

No. 69302-6

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

CHRISTINE NORTON, on behalf of L.T. AND M.T.,

Respondent,

v.

RUBEN TORRES,

Appellant.

BRIEF OF RESPONDENTS

Emily Cordo
WSBA # 37077
Attorney for Respondents L.T. and M.T.
Sexual Violence Law Center
2024 3rd Ave
Seattle, WA 98121
206.436.8611

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 25 PM 12:56

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT..... 11

A. L.T. AND M.T. SATISFIED THEIR STATUTORY
BURDEN UNDER RCW 7.90.010(4)(a)12

B. MR. TORRES’S ARGUMENTS REGARDING RCW
7.90.010(4)(e) ARE IRRELEVANT AND
MISREPRESENT THE RECORD.....16

C. THE SEVERITY OF THE NONCONSENSUAL SEXUAL
CONDUCT IS IMMATERIAL IF THE STATUTORY
ELEMENTS ARE SATISFIED.....20

D. THIS COURT SHOULD AWARD ATTORNEYS FEES
AND COSTS IN THIS APPEAL.....25

IV. CONCLUSION.....28

TABLE OF AUTHORITIES

Table of Cases

<i>Axess Inter. Ltd. v. Intercargo Ins. Co.</i> , 107 Wn. App. 713, 30 P.3d 1 (2001).....	16
<i>Bostain v. Food Exp., Inc.</i> , 159 Wn.2d 700, 153 P.3d 846 (2007).....	21-22
<i>Broughton Lumber Co., v. BNSF Ry. Co.</i> , 174 Wn.2d 619, 278 P.3d 173 (2012).....	20-21
<i>City of Kent v. Mann</i> , 161 Wn.App. 126, 253 P.3d 409 (2011).....	23-24
<i>The Erection Co. v. Dept. of Labor and Industries of State of Wn</i> , 121 Wn.2d 513, 852 P.2d 288 (1993).....	21
<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 268 P.3d 892 (2011).....	22
<i>Kearney v. Kearney</i> , 974 P.2d 872, 95 Wn.App. 405 (1999).....	25
<i>Veit v. Burlington Northern Santa Fe Corp.</i> , 150 Wn.App. 369, 207 P.3d 1282 (2009).....	16
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	23
<i>Yurts v. Phipps</i> , 143 Wn. App. 680, 181 P.3d 849 (2008).....	25

Statutes

RCW 7.90.005.....	11-12, 21-22, 24
RCW 7.90.010(4).....	11-13, 16-17, 19, 22-23, 25-26
RCW 7.90.090.....	12-13, 20-26
RCW 9.68A.040(b).....	11
RCW 9A.44.040.....	11
RCW 9A.44.115.....	11

Regulations and Rules

RAP 10.3(c).....	16
RAP 18.9(a).....	25-27

I. INTRODUCTION

Persons in the State of Washington who are subjected to nonconsensual sexual penetration or nonconsensual sexual conduct, but who are not eligible for a Domestic Violence Protection Order, are entitled to seek protection by petitioning for a Sexual Assault Protection Order. In this case the respondents on appeal are 13-year-old twin sisters, L.T. and M.T., who asked the King County Superior Court to grant an order protecting them from their paternal grandfather, Appellant Ruben Torres. Following a hearing on the merits, The Honorable Judge Michael Hayden found that L.T. and M.T. satisfied their burden of proof and granted a Sexual Assault Protection Order.

Mr. Torres has not presented any legal argument to justify reversal. Therefore, L.T. and M.T. respectfully request that this court uphold the trial court's ruling granting their Sexual Assault Protection Order. Further, because the argument presented in his Opening Brief is frivolous, L.T. and M.T. ask this Court to order Mr. Torres to pay attorneys' fees and costs associated with responding to this appeal.

II. STATEMENT OF THE CASE

Appellant Ruben Torres is the paternal grandfather of the Respondents on appeal, L.T. and M.T., who are thirteen-year-old identical twin sisters. RP 7. L.T. and M.T. live with their mother (Christine Norton)

and their stepfather (Nicholas Norton). RP 7, 14. L.T. and M.T. have visitation with their biological father (Adrian Torres) pursuant to a parenting plan. RP 13-14. Adrian Torres lived with his parents for years, during which time he had visitation every other weekend. RP 28, 67. At some point he moved out of his parents' home, but continued to bring the girls to spend time with his parents during his weekend visits. RP 28, 48. Although Christine Norton and Adrian Torres were engaged in parenting plan modification litigation concurrent with this Sexual Assault Protection Order case, the two cases have no direct bearing on each other. RP 7, 14.

The parties and witnesses appeared before King County Superior Court Judge Michael Hayden on August 21, 2012. Mr. Torres's attorney proposed (and the twins' attorney and Judge Hayden agreed) that instead of making these young girls testify in open court, Judge Hayden should watch (on the record in open court) DVD recordings of child forensic interviews of the twins, which were conducted during law enforcement's investigation of potential criminal charges. RP 7-11.

