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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III

Court of Appeals No. 339815-III
Spokane County Superior Court No. 2015-02-03217-2

In re:

DANA CONDREY, obo,
JACKSON CONDREY

Respondent/Petitioner,

and

NEIL CONNOR FUCHS,

Appellant/Respondent.

APPELLANTS' REPLY BRIEF

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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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I. ARGUMENT ON REPLY

A) **The trial court erred when it granted an antiharassment protection order in the absence of evidence to demonstrate a knowing and willful course of conduct directed at Jackson Condrey by Connor Fuchs, which seriously alarmed, annoyed, harassed, or was detrimental to Jackson Condrey, and which served no legitimate or lawful purpose.**

1. “Connor Fuchs’ course of conduct was knowing and willful.”

The *Appellants’ Opening Brief* argued that in the underlying testimony before the trial court, “no one ever alleged that Connor intended to be hurtful, that he was aware that his behavior was hurtful, or that he had any idea that contact as unwanted by Jackson at the time it occurred.” *Appellants’ Opening Brief*, pgs. 31-32.

Dana Condrey’s argument in response to that allegation on appeal is made up of two paragraphs, which are comprised of conclusory statements that do not dispute that assertion in any meaningful way or provide any citation to authority. On page 14 of her brief, Dana states: “Connor Fuchs and his parents were on notice during that span of time that the conduct was occurring and unwanted.” Through use of a sentence with passive construction, Dana avoids indicating how, when, or by whom Connor was put on notice and during what “span of time” such notice was given. This Court should disregard her comments; this Court need not address issues that a party neither raises appropriately nor discusses meaningfully with

citation to authority. Saviano v. Westport Amusements, Inc., 144 Wn.App. 72, 84, 180 P.3d 874 (2008); citing RAP 10.3(a)(6); State v. Mills, 80 Wn.App. 231, 234, 907 P.2d 316 (1995); see also State v. Logan, 102 Wn.App. 907, 911, n.1, 10 P.3d 504, (2000)(“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”)(quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

There is no substantial evidence in the record to support a finding that Connor’s conduct was knowing and willful; therefore, Dana failed to meet her burden and her petition for a restraining order should have been denied.

2. “Connor Fuchs’ course of conduct was directed at Jackson Condrey.”

Dana Condrey’s argument in response to that allegation on appeal is made up of two paragraphs, which are comprised of conclusory statements that do not dispute that assertion in any meaningful way or provide any citation to authority. These comments should be disregarded. Saviano at 84; Logan at 911, n.1.

On page 15 of the *Responding Brief*, Dana states that there was “a pattern of behavior from Connor Fuchs toward Jackson Condrey over a

course of five years,” but she does not clearly indicate how any of the incidents she references are properly viewed as a “course of conduct,” which is defined as a series of acts “evidencing a continuity of purpose.” RCW 10.14.020(1). In her statement of the case on appeal, Dana indicates that there were several issues that took place over a two-year period beginning in January of 2011 and ending in January of 2013 that resulted in complaints being made to the boys’ school, but she provides no information to describe problems occurring over the two and a half years from January of 2013 to June of 2015 other than the one sentence “Connor Fuchs continued to make harassing comments to Jackson at school, including calling Jackson names like “faggot,” “pussy,” “homo,” and “gay.” *Responding Brief*, pg. 4. She makes no argument as to why this information supports a conclusion that Connor’s actions were taken with a continuity of purpose directed at specifically at Jackson. Not only does Connor directly dispute this conclusion in his testimony to the trial court, he also stated that Jackson himself used these terms to refer to Connor specifically as well as his other friends, which was undisputed. (CP 78.) The testimony of Dana, Jackson, and Connor confirms that, however regrettable and inappropriate, these type of comments were routinely made in Jackson’s daily experience with teenage boys, and those terms were

generally used by their social group and not unique to Connor or to Jackson. (CP 28-29; 78; 113.)

