLY ERRONOUS BASED ON THE EVIDENCE SUBMITTED?

March v. Thursby, 2011 S.D. 73, ¶¶ 19-20, 806 N.W.2d 239, 244

II. WHETHER THE COURT ABUSED ITS DISCRETION WHEN IT DENIED THE PETITIONER A PERMANENT PROTECTION ORDER?

SDCL § 22-19A-1

Donat v. Johnson, 2015 S.D. 16, ¶ 13, 862 N.W.2d 122, 127.

STATEMENT OF THE CASE

Petitioner filed for an Ex Parte Protection Order on January 30, 2026 and the Court granted the same. SR. 8. The matter was set for hearing before the Honorable Heidi Linngren. Both parties appeared with counsel and called witnesses. After hearing testimony and argument of both counsels, the Court denied the request for a Permanent Protection Order, finding Petitioner did not meet her burden. The Court then dismissed the Ex Parte Order. SR. 27. Petitioner timely appealed. SR. 45.

STATEMENT OF THE FACTS

Kayden Kursave, Petitioner, filed a Domestic Abuse Petition for a Permanent Restraining Order against Van Der Mescht. SR. 1. Kursave is a resident of Custer County, South Dakota. Van Der Mescht is a South African National who temporarily resides in the United States on a Special VISA. HT. 44.

Kursave testified that she and Respondent started dating in March of 2024. The Petitioner resides in Hermosa, South Dakota, and was employed as a teacher at the Hermosa School District. HT. 4. and HT. 5. After ten (10) months of dating and controlling behavior by Respondent, Ms. Kursave ended the relationship with the Respondent and texted him that, "we are done." HT. 6 and Exhibit 4. The answer from Respondent was, "No." Exhibit 4. Respondent then came to Petitioner's church; they talked and reconciled in November of 2024. HT. 9.

Petitioner and Respondent tried again, and four months later Petitioner felt like she was not meant to be with the Respondent. Petitioner ended the relationship again on February 14, 2025. Respondent replied that Petitioner was living in a dream world and that when he gets back from South Africa, perhaps she will give him another chance. HT. 10.

On February 26, 2025, just less than two weeks after Petitioner ended the relationship with Respondent, Respondent came to Petitioner's workplace, the Hermosa School District in Hermosa, South Dakota. HT. 11 and 12. Respondent asked the receptionist, Laura Butler at the front desk if he could see the Petitioner. Respondent had flowers and a gift for Petitioner. Laura Butler testified that she went back to Petitioner's classroom and told Petitioner that someone was there to see her. Kursave testified that she asked Ms. Butler if it was the Respondent and Ms. Butler said yes. Kursave testified that she

asked Ms. Butler to send him away. Petitioner testified that she took the flowers from Ms. Butler and threw them in the garbage. The Petitioner testified that she was crying because the Respondent came to her workplace and that she was embarrassed by him coming to her workplace. HT. 41.

Ms. Butler then told the Respondent to leave and he did so. After the Respondent left, the Respondent sent the Petitioner a picture of his left butt cheek with Petitioner's name tattooed on his butt. Exhibit 11 The Petitioner did not respond to the butt cheek picture from the Respondent.

The Respondent continued to send texts and Facebook messages to Petitioner. There was no response to his messages from Petitioner. The Petitioner blocked the Respondent after the incident at the school. HT. 68. The Respondent admitted on the stand that he knew he was blocked by Petitioner for the majority of 2025. HT. 69. The Respondent testified he left the U.S. shortly thereafter for South Africa. HT. 67. There was no contact between the Petitioner and Respondent for the remainder of 2025.

On January 30, 2026, the Petitioner was in her home in Hermosa, South Dakota when she heard a knock, she turned and saw the Respondent at her sliding glass door. HT. 16. At trial, the Respondent admitted opening the door without being invited and leaning into the Petitioner's home. HT. 69.

He testified at trial, he said "Hi, I just wanted to check on you." HT. 69. Respondent testified he *knew* he was blocked by Petitioner at the time he went to her home. HT. 69. Respondent was never invited in but just opened the

Petitioner's back door and began arguing with Petitioner and asking her questions about her sex life. HT. 71.

After arguing back and forth, Respondent left and slammed the sliding glass door. HT. 18. Petitioner then ran around her house closing and locking all doors. HT. 18. Petitioner contacted the Clerk of Court that same day to file for an Order for Protection. SR. 1. Petitioner took pictures of the Respondent's footprints in the snow and went to the Courthouse to get a protection order. Exhibit 20.