The child forensic interviewer spoke with each girl separately. RP 8. She began by asking introductory questions to establish rapport, then set ground-rules (such as telling the girls to correct her if she made any false assumptions), confirmed that the girls knew the difference between truth and lies, and obtained their agreement to tell the truth. RP 14-21, 46-47.

Judge Hayden began by listening to the interview of M.T. RP 20. The interviewer asked if M.T. knew why she was being interviewed, and M.T. responded “Because of my grandpa is being inappropriate.” RP 21-22. M.T. said that the inappropriate touching that concerned her happened “More than one [time],” as recently as “a couple visits ago.” RP 22.

M.T. described her grandfather’s behavior, “he would like tickle me and like get his hand down my shirt and go like that,” gesturing toward her chest. RP 22. Immediately thereafter, M.T. disclosed, “I would tell [my grandma Tela Torres] that it was happening a lot.... And she would just say it was an accident.” RP 22. At that point, the interviewer had to take a brief break to get tissues for M.T., who was in obvious distress. RP 22. After returning with the tissues, the interviewer asked M.T. to describe the tickling in more detail:

A: He would like tickle me and then he would get his hand up my shirt and he would keep his hand I there and I would push him away and I’d go tell someone.

Q [interviewer]: I want to hear all about the tickling, okay? Tell me how it would start. Tell me about this time, how it started.

A: Like I would just be sitting on the couch and then he’d start like tickling my neck.

Q: Uh hm.

A: And then he would tickle my foot. And then he’d tickle my stomach and then he’d go up my shirt.... He’d like just do that and then I would tell him to stop.

Q: Uh hm.

A: And then I’d be like what are you doing? And he was like I’m not doing anything. I was like that’s the girl’s spot. Then he was like, he was like I didn’t even do anything.

RP 23-24. The interviewer then asked for more detail about where M.T.'s grandfather was tickling her, and M.T. identified it as "My chest." RP 24. She explained that when his hand was up her shirt he would, "Just like brush [his hand] back and forth." RP 24. This occurred before she began wearing a bra, so there was direct hand-to-breast contact. RP 24.

In LT's case the touching was only over her shirt. RP 53-54. Other than that, L.T.'s description was quite similar to M.T.'s. She said:

Q: So tell me all about how he tickled up here. Tell me how he did that.

A: He like tries, tickles my neck. And then he like to, goes more down.... He sort of goes down to like here and then like (inaudible).

Q: And went down to your what?

A: Boobs....

Q: Okay. And then what does he do when he gets down to your boobs?

A: Well, and then I, I like run away. And my sister like tackles him. Well, not tackles him, but like starts to run away.... And then like we go downstairs.

Q: Okay. Okay. And where on your boobs did he do the tickling?

A: Like right here...

Q: Okay In the middle of here?

A: Yeah.

RP 52-53. Upon further questioning, L.T. explained what she meant when she said M.T. "tackles him," as, "Well, like, so sort of like pushing him to get him like away from me." RP 56.

The interviewer asked the girls if Mr. Torres touched their breasts other than brushing back and forth against them in the context of tickling.

M.T. said, “[S]ometimes he like grabbed me ... and he says he’s tickling my neck, but I can feel him pushing on my boobs and I’m like stop doing that and stuff.” RP 34. L.T. said that in addition to the tickling, “he’d be like giving us hug [sic] and like he tries to touch my boobs.” RP 50. L.T. demonstrated for the interviewer how when Mr. Torres hugged them the twins would hold their arms up against their chest protectively, “Trying to cover it up because we don’t want him to touch us.” RP 54. L.T. said they shielded their breasts when he hugged them because, “Well, he just, he does it like, I don’t know, he might want to feel it, like on his stomach or something, so we just do that.” RP 56. Although she had a difficult time putting it into words, L.T. told the interviewer that the way Mr. Torres hugged the twins was different from the way he hugged other people (*e.g.*, the body-contact lasted longer), and that his hugs felt different to them than hugs they received from other people. RP 56.

Additionally, M.T. and L.T. responded to the interviewer’s requests for other examples of inappropriate touching by noting that “a lot of the times, he like slapped our butt[s],” and both girls referred to an incident in which Mr. Torres tried to “touch” or “pinch [L.T.’s] butt” while adjusting her shirt. RP 31-33, 50-51. However, the girls’ primary complaint was the way he touched their breasts.

The girls were explicit that reason they wanted him to stop was not merely that they didn't like being tickled, but that it was sexually inappropriate, and indicated that they tried to tell him that this was the reason. L.T. explained that the problem was her grandfather's inability to understand age-appropriate touching, and that when he was tickling her chest, "I was thinking that is awkward and weird.... Like before we didn't really know what's going on since like, since we're getting older, we notice more stuff." RP 54. Likewise, M.T. reported:

Q: Okay. And how did it feel on your chest area when his hand was there.

