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COURT OF APPEALS, DIVISION TWO
STATE OF WASHINGTON

ANGEL GUTIERREZ

APPELLANT

V

LUVY GUTIERREZ

APPELLEE

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

INTRODUCTION 5

ASSIGNMENT OF ERRORS5

STATEMENT OF THE CASE5

ARGUMENT6

1.THE TRIAL COURT ERRED IN LIMITING RESPONDENT’S ACCESS TO REAL PROPERTY IN WHICH HE HAD A COGNIZABLE INTEREST, WITHOUT FINDING 26.09 RCW FACTORS6

2.THE TRIAL COURT ERRED IN APPLYING 10.14 RCW FACTORS TO THE NUCLEAR FAMILY AS DOING SO IS UNCONSTITUTIONAL AND DEFIES LEGISLATIVE INTENT7

3. THE TRIAL COURT ERRED BY FINDING A COURSE OF CONDUCT11

4. THE TRIAL COURT ERRED IN FINDING THAT THE PUTATIVE VICTIM HAD SUFFERED SUBSTANTIAL EMOTIONAL DISTRESS12

CONCLUSION14

TABLE OF AUTHORITIES

Barber v. Barber, 150 P.3d 124, (2007 Div. II).....9

State v. Noah, 103 Wash.App 29 (2000).....7, 9

Hough v. Stockridge, 150 Wash.2d 234 (2003).....9

Loving v. Virginia, 388 U.S. 1, (1967).....7, 10

Price v. Price, 301 P.3d 486, (2013 Div. II).....7

Sofie v. Fiberboard Corp., 112 Wash. 2d 636 (1989).....11

RCW 10.14.080(1).....12

RCW 10.14.080(9).....

26.09 RCW.....4,7,9,11

10.14 RCW.....4,5,6,9,10,13

13.34 RCW11, 14

RCW 5.60.06011

RCW 26.50.1109

I. INTRODUCTION

This case is about the reach of the trial court when hearing an anti-harassment petition: namely, whether a court may limit a respondent's access to real property to which he has a cognizable interest, without a **26.09 RCW** petitioner; whether **10.14 RCW** is appropriate in the context of a nuclear family; whether the communication between a husband and wife are constitutionally protected; and whether the putative victim suffered substantial emotional distress.

II. ASSIGNMENT OF ERROR

1. The trial court erred in limiting Respondent's access to real property in which he had a cognizable interest, without finding **26.09 RCW** factors.
2. The trial court erred by applying **10.14 RCW** factors to the nuclear family.
3. The trial court erred by finding a course of conduct.
4. The trial court erred by finding that the putative victim had suffered substantial emotional distress.

III. STATEMENT OF THE CASE

Mrs. Gutierrez filed an antiharassment petition against her husband under **10.14 RCW** on May 3, 2019. CP 2. A temporary order was issued requiring Mr. Gutierrez remain outside 500 feet from the marital home. CP 5. At the full hearing on May 23, 2019 the trial court ruled that only **10.14 RCW** factors were at play and entered an antiharassment order requiring Mr. Gutierrez to remain more than 500 feet from the marital home along with other restrictions. CP 11. Ms. Gutierrez requested that Mr. Gutierrez be prevented from having any contact with his children. CP 5.

More than a year before the filing of the petition, Mr. Gutierrez, after giving prior notice, entered the marital home. TS Pg. 62 Ln. 9-14 and Pg. 38 Ln. 5-10. It was not unusual for Mr. Gutierrez to enter the marital home and had done so for some time without Ms. Gutierrez taking issue. TS Pg. 28, Ln. 1-3. Mr. Gutierrez arrived at the home that night at approximately 10:00pm. TS Pg. 40, Ln. 22-23. He entered through the garage via the code given to him by Ms. Gutierrez. TS Pg. 40, Ln. 19-25. Mr. Gutierrez went to the laundry room and then upstairs where there is a small bedroom and bed. TS Pg. 41, Ln. 3-14.