Petitioner testified that she has not stayed in her Hermosa home since the January 30, 2026, incident even though she continues to pay rent because she is scared and feels unsafe. HT. 20.

After the Court hearing testimony at trial, the Court found for the Respondent and dismissed the Ex Parte Order. Petitioner timely appeals.

STANDARD OF REVIEW

"The grant or denial of a protection order is reviewed under the same standard used to review the grant or denial of an injunction. The Court must first determine if the trial Court's Findings of Fact were clearly erroneous, and in applying the clearly erroneous standard, the question is not whether this Court would have made the same findings that the trial Court did, but whether on the entire evidence we are left with a definite and firm conviction that a mistake has been committed. *Judstra v. Donelan*, 712 N.W.2d 866, 2006 SD 32 (S.D. 2006); *Donat v. Johnson*, 2015 S.D. 16, ¶ 13, 862 N.W.2d 122, 127.

"If the Findings of Fact are not clearly erroneous, the Court must then determine whether the trial Court abused its discretion in granting or denying the protection order." *Judstra v. Donelan*, 712 N.W.2d 866, 2006 SD 32 (S.D. 2006; *Schaefer v. Liechti*, 2006 SD 19, ¶ 8, 711 N.W.2d 257, 260 (citations omitted). "An abuse of discretion 'is a fundamental error of judgment, a choice outside of the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable. *Gartner v Temple*, 2014 SD 74, ¶ 7, 855 N.W.2d 846, 850.

ARGUMENT

- I. The Court's findings are clearly erroneous and are contradicted by the record. Instead, the trial record, evidence, and exhibits support evidence of stalking and harassment, and a permanent Order should have been granted.**

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *Zarecky v. Thompson*, 2001 S.D. 121, ¶ 11, 634 N.W.2d 311, 315 (quoting *First Nat'l Bank of Biwabik, Minn. v. Bank of Lemmon*, 535 N.W.2d 866, 869 (S.D.1995).

Here, there are not two permissible views of the evidence, because both the Respondent's own texts messages and his own testimony show a continued pattern of harassment towards the Petitioner after the Petitioner repeatedly ended the relationship with Respondent. The Court's findings in this case are not supported by the evidence and are instead contradicted by it.

Respondent testified to the most recent incident between the parties on January 30, 2026. Respondent testified that he returned to the United States from South Africa, in September of 2025. HT. 44. He testified that after not having spoken to the Petitioner because he was blocked by her, he went to her home in Hermosa, where he approached the Petitioner's sliding back door and opened it. HT. 69.

Respondent testified he leaned in and started asking the Petitioner about her sex life. *Id.* He testified he asked her, "are you having sex?" *Id.* The Petitioner asked the Respondent to leave, after he asked her about her sex life. Respondent then testified he continued to stand at her door and ask her "why?" HT. 71.

Respondent testified he did all of the following, *knowing* the parties had not talked since February 2025, *knowing* that they were no longer together, and *knowing* the Petitioner had blocked him. HT. 69. This shows a malicious intent to harass the petitioner. Based on these facts, coupled with the history of the unanswered texts, a stalking protection order should have been granted.

Simply put, Respondent continued to harass the Petitioner after she refused to see him at her workplace, after she refused to communicate with him, and after she blocked him. Further, there was no legitimate purpose in Respondent going to Ms. Kursave's private residence and asking her about her sex life.

The above evidence alone supports a finding that the Court erred when it found that the Respondent had not engaged in a willful course of conduct that harassed the Petitioner, that lacked a legitimate purpose. This Court should find that the lower Court has made a mistake in its findings and the application of the law and has clearly erred and reverse the decision.

This Court has also reversed protection orders when the Circuit Court's findings did not correspond with the testimony at trial, and there were no findings or evidence to support the order that was entered. March v. Thursby, 2011 S.D. 73, ¶¶ 19-20, 806 N.W.2d 239, 244.

Here, the Court erred in finding that the parties had not been in a significant relationship during the last twelve months, as required by SDCL § 25-10-3.1. The evidence supports a finding that the parties were at least "together" on February 14, 2025, as that is the date the Petitioner testified she ended the relationship with the Respondent. Days later, around late February of 2025, the Respondent testified he went to the Hermosa School with gifts and flowers for the Petitioner.

Here, the Petition was filed by Petitioner on January 30, 2026, which is within twelve (12) months of the relationship. SR. 1. The Court stated at the end of the hearing, "I find it is not a significant romantic relationship because of the time that has passed." HT. 82. According to both parties' testimony, they both were in an intimate relationship as of February 14, 2025, making SDCL § 25-10-3.1 apply here.