A: It felt awkward, like really awkward and stuff. And it's like you're my grandpa, not some pervert or whatever.

Q: Okay. And you talked about telling [him] that's a girl's spot?

A: Yeah.

Q: Did you say some other things to him?

Q: I just told him that he should stop and stuff

RP 25. M.T. described multiple incidents, but explained, "I try to block it out of my mind Because it's gross." RP 28-29. The interviewer asked M.T. to clarify why she interpreted Mr. Torres's behavior as intentionally sexual, rather than innocent or incidental:

Q: Okay. Tell me about that. I'm confused about that.

A: Like sometimes he'll go like that ... and then he'll like push me down and will try to like get onto my boob and stuff.

Q: How do you know he's trying to get on your boob?

A: Because like when I push his hand, he like tries to stay in one spot I guess....

Q: How do you know he's going for your boob and not just back up to your neck...?

A: Because he just like always does gross stuff like that....

Q: Okay. Is there something else that he did that's kind of weird or strange that we haven't talked about yet?

A: Well, sometimes when we're – well, it's not like to me. He just always looks at, at teenage girls and stuff inappropriately. Like he always looks at their parts and stuff.... I could like see like all where his eyes are going. And when they were walking, like his eyes were following them and he would like look at their chest and their butt and stuff like that....

RP 34-36. Additionally, M.T. found it suspicious that the touching of her “boobs” only occurred when no witnesses (other than L.T.) were around.

RP 25-27. She later added, “I don't know about [L.T.], but to me, he like, he does it when everyone's like either not looking or not paying attention or something.” RP 33-34. L.T. confirmed that although Mr. Torres tickled the twins' feet when other people were around, he only tickled her chest when they were alone or with M.T. (*i.e.*, not around her father or grandmother). RP 61-62.

In addition to telling Mr. Torres to stop, the twins reported that they tried to make him stop in several ways. For example, M.T. said that when “his hand was brushing back and forth” on her bare breasts: “I would like, would take his hand and I'd take it away and then push his hand away.... Then I would run away.... Or sometimes I would just go to my room with [L.T.] and talk to her.” RP 24-25.

The twins were twelve years old when the case was filed, and had learned in school about good-touch/bad-touch and about asking trusted

adults for help. As M.T. put it, “my mom said if, when I was little, that if anything bad happens to you, go tell an adult. And they tell you that at school for like a week and stuff.... And then so I did, but they wouldn’t listen to me.” RP 24. For example, M.T. said that when Mr. Torres would touch her breasts, “I would tell my grandma and she would just say it was an accident,” “And I would tell her that it was happening a lot,” “And she would just say it was an accident.” RP 22, 27, 58. Additionally, L.T. reported, “One time my sister told my dad that our grandpa was touching us in weird spots. And then he’s like just laughing like saying that she doesn’t know what she’s talking about.” RP 49, 51, 58-59. The girls concluded, “they never believe us when we tell them.” RP 49, 51, 58.

Because their requests for help were ineffective, the twins had to fend for themselves:

And he would do it again and stuff and he would be like really mad and stuff. So when we, the last times we’ve been at our dad’s with our grandpa and stuff... [L.T.] and I would be with each other 24-7. And when he would try to get near us, we would push him away and run down into our room and lock the door.

RP 27-28. M.T. admitted, “And then when I’m at their house sometimes, I, I want to run away. And actually we planned [on] running away.” RP 32.

In January 2012 the twins finally sought help from their mother.

Christine Norton testified:

The girls came home on a Wednesday visit with their father and they were very, they just, they kept saying why are you making me, why are you making us go to our dad's? And I said I'm sorry, I have to follow the parenting plan.... And they were just very angry about it. And I was like where is this anger coming from? And they said that because our grandpa's creepy.... I suggested that they write a letter to their dad explaining how they feel.

RP 68. The girls agreed, and when Ms. Norton read the letters she became concerned. At the hearing, Mrs. Norton read the concerning parts of the twins' letters on the record:

M.T.'s letter: Ruben is being very inappropriate and I really don't like it.... If I went to the police, he could go to jail. I want him to stop. So the only way it would would [sic] be to leave and not come on visits. And I also have said I don't want to come and say my feelings, but no one ever listens to what I say.

L.T.'s letter: Ruben is being very inappropriate with me and I feel very uncomfortable with him.

RP 69. After reading the letters Mrs. Norton spoke with the girls, and they disclosed being uncomfortable about Mr. Torres touching "on their chest, their butt [sic]." RP 70. Mrs. Norton asked her daughters if they'd previously disclosed the touching:

And I actually asked the girls have they told anyone about the incident, and they said yes. And I've always told them that if anything ever happens, if they're in trouble or anything like that, they need to at least tell two people. And they told two people that they thought they trusted, their grandmother and their father. They didn't tell me. And I asked them why they didn't tell me either and they said well, you told us to tell us two people we trusted and we thought that, you know, that it was, those two people would help us, would do something about it. And they, one said it was an accident and just blew it off, and the other one laughed at them, so.