Ms. Gutierrez realized that Mr. Gutierrez was in the house and confronted him, ordering him to leave the marital home immediately. He refused. Ms. Gutierrez then picked up a doll with a porcelain head and struck Mr. Gutierrez in the face, using the porcelain or hard plastic portion of the doll as a mace type weapon. TS Pg. 41, Ln. 15 – Pg. 42, Ln. 14.

After initially attacking Mr. Gutierrez, he did not respond. His seeming apathy enraged Ms. Gutierrez who then slapped Mr. Gutierrez twice. After the second slap Mr. Gutierrez grabbed her to stop the assault. A wrestling match ensued. Mr. Gutierrez wrested control of Ms. Gutierrez and then released her. TS Pg. 41, Ln. 15 – Pg. 42, Ln. 14.

About the time of the laundry incident the parties were emailing and texting one another; negotiating the terms of divorce in hopes of non-contestation. TS Pg. 8, Ln. 9 – Pg. 10, Ln 9. The communication between them was rough. TS Pg. 80, Ln. 17-25. The trial court rules that parents should not talk to each other in this way. TS Pg. 80, Ln. 17-25. The parties took turns initiating communication and insulting one another. TS Pg. 80, Ln 17-19. As an example, one of Mr. Gutierrez's messages was, "Do not message me until your head out of your ass." TS Pg. 83, Ln. 9-23. One of Ms. Gutierrez's mocked Mr. Gutierrez for having been molested as a child. TS Pg. 52, Ln. 10-12. The banter was mutual. TS Pg. 51, Ln. 3-6.

The trial court found that Mr. Gutierrez employed a course of conduct purposed to harass Ms. Gutierrez; that the communication by both parties was not that of a reasonable person nor had a legitimate purpose; and that derivatively, as a result of the communication and the entering the marital home, Ms. Gutierrez had suffered substantial emotional distress. TS Pg. 3 – Pg. 87, Ln. 25. The trial court then issued an order forbidding Mr. Gutierrez from going within 500 of his home, among other limitations. CP 11.

During the hearing, Mr. Gutierrez’s counsel advised the trial court that 10.14 RCW was not appropriate between a married couple. TS Pg. 74, Ln. 2-18. Counsel for Ms. Gutierrez argued that 26.09 RCW factors were not the issue. TS Pg. 36, Ln. 2-16 and Pg. 69, Ln. 13-16. The trial court agreed and found that there was no violence or threat of violence by Mr. Gutierrez. TS Pg. 36, Ln. 17 – Pg. 37, Ln. 2.

IV. ARGUMENT

1. THE TRIAL COURT ERRED IN LIMITING RESPONDENT’S ACCESS TO REAL PROPERTY IN WHICH HE HAD A COGNIZABLE INTEREST, WITHOUT FINDING 26.09 RCW FACTORS

RCW 10.14.080(9):

(9) The court in granting an ex parte temporary antiharassment protection order or a civil antiharassment protection order shall not prohibit the respondent from the use or enjoyment of real property to which the respondent has a cognizable claim unless that order is issued under chapter 26.09 RCW or under a separate action commenced with a summons and complaint to determine title or possession of real property.

Standard of Review

Facts are reviewed for substantial evidence. Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. **Wenatchee Sportsmen Ass'n v. Chelan County**, 141

Wash.2d 169, 176, 4 P.3d 123 (2000). **Sunnyside Valley Irr. Dist. v. Dickie**, 73 P. 3d. 369 (2003). Conclusions of law are reviewed *de novo*. **Sunnyside Valley Irr. Dist. v. Dickie**, 73 P. 3d. 369 (2003). Generally a reviewing court only overturns a trial court when the trial court has engaged in an abuse of discretion which is a decision that is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons.

In Washington, property acquired during the marriage is community property. RCW 26.16.030. Exception are not pertinent here.