The Court's findings are not supported by the evidence, and this Court should find that a mistake has been made and reverse the decision.

II. The Court abused its discretion in denying a permanent Order and the Circuit Court's decision should be reversed.

If the Findings of Fact are not clearly erroneous, the Court must then determine whether the trial Court abused its discretion in granting or denying the protection order." *Schaefer v. Liechti*, 2006 SD 19, ¶ 8, 711 N.W.2d 257, 260 (citations omitted).

In this case, the Petitioner has proved by a preponderance of evidence that stalking has taken place, because the Respondent has engaged in a willful and knowing course of conduct that seriously alarmed, and annoyed the Petitioner without a legitimate purpose. Further, the parties had been in an intimate relationship during the last twelve (12) months. Moreover, Petitioner has shown the Respondent willfully, maliciously and repeatedly harassed the Petitioner by electronic communication.

In South Dakota, a court may enter a stalking Order in a domestic violence petition if it finds the elements of stalking are met. Under South Dakota law, "domestic abuse includes a violation of chapter 22-19A, if the stalking is between persons in certain relationships. See *Trumm v. Cleaver*, 2013 S.D. 85, ¶ 12, 841 N.W.2d 22, 25.

Under SDCL 25-10-1(1) South Dakota defines domestic abuse as:

1. Physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical;

2. Harm or bodily injury when occurring between persons in a relationship described in SDCL § 25-10-3.1. Any violation of SDCL § 25-10-13 or Chapter 22-19A or any crime of violence as defined in subdivision 22-1-2(9) constitutes domestic abuse if the underlying criminal act is committed between persons in such a relationship.” *Id.*

Under SDCL 22-19A-1 South Dakota defines stalking as:

1. Willfully, maliciously, and repeatedly follow or harass another person;
2. Make a credible threat to another person with the intent to place that person in reasonable fear of death or great bodily injury; or
3. Willfully, maliciously, and repeatedly harass another person by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication.

Under SDCL § 22-19A-4 South Dakota defines Harassment as:

A knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose.

Under SDCL § 22-19A-5, South Dakota defines Course of Conduct as:

A course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of course of conduct.

Under SDCL § 22-1-2(1)(a), South Dakota defines Malice as:

“Conduct that is intentionally “annoying” is equivalent to conduct that is “malicious.” “The words, ‘malice, maliciously,’ and all derivatives thereof import a wish to intentionally vex, *annoy*, or injure another person, established either by proof or presumption”. White v. Bain, 2008 S.D. 52, ¶ 8, 752 N.W.2d 203, 206.

Here, the evidence supports entry of a permanent Order and the lower court erred in finding otherwise. The court’s ruling is contrary to the evidence, is arbitrary, and an abuse of discretion. The Petitioner testified that she first ended the relationship in October of 2024, because of controlling behavior, but decided to give it another try a month later, finally ending the relationship again, on February 14, 2025. HT. 10.

Petitioner was clear with Respondent on February 14, 2025, and ended the relationship, telling the Respondent there is no chance they will get back together. HT. 10. Respondent replied she was living in a dream world and replied “No” in a text message to Petitioner wanting to end the relationship.

Just less than two weeks after Petitioner ended the relationship, the Respondent went to the Petitioner’s workplace, the Hermosa School District, with gifts and flowers for the Petitioner. HT. 52. He admitted the same. Id. He then asked the front desk, Laura, to see the Petitioner. HT. 40. The Petitioner

refused to see the Respondent. Petitioner testified she threw Respondent's flowers in the trash and asked Laura, the administrator, to tell the Respondent to leave. The Respondent then left. Petitioner was extremely upset by Respondent coming to her workplace. HT. 40.

After leaving the Hermosa School, the Respondent then sent Petitioner a text message picture of his butt cheek and wrote her "I was hoping I could show you in person but apparently life wants something else." That's my left butt cheek the one you used to hold when we were snuggling. No matter what the future holds for us my hairy butt belongs to you." Exhibit 11.

By sending the Petitioner a picture of his butt cheek, on February 26, 2025, after Petitioner refused to see him at her workplace, and after she ended the relationship, the Respondent engaged in a course of conduct that harassed the Petitioner. This was a pattern of conduct that commenced when she ended the relationship and he said "No". The pattern then continued to him going to her place of work, asking for her, and then texting her a picture of his butt cheek, when she refused to see him.