RP 72. After speaking with the twins Mrs. Norton called the girls' father, Adrian Torres, but his reaction to her was similar to his reaction when the twins disclosed to him: "he laughed at me, called me crazy..." RP 71.

Although the twins said they repeatedly asked their grandmother for help, Tela Torres denied that M.T. and L.T. ever approached her to complain about the touching. RP 85-86. The appellant, Ruben Torres, denied ever touching the girls inappropriately. RP 90-91. He admitted that the girls told him to stop, but said that when they did he would stop and they would "run off." RP 94. He also admitted that one of the twins "jumped on my back and tried to peel me off" while he was tickling the other twin. RP 95-96. However, he characterized all of it as a "game," and, "nothing sexually, nothing inappropriate as they seem to believe at this point." RP 95-96. Adrian Torres did not testify.

After watching the DVDs, hearing from the other witnesses, and considering the closing arguments, Judge Hayden concluded:

I have during the many years on the bench seen many victims of sexual abuse, both young and older. I will tell you that the demeanor that they showed me in the video was convincing. The demeanor certainly changed dramatically the instant there was any suggestion that the interviewer was getting close to the topic of the touching. It was striking. I do find that the touching did occur on the breasts of both girls, perhaps during tickling, that the issue was brought up and then it continued for some period of time. I don't find it unusual that the girls would have complained about it and that adults would have, I won't say made light of it, but had

brushed it off as something that was of no consequence. But the court finds that it did happen, and the court will enter a sexual assault protection order.

RP 107-108. After Judge Hayden granted L.T. and M.T.'s Sexual Assault Protection Order, Ruben Torres filed this appeal.

III. ARGUMENT

Sexual abuse can take myriad forms. Accordingly, a broad range of sexual behaviors are criminalized in Washington, ranging from rape by forcible compulsion to voyeurism to producing child pornography, for example. RCW 9A.44.040, .115; RCW 9.68A.040(b). The Washington State legislature enacted the Sexual Assault Protection Order Act, because it acknowledged that the criminal justice system and domestic violence protection order laws do not offer adequate protection for many victims of sexual assault. RCW 7.90.005. The Act created a civil remedy that can provide protection to victims of a wide range of nonconsensual sexual behaviors, who are ineligible for a Domestic Violence Protection Order. *Id.*

In his Opening Brief, Mr. Torres makes a muddled argument that can be interpreted as including three points. First, he claimed the Sexual Assault Protection Order should have been denied because the conduct alleged by L.T. and M.T. did not constitute nonconsensual sexual conduct (as defined by RCW 7.90.010(4)(a)). Appellant's Opening Brief at 10-11. Second, he argues that they did not establish sexual motivation (as per

RCW 7.90.010(4)(e)). Appellant’s Opening Brief at 11. Third, he suggests that the protection order should have been denied because the way he touched L.T. and M.T. was not the “most heinous crime against another person short of murder.” Appellant’s Opening Brief at 10, quoting RCW 7.90.005.

Mr. Torres’s first argument does not accurately reflect the record on appeal, his second has no bearing on the actual basis for Judge Hayden’s ruling, and his third does not accurately reflect the law. Therefore, M.T. and L.T. respectfully request that this Court uphold their protection orders. Moreover, because this appeal is so plainly frivolous, L.T. and M.T. ask the appellate court to award compensatory damages, including attorneys’ fees and costs, to the Sexual Violence Law Center.

A. L.T. AND M.T. SATISFIED THEIR STATUTORY BURDEN UNDER RCW 7.90.010(4)(a).

The evidentiary burden on a petitioner seeking a Sexual Assault Protection Order is explicit and simple:

If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order....

RCW 7.90.090(1)(a). The legislature defined “sexual conduct” to include a wide range of sexual behaviors, divided into six categories:

- (a) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing;
- (b) Any intentional or knowing display of the genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent;
- (c) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing, that the petitioner is forced to perform by another person or the respondent;
- (d) Any forced display of the petitioner's genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent or others;
- (e) Any intentional or knowing touching of the clothed or unclothed body of a child under the age of thirteen, if done for the purpose of sexual gratification or arousal of the respondent or others; and
- (f) Any coerced or forced touching or fondling by a child under the age of thirteen, directly or indirectly, including through clothing, of the genitals, anus, or breasts of the respondent or others.

RCW 7.90.010(4). If a petitioner proves by a preponderance of the evidence that the respondent engaged in “any” of these behaviors without the petitioner’s consent, the court “shall” enter a sexual assault protection order. RCW 7.90.090(1)(a), .010(4).