Orders of the court which are not authorized are void, not voidable, and may be collaterally attacked. *State v. Noah*, 103 Wash.App 29 (2000). *State v. Noah* (in tandem with **Price v. Price**, 103 P.3D 486 (Div. II 2013) stands for rule that only motions or petitions under 26.09 RCW (RCW 26.50.110) may authorize restrictions on a respondent's access to real property in which the respondent has a cognizable interest. At the very least the trial court must find that 26.09 RCW factors have been met. **Price v. Price**, 103 P.3d 486 (2013 Div. II). Both the temporary and permanent orders are void.

2.THE TRIAL COURT ERRED IN APPLYING 10.14 RCW
FACTORS TO THE NUCLEAR FAMILY AS DOING SO IS
UNCONSTITUTIONAL AND DEFIES LEGISLATIVE INTENT

Loving v. Virginia, 388 U.S. 1, (1967); **Troxel v. Granville**, 530 U.S. 57 (2000)

RCW 10.14.010

Legislative finding, intent.

The Legislature finds that serious, personal harassment through repeated invasion of personal privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing. The Legislature further finds that the prevention of such harassment is an important governmental objective. This chapter is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection

orders preventing all further unwanted contact between the victim and the perpetrator.

RCW 10.14.020

Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "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. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."

(2) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

"Principles of Statutory Interpretation. Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wash.2d 9, 19, 978 P.2d 481 (1999). Our starting point must always be "the statute's plain language and ordinary meaning." *Id.* When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise. *State v. Wilson*, 125 Wash.2d 212, 217, 883 P.2d 320 (1994)." **State v. J.P. 69 P.3d 318, 320 (Div. II 2003).**

The purposes and therefore the applications of **10.14 RCW** and **26.09 RCW** are different.

Barber v. Barber, 150 P. 3d 124 (Div. II 2007): "We decline Bruce's invitation to apply *Hough's* interpretation of the harassment statute to the domestic violence statute. While the language is essentially the same, the purposes served are quite different. For example, the harassment statute involves behavior that is "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person,

and which serves no legitimate or lawful purpose." **RCW 10.14.020(1)**. The statute then defines "[c]ourse of conduct" as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." **RCW 10.13.020(2)**." *Id.* at 126.

State v. Noah, 103 Wash. App. 29 (Div. I 2000): Constitutionally protected speech is not part of a course of conduct.

Constitutionality and Appropriateness

The provisions at issue, **10.14 RCW** and **26.09 RCW (RCW 26.50.110)**, have different purposes. The intent of **10.14 RCW** is to protect members of society from individual members of society while **26.09 RCW** is intended to protect family members from family members.

While **10.14 RCW** is found under the Criminal Procedure, **26.09 RCW** and concomitantly **26.50 RCW** are under Domestic Relations. This of itself does not necessarily render different treatment, but placement can and in this case does indicated that the two provisions deal with very different matters.

The court in **Barber v. Barber, 150 P. 3d 124 (Div. II 2007)** refused to apply reasoning applied in **Hough v. Stockbridge, 150 Wash. 2d 234 (2003)** to **10.14 RCW** which required a greater showing when applying for reissuance of the order, to the **26.09 RCW** arena. You simply cannot use the reasonable person standard when dealing with nuclear families. The reach is too far, the resolution impractical and the enforcement impossible. This is particularly true in this case because Ms. Gutierrez attempted to prevent Mr. Gutierrez from having any contact with his children by simply using **10.14 RCW** standards.

The parties are married. The house Mr. Gutierrez entered was the marital home. The emails Mr. Gutierrez sent to Mrs. Gutierrez were during communicative altercations which she, at least at times, initiated and where she "gave as good as she got." These altercations were part of an attempt

to hash out the meets and bounds of an upcoming divorce. No threats of violence were communicated and the only violence in this matter was perpetrated by Ms. Gutierrez.