By sending the electronic picture of his butt cheek to the Petitioner was a willful course of conduct that alarmed and annoyed the Petitioner. The actions of the Respondent in going to the school and then sending the picture of his butt cheek, are a course of conduct that served no purpose, and should be a basis entry of a stalking protection Order.

Moreover, the Respondent engaged in malicious and repeated texts with the Petitioner by sending her the photo, coupled with other texts, (when she previously ended the relationship) that harassed the Petitioner by means of electronic communication. Each time the Petitioner texted the Respondent that she was “done” he would either reply “No” or “I’m not losing you” or “You can't just try and run away every time things get hard Kayden that's now how it works”. Exhibit 4 and Exhibit 5. Respondent’s refusal to accept the end of the relationship is frightening.

The Respondent then left the United States for South Africa. When he returned to the United States, he testified that he knew he had been blocked by Petitioner and had no contact with her, after he left South Dakota sometime in 2025. HT. 69.

On or about, January 30, 2026, the Respondent testified he went to the Petitioner’s home in Hermosa, because he wanted to “check on her”, *knowing* that he was also blocked by her on social media and by telephone. HT. 69.

Knowing this, he still went to her home and uninvitingly opened her back door. HT. 70. The Respondent testified that after he opened Ms. Kursave’s door and leaned into her home, he began asking her personal questions about sex and her sex life. Respondent testified, “I just asked her like, are you having sex?” HT. 71. Respondent testified and admitted being asked to leave by Petitioner and then asked her “why”? HT. 71.

Here, the Respondent has engaged in a malicious, knowing and willful course of conduct, that seriously alarmed and annoyed the Petitioner. There was simply no legitimate purpose in coming to the Petitioner's private home, after the two had not spoken the majority of 2025, and she had ended the relationship, also blocking him.

Further, there was no legitimate purpose in asking the Petitioner about her sex life, when she was no longer involved with the Respondent. The Respondent's actions constitute stalking and harassment under South Dakota law and the Court erred in not finding the same.

In this case, the court has abused its discretion by denying this schoolteacher and Hermosa resident a stalking protection order against her South African ex-boyfriend.

CONCLUSION

The actions, which should be viewed as whole, with the repeated texts from Respondent not accepting the relationship was over, the Respondent's coming to the Petitioner's workplace a week or so after Petitioner broke up with the Respondent, the picture the Respondent sent of his hairy butt (Petitioner's name, "Kayden", tattooed into his butt cheek), the uninvited trip he took to her private residence on January 30, 2026, his opening her sliding glass back door, and him asking Ms. Kursave about her private sex life, while hanging in her doorway on January 30, 2026, are many reasons why a protection order

should have been granted in this case. It would be against reason, evidence, and the law to deny her a protection order when she has met the criteria for a stalking Order.

What the Respondent did by going to Ms. Kursave's home, knowing he had been blocked by her, and sliding open her door, is a crime under South Dakota law. However, the lower court found his presence at her home and the questions about her sex life, although "*alarming*" to petitioner, to not be harassing or threatening. HT. 84.

It is hard to imagine, how, when the law identifies an act as a crime, the trial court could make a finding that the act was not "threatening" or "harassing". The lower court's findings in this case are arbitrary, contrary to the law, and contrary to the evidence.

The judgment should be reversed, and Ms. Kursave should be granted a stalking protection Order against the Respondent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Appellant's Brief is within the limitation provided for in SDCL §15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellant's brief contains 3932 words.

I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 22nd day of June, 2026.

/s/ Gina Ruggieri

Gina Ruggieri

Attorney for the Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 22, 2026, a true and correct copy of Appellee's Brief with Attachments in the matter of *Kayden Kursave v Tertius Van Der Mescht* was filed electronically with the Court using the Odyssey File and Serve system which sent notification to the Attorney for the Respondent, Matthew McCoy this 22nd day of June, 2026.

/s/ Gina Ruggieri

Gina Ruggieri

Attorney for Appellant

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Notice of Appeal filed March 16, 2026

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PRELIMINARY STATEMENT

For ease of reference, Appellant Kayden Kursave is referred to as “Kursave” or “Petitioner.” Appellee Tertius Van Der Mescht is referred to as “Van Der Mescht” or “Respondent.” References to the hearing transcript are cited as “HT.” References to Petitioner’s exhibits are cited as Pet’r Ex.

JURISDICTIONAL STATEMENT

Appellee does not dispute that this Court has jurisdiction over this appeal under SDCL § 23A-32-2.

STATEMENT OF THE ISSUES

1. *Whether the circuit court clearly erred in finding that Petitioner failed to prove a repeated course of conduct constituting stalking or harassment.*

No. The circuit court did not clearly err in finding the January 30, 2026 encounter as a singular incident.