Mr. Torres argued that the trial court erred when it found that L.T. and M.T. established by a preponderance of the evidence that they were the victims of nonconsensual sexual conduct. Appellant’s Opening Brief at 10. He notes that the court relied upon RCW 7.90.010(a): “Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing.” Appellant’s Opening Brief at 11. Mr. Torres claimed:

[T]here was no testimony that Torres ‘intentionally or knowingly’ touched either of the girl’s [sic] breasts. There was testimony about tickling and one of the girls mentioned her chest, but neither one testified that Torres touched their breast [sic].

Appellant’s Brief at 11. Due to the lack of analysis in his brief, it is difficult to parse Mr. Torres’s point. He does not explicitly argue that a person can “tickle” someone else’s breasts without “intentionally or knowingly” touching those breasts. He does not explicitly argue that “tickling” is not “touching.” He does not explicitly argue that “boobs” and “chest” are categorically distinct from “breasts.” He does not explicitly argue that the testimony was insufficiently detailed or lacked credibility.

Therefore, rather than an argument about statutory interpretation or the sufficiency of the evidence, it appears Mr. Torres is simply arguing about the content of the record, claiming that the record contains “no testimony” from the twins that he touched their breasts. Appellant’s Opening Brief at 11. This is patently inaccurate. The record on review is replete with examples of L.T. disclosing that Mr. Torres touched her breasts over her shirt, and M.T. disclosing that Mr. Torres touched her breasts both over and under her shirt. For example:

- M.T.: “He would like tickle me and like get his hand down my shirt and go like that.” RP 22.
- M.T.: He would “Just like brush [his hand] back and forth” on “My chest.” RP 24.
- M.T.: “He would like tickle me and then he would get his hand down my shirt and he would keep his hand there....” RP 23.

- M.T.: “[S]ometimes he like grabbed me ... and he says he’s tickling my neck, but I can feel him pushing on my boobs and I’m like stop doing that and stuff.” RP 34.
- M.T.: When hugging her, “Like sometimes he’ll go like that and then he’ll like – and then he’ll like push me down and will try to like get onto my boob and stuff.” RP 34-36.
- L.T.: “[H]e’d be like giving us hug [sic] and like he tries to touch my boobs.” RP 50
- L.T.: After tickling her neck, “He sort of goes down to like here..., [to my b]oobs.” RP 52-53.
- L.T.: When asked where on her boobs he tickled she gestured, to which the interviewer responded, “Okay. In the middle of here?” and L.T. responded, “Yeah.” RP 52-53.

In addition to these verbal examples, as the last example indicates the girls were repeatedly asked by the interviewer to *show* her where he touched them. Although the visual component of the DVDs is not transcribed in the record of the proceedings, Judge Hayden did see them, and could confirm the twins’ verbal references to their “chest” and “boobs,” by observing their simultaneous physical gestures. After watching the DVDs and reviewing the rest of the evidence Judge Hayden concluded, “I do find that the touching did occur on the breasts of both girls, perhaps during tickling.” RP at 107. Consequently, Mr. Torres’s claim that “neither [L.T. or M.T.] testified that Torres touched their breast [sic]” is simply not accurate. Appellant’s Opening Brief at 11.

L.T. and M.T. do not get to file a second brief, so this Court should not allow Mr. Torres to sandbag them by providing new explanations in his Reply Brief for his claim that L.T. and M.T. never testified that he

touched their breasts without their consent. Indeed, Washington courts have uniformly ruled that, “An issue raised and argued for the first time in a reply brief is raised too late.” *Axess Inter. Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 719, 30 P.3d 1 (2001); *Accord Veit v. Burlington Northern Santa Fe Corp.*, 150 Wn.App. 369, 207 P.3d 1282 (2009); RAP 10.3(c). For example, Mr. Torres’s Opening Brief does not explicitly dispute Judge Hayden’s conclusion that the twins’ testimony was credible. RP 107-108. Therefore, he should not be permitted to contest their credibility in his Reply. Likewise, Mr. Torres’s Opening Brief does not argue that the girls failed to establish that the touching was nonconsensual. Therefore, he should not be able to claim in his Reply Brief that he believed the touching was consensual.

B. MR. TORRES’S ARGUMENTS REGARDING RCW 7.90.010 (4)(e) ARE IRRELEVANT AND MISREPRESENT THE RECORD.

Mr. Torres’s Opening Brief asserts that L.T. and M.T. did not satisfy RCW 7.90.010(4)(e) (“Any intentional or knowing touching of the clothed or unclothed body of a child under the age of thirteen, if done for the purpose of sexual gratification or arousal of the respondent or others”), which is the sixth option in the definition of “sexual conduct.” *Id* This argument is irrelevant, because the statute prefaces the six options with, “‘Sexual conduct’ means *any* of the following.” RCW 7.90.010(4)

(emphasis added). Although the twins' attorney pointed out in closing arguments that the court could find that either (4)(a) or (4)(e) applied, Judge Hayden granted the order pursuant to RCW 7.90.010(4)(a). RP 97, 107-108. Therefore, L.T. and M.T. were not obligated to prove that they also satisfied subsection (4)(e).