This information undermines Dana's argument on appeal implying that the "course of conduct" by Connor was specifically and uniquely directed at Jackson and, presumably, not other students: "Connor did not engage with the other students during the altercation." *Responding Brief*, pg. 15. This statement is somewhat misleading, because its truth entirely depends on an extremely narrow definition of the events that are included in "the altercation." There is no evidence to support an affirmative statement that Connor "did not engage with the other students during the altercation" because there is very little discussion about or attention paid to what Connor was doing prior to his interaction with Jackson; therefore, it is not clear whether that information is accurate or whether it was presented to the trial court.

On appeal, Dana also argues: "The name calling and injurious behavior over the course of five years was not a general act observed or collaterally received by Jackson Condrey." *Responding Brief*, pg. 15. It is unclear what is intended by the phrase, 'general act observed or collaterally received' and whether it is referencing a particular authority, but to the extent that Dana intends to argue that Connor specifically targeted Jackson to receive negative treatment that he did not supply to

other boys in their social group or that Jackson received treatment from Connor that he did not receive from other boys in their social group, such an argument is entirely without support in the record.

There is no substantial evidence in the record to support a finding that Connor engaged in a pattern of conduct composed of a series of acts over a period of time evidencing a continuity of purpose; therefore, Dana failed to meet her burden and her petition for a restraining order should have been denied.

3. “Connor Fuchs’ course of conduct did in fact alarm, annoy, harass, and cause detriment to Jackson Condrey and his parents.”

FACTS: First, there are several factual corrections that must be made in this portion of Dana’s *Responding Brief*.

On page 16, Dana states that “[d]uring the incident in the gym, Connor Fuchs tripped Jackson Condrey, and Jackson landed on the right side of his face.” But the evidence provided by Jackson and his family, even if taken as true, cannot establish this fact. On three prior occasions, Jackson himself stated that it was *he* who had tripped Connor, not the other way around. He made identical statements to his mother, (CP 1-8, 29), the deputy police officer (CP 17-18), and the school (CP 57), and he had previously acknowledged that when he and Connor fell over it had been an accident. It was not until September of 2015 when Jackson filed a

declaration through his attorney that, for the first time, he argued that *Connor* had intentionally tripped *him*. (CP 44.)

On the same page of her appellate brief, Dana also states: “The incident caused detriment to Jackson, requiring him to seek medical attention.” *Responding Brief*, pg. 16. But there is no clear evidence or finding as to what incident caused Jackson to seek medical attention. In the materials provided to the trial court, Connor noted that Jackson had joined everyone else to run a mile and play volleyball after the incident where he and Jackson fell down together and that it was not until he fell into the bleachers later in the day that he grabbed the left side of his face like he had been hurt. (CP 79.) While the inferences made from this information are disputed, the underlying fact that Jackson fell into the bleachers and grabbed the left side of his face remains undisputed in the underlying proceeding and on appeal. The trial court made no specific finding as to the cause of Jackson’s injuries or the gym incident in general, stating that the information provided to him had not been “decisive” in his ruling. (CP 82.)

Finally, on page 17, Dana states: “Connor was on notice at school that he was not to engage in contact or teasing of Jackson,” but there is no reference to the record for this statement. As previously argued, there is

no evidence in the record that Connor himself was specifically told any such thing at any point, ever.

ARGUMENT: As argued in the *Appellant's Opening Brief*, in any antiharassment analysis, conduct is tested both subjectively and objectively. RCW 10.14.020; Burchell v. Thibault, 74 Wn.App. 517, 521, 874 P.2d 196 (1994).