SDCL § 22-19A-1

SDCL § 22-19A-4

SDCL § 22-19A-5

2. *Whether the circuit court clearly erred in finding that Respondent did not act maliciously or without a legitimate purpose.*

No. The circuit court did not clearly err in finding Respondent’s purpose of reconciliation was not malicious or without legitimate purpose.

SDCL § 22-19A-1

SDCL § 22-19A-4

SDCL § 22-1-2(1)(a)

3. *Whether the circuit court abused its discretion by denying a permanent protection order.*

No. The circuit court did not abuse its discretion in denying the petition.

SDCL § 22-19A-1

SDCL § 22-19A-4

SDCL § 25-10-1

4. *Whether any alleged error regarding SDCL § 25-10-3.1 requires reversal.*

No. The court independently found that Petitioner failed to prove the underlying stalking or harassment required for relief.

SDCL § 25-10-1

SDCL § 25-10-3.1

SDCL § 22-19A-1

STATEMENT OF THE CASE

Petitioner filed for an ex parte protection order on January 30, 2026. Both parties appeared with counsel before the Honorable Heidi Linngren on March 12, 2026. HT 1:10-25; HT 3:17-20.

At the hearing, Petitioner testified on her own behalf. Petitioner also called Laura Butler, the secretary at the Hermosa school. HT 4:6-8; HT 38:15-23. Respondent testified on his own behalf. HT 43:19-25.

After hearing testimony, receiving exhibits, and considering closing argument, the circuit court dismissed the protection order, finding that Petitioner had not met her burden to prove a statutory course of conduct or qualifying harassment. HT 82:13-84:16. Petitioner appealed.

STATEMENT OF THE FACTS

The parties began dating in 2024 and became engaged later that year. HT 5:3-12; HT 45:4-14. The relationship was serious, but also unstable. Petitioner testified that she first attempted to end the relationship in October 2024. HT 7:1-16. However, after that breakup, the parties continued communicating, met again, and reconciled. HT 9:8-10:3. For example, Respondent testified that after this first break up, Petitioner invited him to church and that, after church, he had lunch with Petitioner and members of her family. HT 48:21-49:15. Petitioner did not dispute this assertion from Respondent. HT 9:15-17, 25:3-5.¹

The parties broke up again in February 2025 HT 10:12-14. Petitioner testified that she told Respondent there was no chance they would ever get back together. HT 10:18-25. Respondent testified differently. He testified that after the breakup, the parties met at QDOBA² in Rapid City, and Petitioner told him there was a possibility they would date in the future, but that “now isn’t the time.” HT 51:18-52:2. He testified that he understood that conversation as leaving open a future possibility of reconciliation, and that in the future they would date again.. HT 51:25-52:13, 63:23-24.

After that meeting, on February 26, 2025, Respondent went to Petitioner’s workplace at the Hermosa school with flowers, coffee, and gifts. HT 39:21-40:15. Respondent testified that he did this because Petitioner had previously expressed that she wanted that kind of gesture. HT 52:15-53:7. Petitioner was upset by that visit. HT 12:1-16. But Laura Butler, the school secretary, testified that Respondent did not force

¹ Petitioner testified that she did not remember whether he had been invited. HT 9:15-17; HT 25:3-5.

² Originally misidentified as Chipotle by Respondent in testimony, but subsequently corrected to QDOBA on the record. HT 79:16-18.

his way into the school, stopped when told he could not proceed further, and left on his own. HT 41:22-42:11. Additionally, Butler further testified because he was denied access, Respondent did not see Petitioner throw the gifts away, did not see Petitioner crying, was not told Petitioner was upset, and did not know that his presence had made Petitioner upset. HT 42:17-43:4.

Petitioner testified that Respondent later sent her a picture of his butt cheek with her name on it. HT 13:9-21. Petitioner did not respond. HT 14:4-6. Petitioner then blocked Respondent on her phone and social media. HT 14:18-20. Petitioner acknowledged that after she blocked Respondent, he did not talk to her again until the January 30, 2026 encounter. HT 27:19-28:10. Respondent similarly testified that there was no contact after April 2025 and through the remainder of 2025. HT 27:22-28:12, 68:21-25.