Under section (4)(a), the section relied upon by Judge Hayden, the only *mens rea* element is that the touching itself must be “intentional or knowing.” RCW 7.90.010(4)(a). The motivation for the touching is irrelevant. In contrast, subsection (4)(e) requires that the touching's purpose was sexual gratification or arousal. RCW 7.90.010(4)(e). In other words, lack of sexual motivation is a defense to (4)(e), it is not a defense to subsection (4)(a).

Although Judge Hayden did not make any findings regarding (4)(e)—because it was moot after he found that (4)(a) was satisfied—Mr. Torres raises this argument in order to assert that he did not have a sexual motivation:

As to subsection (e) there was absolutely no testimony that would support an argument that Torres engaged in this touching for purposes of sexual gratification. All of the touching took place in public or while others were present. There were no indications that anyone believed the touching to be sexual except perhaps Ms. Norton.

Appellant's Opening Brief at 11. Although it is totally unnecessary for the court to evaluate this argument, because the elements of (4)(a) are so clearly met, this Court should note that every factual claim in that paragraph is inaccurate.

Not only did the twins state repeatedly in their interviews (albeit in 13-year-old language) that the reason they objected to Mr. Torres touching their breasts is that they viewed it as sexual, the record even shows that M.T. explained that to Mr. Torres :

- M.T. described the touching as "inappropriate" (RP 21-22) and "gross" (RP 29).
- M.T. said that when Mr. Torres touched her breasts, "I'd be like what are you doing? And he was like I'm not doing anything. I was like that's the girl's spot." RP 23-24.
- M.T. explained that when he touched her chest, "It felt awkward, like really awkward and stuff. And it's like you are my grandpa, not some pervert or whatever," so "he should stop and stuff." RP 25.

L.T. explained that "since we're getting older" they'd noticed that his behavior was not age-appropriate. RP 54. The fact that Mr. Torres persisted in touching the girls' breasts, after being told not to because that is a "girl's spot" and "perverted," could support an inference of a sexual motivation.

M.T. and L.T. made several other observations that support their interpretation that Mr. Torres was sexually motivated. For example, Mr. Torres misrepresents the record by claiming that "All of the touching took

place in public or while others were present.” Appellant’s Opening Brief at 11. The twins testified that he only touched their breasts when nobody else was in the room, and that when witnesses were present he would only tickle their feet. RP 25-27, 33-34, 61-62. The evidence that he concealed his touching of their breasts is, again, evidence of sexual motivation.

Furthermore, M.T. said that part of the reason she felt his behavior was “gross,” and that she believed he was intentionally touching her breasts like a “pervert” was that:

He just always looks at, at teenage girls and stuff inappropriately. Like he always looks at their parts and stuff.... And when they were walking, like his eyes were following them and he would look at their chest and their butt and stuff like that.

RP 35-36. This is evidence that Mr. Torres is in fact sexually attracted to underage girls.

In the end, Judge Hayden did not have to evaluate the strength of the evidence of sexual motivation, because he found that L.T. and M.T. presented sufficient credible evidence to satisfy RCW 7.90.010(4)(a). Therefore, the issue of sexual motivation is not relevant to this appeal, but Mr. Torres’s misrepresentations of the record were too blatant to go unanswered. He should not be permitted to expand upon this argument in his Reply. Therefore, this Court should uphold Judge Hayden’s finding that subsection (4)(a) was satisfied, irrespective of (4)(e).

C. THE SEVERITY OF THE NONCONSENSUAL SEXUAL CONDUCT IS IMMATERIAL IF THE STATUTORY ELEMENTS ARE SATISFIED.

The burden of proof and legal elements required to obtain a final order under the Sexual Assault Protection Order Act are limited and clear:

If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court *shall* issue a sexual assault protection order....

RCW 7.90.090(1)(a) (emphasis added). There are no conditions, limitations, or exceptions to this statement of the elements in the Act, only definitions of the scope of these terms. Mr. Torres’s argument appears to be that this court should impose a new element, limiting issuance of Sexual Assault Protection Orders to cases that rise to the level of “the most heinous crime against another person short of murder,” due to the language in the Legislative Purpose section of the Act. Appellant’s Opening Brief at 10.

Appeals over the meaning of a statute are reviewed *de novo*, but, “If a statute’s meaning is plain on its face, we must ‘give effect to that plain meaning as an expression of legislative intent.’” *Broughton Lumber Co., v. BNSF Ry. Co.*, 174 Wn.2d 619, 624, 627, 278 P.3d 173 (2012). Specifically, in reviewing statutes that use the word “shall”:

It is well settled that the word “shall” in a statute is presumptively imperative and operates to create a duty. The word “shall” in a

statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.