Imagine applying **10.14 RCW** restriction in a home. Assuming that some kind of restriction could be fashioned it would be impossible to enforce. Enforcement itself would be unreasonable. Family members at times engage in a course of conduct to harass another member of the family. The court, as much as it might like, has no meaningful authority and is beyond its place attempting to fashion the home. Applying **10.14 RCW** to the nuclear family is nothing short of attempting to fashion how the nuclear family should operate. This is a clear constitutional violation. **Virginia v. Loving, 388 U.S. 1, (1967)** and its prodigy. The right of association and the sanctity recognized by the federal and state constitutions make meddling in family relations on mere annoyance a overreach, to be sure. This is true even when the parties are getting a divorce. In this case the parties had not filed for divorce when the actions at issue occurred. If spouse wishes a court to intervene then the spouse may file a petition for separation or divorce. Even in the context of divorce the courts' powers are limited as all orders are default orders, meaning that the parties may completely ignore the orders with regard to their relationship and the relationship with their children. The only exception is a restraining order or domestic violence protection order and one can cogently argue that this itself is a violation of both the federal (via the 14th Amend.) and state constitutions. In the case of a restraining order, threats and reasonable fear of violence have been found by competent authority. The trial court's decision here is reversable. **Sofie v. Fiberboard Corp., 112 Wash. 2d 636 (1989)**.

In our case, the trial court's reach into the family arena in order to fashion a more reasonable situation is utterly out of bounds. According to the trial court, Mr. Gutierrez saying, "Pull your head out of your ass," is unreasonable and worthy of an order. If this is so then

shockwaves across the state will be felt. Some families are harsher on each other than others. This is simply not the courts' business.

One reason antiharassment is not appropriate in the family setting is that speech is particularly free. The state has recognized this in a number of ways. First, that **26.09 RCW** must be invoked and fear of harm reasonably realized before a court may reach into the family. The state recognizes the sanctity of husband/wife communications by giving them particular protection. **RCW 5.60.060**. Before the state can interfere in the family arena regarding children the state must show that the child is being abused or neglected. Even after that showing the state must allow the parents to get their acts together and must help the parents get their children back. As well, due process requires a preliminary hearing and then a full hearing. **13.34 RCW**. More than mere harassment must be present for the state to disturb the family.

Mr. Gutierrez's communications between his wife were constitutionally protected. The attorney at the hearing advised the trial court that 26.09 RCW factors must be met for an order of the court to be appropriate. In the instant case, even if there were no invocation by the attorney for Mr. Gutierrez, the application of 10.14 RCW factors is plain error. RCW 10.14.080(9) itself is a statement of this policy.

3. THE TRIAL COURT ERRED BY FINDING A COURSE OF CONDUCT

Course of Conduct: 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. "Course of conduct" includes electronic communication, but does not include constitutionally protected free speech. **RCW 10.14.080(1)**

The trial court found that Mr. Gutierrez had engaged in a course of conduct but no such thing was evidenced at the hearing. A course of conduct is actions taken in concert to bring about

substantial emotional distress. These conversations were initiated by both parties at different times and were individual communicative altercations in the pursuit of a non-contested divorce. There was not, nor did the trial court find that Mr. Gutierrez was engaged in a campaign to bring about substantial emotional distress. The trial court found the opposite. The trial court found that both party's communications were vile in a series of communicative altercations between the parties. By definition this cannot be a course of conduct.

The trial court found that neither party was reasonable. While this finding negates a course of conduct finding, it also punctuates the impossibility of antiharassment factors being applied in the nuclear family context. In this particular case where both parties are engaged in rancorous communication back and forth, even if these parties were not married there could not be a course of conduct or an aim toward inflicting substantial emotional distress.