Eleven months later, on January 30, 2026, Respondent went to Petitioner's home. HT 16:16-17:13. Petitioner testified that Respondent knocked, opened her sliding-glass door, leaned in, and said he wanted to check on her. HT 16:23-17:13. Petitioner testified that she asked him to leave multiple times and that Respondent asked questions about her intimate life. HT 17:14-23. She estimated the encounter lasted approximately five minutes. HT 29:13-30:14. Petitioner testified that Respondent eventually left on his own. HT 30:12-18. She also testified that Respondent did not physically threaten her, did not damage her property, and that the January 30, 2026 encounter was the only incident in 2026 where they crossed paths or spoke. HT 23:13-24:7; HT 30:20-32:11.

Respondent testified that he went to Petitioner's home to check on her well-being because he happened to be in town that day. HT 55:21-25, 69:4-19. He testified that he believed there remained ambiguity because Petitioner had not clearly told him never to come near her or her home. HT 56:1-7; HT 58:13-20. Respondent admitted that he knew he had been blocked, admitted opening the door, admitted leaning in, and admitted asking questions about sex. HT 69:8-70:18. But he also testified that Petitioner invited him in, that the encounter was a conversation regarding their relationship, and that the Petitioner engaged him in this conversation. HT 56:10-57:25. Respondent testified that the questions about sex related to what he understood as a promise between the parties that they would not have sex with anyone else while broken up. HT 71:5-7, 73:17-74:12.} Respondent testified that this conversation lasted between five to ten minutes, that he was told to leave because Petitioner had a new boyfriend, and that Respondent left on his own. HT 56:24-57:2, 74:4-12

The circuit court denied the permanent protection order. The circuit court found portions of petitioner's testimony as credible, found the Respondent's testimony to be credible. The circuit court referred to the parties' relationship as "up-and-down" and cited the text exhibits as showing at least some back-and-forth between them, including the phrase "we'll talk later". HT 83:12-16; Pet'r Ex. 4. The court found the year-long gap relevant. HT 82:16-18. The court found that Petitioner failed to prove a pattern of conduct consisting of a series of acts over time. HT 82:19-83:1. The circuit court found Respondent credible regarding his intent during the January 30, 2026, encounter, specifically crediting his testimony that he believed the Petitioner was open to

reconciliation, and further noted that he departed promptly upon request. HT 83:9-11; HT 84:3-5. The court acknowledged that the visit may have been alarming to Petitioner, but found it was not threatening or harassing behavior as identified under the law. HT 84:5-8.

The court also placed Respondent on clear notice that Petitioner wanted no further contact. HT 83:17-84:11. The court warned Respondent that because notice now exists, any future petition filed by Petitioner that contains future contact by Respondent would be granted. HT 83:17-84:15.

STANDARD OF REVIEW

The grant or denial of a protection order is reviewed under the same standard used to review the grant or denial of an injunction. *Donat v. Johnson*, 2015 SD 16, ¶ 13, 862 N.W.2d 122. *Donat* explains this two step process:

First, we determine whether the trial court's findings of fact were clearly erroneous. We will not set aside the trial court's findings of fact unless, after reviewing all of the evidence, we are left with a definite and firm conviction that a mistake has been made. Furthermore, the credibility of the witnesses, the import to be accorded their testimony, and the weight of the evidence must be determined by the trial court, and we give due regard to the trial court's opportunity to observe the witnesses and examine the evidence. If the trial court's findings of fact are not clearly erroneous, we must then determine whether the trial court abused its discretion in granting or denying the protection order.

Ibid.

Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Zarecky v. Thompson*, 2001 SD 121, ¶ 11, 634 N.W.2d 311.

An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, or a decision that, on full consideration, is arbitrary or unreasonable. *Gartner v. Temple*, 2014 SD 74, ¶ 7, 855 N.W.2d 846.

ARGUMENT

I. The circuit court did not clearly err in finding that Petitioner failed to prove a repeated course of conduct.

Petitioner’s central argument is that the circuit court should have found stalking or harassment based on the January 30, 2026 home encounter. But Petitioner’s argument depends on reweighing live testimony, and rejecting the circuit court’s credibility determination. That is not the standard of review.

Under SDCL § 22-19A-1, the conduct must be willful, malicious, and *repeated*. (Emphasis added). Under SDCL § 22-19A-4, harassment requires a knowing and willful *course of conduct* directed at a specific person that seriously alarms, annoys, or harasses and serves no legitimate purpose. (Emphasis added). Under SDCL § 22-19A-5, a course of conduct requires a *pattern* composed of a *series of acts over time*, however short, evidencing a continuity of purpose. (Emphasis added).

The circuit court correctly focused on the statutory requirement of repetition and continuity. The court found that the January 2026 incident was one encounter, lasting only minutes, and that the prior events were separated by a substantial period of no contact that failed to constitute repeated acts or a course of conduct. HT 82:16-84:8.