The Erektion Co. v. Dept. of Labor and Industries of State of Wn, 121 Wn.2d 513, 519, 852 P.2d 288 (1993)(citations omitted). Absent evidence that the legislature intended the word “shall” to be discretionary in the Sexual Assault Protection Order Act, it should be interpreted as imposing a mandatory obligation on judges to grant such orders every time a petitioner proves nonconsensual sexual penetration or nonconsensual sexual conduct by the respondent, regardless of the severity of the penetration or conduct. RCW 7.90.090(1)(a).

The primary role of an appellate court, in assessing issues of statutory interpretation, is to “effectuate the legislature’s intent.” *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). If the statute’s meaning is plain, based on the ordinary meaning of its language in context, the court must give effect to that meaning. *Id.* A plain reading of the statute makes Mr. Torres’s argument easy to dismiss, notwithstanding the Legislative Purpose section’s purple prose. As that section’s title indicates, it describes what *motivated* the legislature to pass the law, it does not describe or expressly constrain the law’s definitions, elements, procedural obligations, or evidentiary burdens. RCW 7.90.005.

The court may look beyond the plain meaning of the statute only if it is ambiguous, and “The fact that two or more interpretations are conceivable does not render a statute ambiguous,” because the two interpretations must both be “reasonable.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). Mr. Torres’s argument is not reasonable, because he does not explain (whether by reference to the Act’s legislative history, by analysis, or by any other means) why the legislature would have defined “sexual conduct” to include such a wide range of behaviors if they only intended to protect victims of assaults that were nearly as heinous as murder. RCW 7.90.005, .010(4).

However, if this Court decides to give Mr. Torres’s tortured interpretation of the Legislative Purpose section any weight, and treat the statute as ambiguous, there is no support for finding that the ambiguity should be resolved by adding an additional element of severity. If a statute is ambiguous, this Court begins by considering the legislative history. *Five Corners Family*, 173 Wn.2d at 305-306. Unfortunately, Mr. Torres has provided no evidence of the legislative history. Therefore, if this Court finds that the statute is ambiguous, it must rely upon principles of statutory interpretation to resolve the ambiguity. *Bostain*, 159 Wn.2d at 708.

Among the most important of these principles is that “Statutes must be interpreted and construed so that all the language used is given

effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303(1996). The Sexual Assault Protection Order Act provides that the court *shall* grant relief based on proof of either nonconsensual sexual penetration or nonconsensual sexual conduct, and defines the latter to include six categories of behavior. RCW 7.90.010, .090. To give primacy to the preamble, by limiting issuance of protection orders to cases involving “the most heinous crime against another person short of murder,” would make most of those six categories superfluous.

Additionally, the principles of statutory interpretation discourage reading discretion into a statute that contains a mandatory obligation. For example, in *City of Kent v. Mann*, the statute at issue described two circumstances requiring the release of a vehicle during the impoundment period, and provided that the agency should “deny release in all other circumstances without discretion.” 161 Wn.App. 126, 133, 253 P.3d 409 (2011) In *Mann* the court concluded, “it would be illogical to interpret the statute to permit ordinances that confer discretion over the impoundment period beyond that expressly provided in the statute.” *Id.* In this case, it would be illogical to use the Legislative Purpose section to confer discretion that is expressly precluded by the section describing the

statute's actual elements and burdens, which provides that the court "shall" enter an order if the petitioner proves those elements. RCW 7.90.090(1)(a).

In *Mann* the court found that the expansion of agency discretion was illogical, and the court added, "More importantly, to read the statute as requiring an impounding officer to exercise individual discretion ... would result in precisely the type of non-uniform application that the statute expressly seeks to avoid." *Mann*, 161 Wn. App. at 133. The results in this case would be similar, turning a specific "shall" into a discretionary, subjective decision about the severity of each sexual assault. Neither the Legislative Purpose section nor Mr. Torres's Opening Brief provide any standards to guide judges in determining how bad sexual abuse has to be to justify a protection order.

Mr. Torres's apparent interpretation of the statute is also illogical and offensive because it directly contravenes the Legislative Purpose, which is to protect victims from the people who have sexually abused them. Mr. Torres's reasoning seems to be that he was entitled to continue molesting L.T. and M.T. as long as he stopped short of forcibly raping them and causing them "humiliation, degradation, and terror." RCW 7.90.005; Appellant's Opening Brief at 10-11. He seems to believe that the Sexual Assault Protection Order Act was designed to protect the abuser, not the victim, so long as the abuser only engages in *moderate* or

somewhat severe sexual abuse, not “the most heinous” form of sexual abuse (as interpreted by Mr. Torres). This Court should reject this argument as repugnant to both common sense and the Act’s Legislative Purpose, and find that the court correctly granted L.T. and M.T.’s Sexual Assault Protection Orders pursuant to the elements of RCW 7.90.090 and the definition in RCW 7.90.010(4)(a).