4. THE TRIAL COURT ERRED IN FINDING THAT THE PUTATIVE VICTIM HAD SUFFERED SUBSTANTIAL EMOTIONAL DISTRESS

However you want to define substantial emotional distress, there is no evidence to support the trial court's finding. The trial court found that Ms. Gutierrez had suffered substantial emotional. The trial court said that Mr. Gutierrez's entering the marital home uninvited and engaging and mutual banter would cause the reasonable person to suffer substantial emotional distress. The trial court then found that therefore, Ms. Gutierrez suffered substantial emotional distress without indicating the facts which proved the finding. The trial court had already laid out facts which contradicted a finding of substantial emotional distress by finding that both parties were unreasonable and had engaged in "vile" communication toward each other. This is not a case where one party would send a vile message and then one might respond latter. These communications were during segments of attempts to work out the upcoming divorce. Keep in mind that the events

supposedly prompting the petition had occurred some time before. Mr. Gutierrez entering the marital home had occurred more than a year before the petition. Ms. Gutierrez did not show substantial emotional distress as a result of communications or the uninvited presence of Mr. Gutierrez in the marital home. For instance, she admits that Mr. Gutierrez did not have permission to enter the home because she had revoked his right to be there. There is no indication that she was afraid of him. The fact that she attacked him indicates that she had no fear and was not suffering from substantial emotional distress.

The trial court found that Mr. Gutierrez admitted that he had probably harassed Ms. Gutierrez. This is factually incorrect. He admitted that his communication was probably annoying. It does not really matter because Mr. Gutierrez was not operating in lawyer mode. If Mr. Gutierrez had admitted that his actions were harassing this would not be an admission for our purposes because there is no indication that he had the **10.14 RCW** factors in mind when doing so.

Mootness

Alderwood Assocs v. Env'tl. Council, 636 P.2d 108 (1981): Although the controversy between the parties is no longer extant and the case is moot, this court will review an otherwise moot case if certain factors are present. *In re Patterson*, 90 Wn.2d 144, 579 P.2d 1335 (1978); *Sorenson v. Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972). A moot case will be reviewed if its issue is a matter of continuing and substantial interest, it presents a question of a public nature which is likely to recur, and it is desirable to provide an authoritative determination for the future guidance of public officers. *Patterson, supra; Sorenson, supra.*

At this point Ms. Gutierrez could request a re-issuance. The matters presented to the court are very much of a continuing and substantial interest. The order must be voided. Although the order is void as it stands, this will mean little for Mr. Gutierrez's vindication. He was found to have harassed his wife when she did not do so. Moot or not, this case calls for vindication. We also have

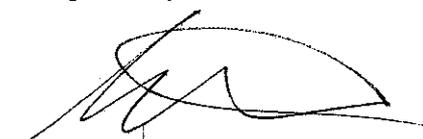
a situation where a court defied statute. In that an appeal has been filed, to leave this open is to question the correctness of doing so. A court might believe that as long as it doesn't get to the courts of appeal in time then it will be fine to forbid an owner of property from entering or exercising cognizable rights. With regard to the constitutionality and legislative intent, the continuing importance of this case would have future effects. Courts need a clear line when meeting out justice in the family arena. The trial court here stepped over the bounds and this should be made clear. Course of conduct and substantial emotional distress will continue to come up, no doubt, thousands of times in the coming years. Course of conduct needs to be something real and not assumed and the same can be said for determining substantial emotional distress. It is not just what a reasonable person feels but what that person felt.

VI. CONCLUSION

The court lacked authority to limit Mr. Gutierrez's access to the marital home. The temporary and permanent order are therefore void. Applying **10.14 RCW** to the nuclear family is unconstitutional and against legislative intent and so much so that it is plain error as it effects an important constitutional right. Even if not plain error, the trial court was advised that applying **10.14 RCW** to the nuclear family setting is inappropriate. Mr. Gutierrez did not engage in a course of conduct as that term is used in the statute and the trial court's finding otherwise is an abuse of discretion. There is no evidence that Ms. Gutierrez suffered from substantial emotional distress and to find so was an abuse of discretion. The order of antiharassment should be vacated.

May 12, 2020

Respectfully Submitted



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