Petitioner attempts to avoid this problem by dividing the January 30, 2026 encounter into several smaller “acts”: approaching the home, knocking, opening the door, leaning in, and asking questions. But the circuit court rejected that

characterization. The statutory phrase “series of acts over a period of time, however short,” does not transform a singular five-minute encounter into a course of conduct. SDCL § 22-19A-5; HT 82:19-83:2; *Schaefer ex rel. S.S. v. Liechti*, 2006 S.D. 19, ¶ 13, 711 N.W.2d 257, 262 (course of conduct upheld on appeal because the acts occurred on more than one occasion). As the record supports the circuit court’s conclusion, these findings are not erroneous under *Zarecky*.

II. The circuit court did not clearly err in finding that Respondent’s conduct was not malicious and did not lack a legitimate purpose in the manner required by the stalking statutes.

Protection orders under SDCL § 22-19A-1 require malice and under SDCL § 22-19A-4 require an improper purpose. Petitioner argues that Respondent’s conduct was necessarily malicious and lacked any legitimate purpose because Petitioner had ended the relationship and blocked him. That argument asks this Court to adopt Petitioner’s view of the evidence and disregard the circuit court’s credibility findings as to the Respondent’s testimony.

“The words, ‘malice, maliciously,’ and all derivatives thereof import a wish to intentionally vex, annoy, or injure another person, established either by proof or presumption of law [.]” SDCL § 22–1–2(1)(a); *Donat v. Johnson*, 2015 S.D. 16, ¶ 21, 862 N.W.2d 122, 129.

“Legitimate purpose” does not appear to have been expressly defined by this Court. However, prior decisions indicate that the analysis centers on (1) whether the asserted purpose is independent of alarming, annoying, or harassing the petitioner; *State v. Shibly*, 2023 S.D. 35, ¶¶ 31–32, 993 N.W.2d 427 (rejecting respondent’s claimed

legitimate purpose of wanting to spend time with petitioner where repeated unwanted calls, texts, and pounding on her door supported intent to vex or annoy); (2) whether the respondent's asserted purpose is credible, *White v. Bain*, 2008 S.D. 52, ¶ 12, 752 N.W.2d 203, 207 (respondent's legitimate purpose of retrieving chairs was "absurd" in light of illegal entry and crazed instigation of a physical confrontation over furniture that was previously meaningless); and (3) whether the conduct is reasonably related to that asserted purpose. *Schaefer ex rel. S.S. v. Liechti*, 2006 S.D. 19, ¶ 16, 711 N.W.2d 257, 263 (Respondent's "surveillance of the children through binoculars while they were swimming, while they were in a tree house, and on other occasions was not related to his purported concern of ensuring compliance with South Dakota's motor vehicle laws.").

The hearing record was not one-sided. The parties' relationship had previously ended and restarted. Petitioner testified that after the October 2024 breakup, Respondent came to church and the parties later reconciled. HT 9:8-24. Respondent testified that Petitioner was the one who invited him, and that he attended church with her, and that he ate lunch with Petitioner's family afterward. HT 48:21-49:15.

The February 2025 breakup was also disputed. Petitioner testified that she told Respondent there was no chance of future reconciliation. HT 10:19-25, 75:13-20. Respondent testified that Petitioner told him there was a possibility they would date in the future, and that they had made mutual promises not to have sex with anyone else while broken up. HT 51:18-52:3, 71:5-7, 73:17-74:12.

The school incident further supports the circuit court's finding. Respondent testified that, during the relationship, Petitioner had expressed that she wanted him to

bring things to her at work, and that he brought flowers, coffee, and gifts because he believed it was a sincere reconciliation gesture. HT 52:15-53:7. The school secretary Ms. Butler testified that Respondent did not force his way into the school, did not proceed when told he could not, and left. HT 41:22-42:10. Butler also testified that Respondent did not see Petitioner crying, did not see Petitioner throw the gifts away, and was not told that Petitioner was upset. HT 42:17-43:4. This testimony supports Respondent's subjective belief of a chance of future reconciliation.

Finally, what exactly happened during the January 2026 incident was also disputed. Respondent testified that he went to Petitioner's house because he thought the relationship could be reconciled, and that Petitioner invited Respondent in and engaged in the conversation. HT 63:23-24, 73:17-74:12.