D. THIS COURT SHOULD AWARD ATTORNEYS FEES AND COSTS IN THIS APPEAL.

L.T. and M.T. request attorney’s fees and costs under RAP 18.9. That rule provides that the appellate courts may sanction a party who “files a frivolous appeal” by ordering that party to “pay terms or compensatory damages to any other party who has been harmed....” RAP 18.9(a). Case law provides that, “An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim.” *Kearney v. Kearney*, 974 P.2d 872, 95 Wn.App. 405 (1999); *Accord Yurts v. Phipps*, 143 Wn. App. 680, 696, 181 P.3d 849 (2008).

An award of attorney’s fees and costs under RAP 18.9 is appropriate in this case. Mr. Torres’s appeal presents no debatable issues. It contains no case citations, no legislative history, and no analysis of possible interpretations of the statute. Indeed, it is difficult to discern any

specific legal argument at all. The “arguments” made in his Opening Brief, though ambiguous and unclear, may be construed as:

- (1) M.T. and L.T. failed to allege behavior by Mr. Torres that meets the definition of sexual conduct (under subsection (4)(a)),
- (2) M.T. and L.T. failed to provide sufficient evidence of his sexual motivation (under subsection (4)(e)) and
- (3) Even if M.T. and L.T.’s allegations satisfy the statutory elements, they should be denied relief because the abuse they suffered wasn’t severe enough.

The first of these three arguments is refuted by even a cursory glance at the record. The second is irrelevant, because the court granted the orders based on subsection (4)(a), which does not require proof of sexual motivation. The third argument is not supported by any statutes, code, case law, canons of statutory interpretation, or any other authority, and directly contravenes the Act’s purpose (protecting victims).

Given that none of these assertions by Mr. Torres rises to the level of a debatable argument, and they are completely unsupported by the record and the law, they have no merit that could conceivably justify reversal. Therefore, his appeal should be deemed frivolous. The fact that the argument section of his brief is less than three and a half pages (one and a half of which are merely block-quotations), and the fact that his brief does not cite a single legal authority other than the Act itself, further illustrate the appeal’s frivolity.

The appeal has so little merit that it is difficult to imagine how Mr. Torres could have prevailed except by default. L.T. and M.T. were represented at trial, and are represented on appeal, by the Sexual Violence Law Center (SVLC). SVLC is a nonprofit whose primary function is to provide free, specialized legal representation to victims of sexual assault. Mr. Torres had no reason to believe SVLC would represent L.T. and M.T. in this appeal. His ability to prevail on appeal relied on the inability of two 13-year-old girls to respond to an appeal *pro se*, and their inability to afford an attorney. This reliance on the possibility of default underlines how meritless and inappropriate this appeal is.

On appeal, this Court is not limited to ordering the payment of attorneys' fees directly to the appellant or respondent personally, but may order sanctions to be paid to "any other party who has been harmed...." RAP 18.9(a). In this case, SVLC is the party who has been harmed by the appeal. The fact that L.T. and M.T. did not pay SVLC for the legal representation does not mean that the appeal was free. Every hour that SVLC spent working on this appeal traded off with an hour that could have been spent working on legitimate, non-frivolous cases on behalf of other victims of sexual assault. Therefore, M.T. and L.T. do not ask this court to unjustly enrich them by awarding sanctions to them personally; the fees should be awarded directly to SVLC, to pay for the representation

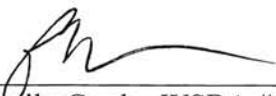
of other victims who need an attorney to assist them in getting Sexual Assault Protection Orders.

IV. CONCLUSION

Mr. Torres presents no serious arguments, based on the record or the law, to justify reversal of Judge Hayden's decision granting L.T. and M.T.'s Sexual Assault Protection Order. To the extent that his Opening Brief makes arguments at all, they misrepresent the record, would require making most of the statute superfluous, and twist a statute clearly intending to protect victims of sexual assault into a legitimization of perpetrators of all but the most extreme forms of sexual abuse. His failure to make any clear arguments supported by fact and law in his Opening Brief should preclude him from doing so in his Reply. Therefore, L.T. and M.T. respectfully request that this court uphold Judge Hayden's ruling and order Mr. Torres to pay attorney's fees to the Sexual Violence Law Center.

Dated this 25th day of February, 2013.

Respectfully Submitted,



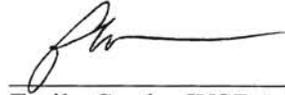
Emily Cordo, WSBA #37077
Attorney for L.T. and M.T.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I personally delivered one copy of this brief to the following address:

Suzanne Lee Elliott
Hoge Building, Suite 1300
705 2nd Ave
Seattle, WA 98104

Dated this 25th day of February, 2013.



Emily Cordo, WSBA #37077

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 FEB 25 PM 12:56