The circuit court was not required to accept Petitioner's version wholesale. The court found that the text exhibits showed at least some "back-and-forth," including the phrase "we'll talk later," and described the relationship as "up-and-down." HT 83:12-15; Pet'r Ex. 4. The court specifically mentioned his testimony was credible as to his intentions during the January 30, 2026 encounter. HT 83:9-11; HT 84:3-5.

Those facts matter because SDCL §§ 22-19A-1 and 22-19A-4 require more than conduct that is unwanted or upsetting; they require malicious conduct and conduct serving no legitimate purpose. The question is not whether Petitioner was subjectively upset, but whether the circuit court was *required* to find that Respondent acted with malicious harassment or without any legitimate purpose. Given the circuit court's factual and credibility findings regarding the history of the relationship, the parties' prior reconciliations, and Respondent's testimony, the court could find that

Respondent's stated purpose of reconciliation was not intended to vex, annoy, injure, alarm, or harass Petitioner; that the stated purpose was credible; and that Respondent's conduct was related to that purpose. The court's finding was not clearly erroneous.

III. The circuit court did not abuse its discretion by denying a permanent protection order.

Petitioner next argues that the circuit court abused its discretion by failing to grant relief under SDCL § 25-10-1, SDCL § 22-19A-1, and SDCL § 22-19A-4. However, explained above, the court did not grant the petition because it did not find the facts met the standard of repeated conduct with no legitimate purpose.

Therefore, Petitioner's abuse-of-discretion argument largely asks this Court to substitute its judgment for the circuit court's judgment. But as explained previously, the court's ruling was within the range of permissible choices because the record supported a finding that this was a singular brief and nonmalicious 2026 encounter separated by many months from the 2025 breakup events. Because the Petitioner did not meet her burden, the court's denial of the petition was not a fundamental error of judgment.

IV. Any alleged error concerning SDCL § 25-10-3.1 does not require reversal because the circuit court independently found no stalking or harassment.

Petitioner argues that the circuit court erred by finding SDCL § 25-10-3.1 did not apply because of the twelve-month requirement. However, any alleged error is harmless. Petitioner's theory at the hearing was expressly a stalking and harassment theory, not a physical-assault domestic-abuse theory.³

³ Petitioner's own closing argument confirms that the case was presented to the circuit court as a stalking and harassment case, not as a physical domestic violence case. HT 76:9-15 ("this is not a case about physical assault, physical harm, bodily injury,

Thus, even assuming the parties' prior relationship could satisfy SDCL § 25-10-3.1, Petitioner was still required to prove stalking under SDCL § 22-19A-1. The court separately and expressly found that Petitioner failed to do so. HT 82:19-84:8. That finding is enough to affirm regardless of any error in applying SDCL § 25-10-3.1 .

V. The circuit court's warning rendered further relief unnecessary on this record.

While the court denied the petition in part because Respondent was not aware Petitioner wanted no contact with him, the court placed Respondent on clear notice as part of its ruling. HT 83:17-84:11. The court further warned Respondent that because notice now exists, any future petition filed by Petitioner that contains future contact by Respondent would be granted. HT 83:17-84:15.

Thus, while the court did not enter a formal protection order, its ruling substantially accomplished the immediate notice function Petitioner sought. Respondent is now on judicial notice that Petitioner wants no contact, and the circuit court made clear that any future contact would be treated differently. Under those circumstances, Petitioner has not shown that reversal is necessary to provide meaningful practical relief on this record.

CONCLUSION

Because the circuit court's findings were not clearly erroneous, and because the denial of a permanent protection order was within the range of permissible choices, the judgment should be affirmed.

obviously"). Any argument for relief under SDCL § 25-10-1 is waived. *Doremus v. Morrow*, 897 N.W.2d 341, 346, 2017 S.D. 26, ¶ 14.

CERTIFICATE OF COMPLIANCE

I, Matthew Hays McCoy, attorney for Appellee Tertius Van Der Mescht, certify that this brief complies with the type-volume limitation set forth in SDCL 15-26A-66(b) and the South Dakota Rules of Appellate Procedure.

I further certify that this brief contains 3166 words, excluding the portions exempted by SDCL 15-26A-66(b). This brief was prepared using Times New Roman, 12-point font. The brief was prepared using Google Docs, and the word count was obtained using the word-count feature of Google Docs.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of July, 2026, a true and correct copy of the Appellee's Brief in the matter of *Kayden Kursave v Tertius Van Der Mescht* was filed electronically with the Court using the Odyssey File and Serve system which sent a notification to the Attorney for Petitioner, Gina Ruggieri on this 2nd day of July, 2026.

Respectfully submitted this 2nd day of July, 2026.

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