Dana argues: "Substantial evidence existed showing that Jackson Condrey did in fact suffer emotional (and physical) distress by Connor Fuchs' course of conduct" and that "RCW 10.14.020(2) offers an alternative to a showing of emotional distress by the victim if the parent of the victim fears for the well-being of his or her child." *Responding Brief*, pg. 17. But these conclusions do not find clear support in the record. Dana is arguing three things simultaneously; she is arguing that (a) Jackson was actually emotionally distressed, (b) that it was reasonable for him to be emotionally distressed, and (c) that it was reasonable for Dana herself (and Jackson's father) to be emotionally distressed on Jackson's behalf.

These conclusions are difficult to ascertain looking at the evidence presented to the trial court because Jackson himself provides a great deal of conflicting information. In fact, for a large portion of the record it appears that what Jackson finds primarily emotionally distressing is not

the behavior of Connor as much as the behavior of his parents in inserting themselves into his life at school; further, it is immediately apparent from Jackson's own admitted behavior that despite his complaints about Connor's actions, Jackson himself engages in much the same activity with other students, which he does not find emotionally distressing based entirely on his subjective perception that such behavior is appropriate when undertaken by someone Jackson views as a friend. Therefore, it is not clear that Jackson was subjectively emotionally distressed or objectively justified in being emotionally distressed, and no specific findings were entered by the trial court on that subject.

As for Dana's argument that she was objectively reasonable in fearing for the well-being of her child pursuant to RCW 10.14.020, she fails to indicate substantial evidence in the record to support such a finding, particularly given that every other adult who viewed the video of the incident in question, including the trial judge, did not find it to be conclusive or particularly compelling.

Despite the foregoing argument, however, what Dana fails to discuss in her brief is that any affirmative finding on any of the three arguments she makes above is not, in itself, sufficient to support a finding of harassment. Even if the trial court properly found that Connor's conduct seriously alarmed, annoyed, harassed or was detrimental to Jackson and

that it actually and reasonably caused him substantial emotion distress or that it reasonably caused his parents to fear for his well-being (which the trial court did not specifically do), there is still no substantial evidence in the record to support a finding that Connor engaged in a “knowing and willful course of conduct” or that Connor’s conduct served “no legitimate or lawful purpose.” Therefore, Dana failed to meet her burden and her petition for a restraining order should have been denied.

4. “Connor Fuchs’ course of conduct served no legitimate or lawful purpose.”

Here again, Dana’s argument on appeal is made up of two paragraphs, which are comprised of conclusory statements that do not address the Fuchs’ argument in any meaningful way or provide any citation to authority. Dana entirely ignores the factors contained in RCW 10.14.030 for consideration by a court when determining whether a course of conduct has any legitimate or lawful purpose as argued in *Appellant’s Opening Brief*. Her unresponsive comments should be disregarded. Saviano at 84; Logan at 911, n.1.

There is no substantial evidence in the record to support a finding that Connor engaged in a course of conduct that served no legitimate or lawful purpose; therefore, Dana failed to meet her burden, and her petition for a restraining order should have been denied.

5. “The incident between the parties was more than a mere ‘schoolyard scuffle.’”

In her argument on appeal, Dana entirely ignores the arguments made in *Appellant’s Opening Brief* and fails to acknowledge the statutory authority contained in RCW 10.14.040(7) regarding the requirement that a parent prove that an offense by the child to be restrained against the child to be protected had already be adjudicated or investigated before a petition for an antiharassment order could be filed. Instead, she argues briefly that there is basis in statute for a parent to bring a petition for restraining order against a child on behalf of a child (which was never disputed), and that, in her opinion, the incident between Connor and Jackson was not a schoolyard scuffle, which she argues without any meaningful reference to the record or citation to authority. Her arguments should be disregarded. Saviano at 84; Logan at 911, n.1.

There is no substantial evidence in the record to support a finding that the incident between Connor and Jackson was anything more than a schoolhouse scuffle; therefore, Dana failed to meet her burden, and her petition for a restraining order should have been denied.

- B) The trial court erred when it granted an antiharassment order that exceeded one year without evidence to support a finding that Connor Fuchs is likely to resume unlawful harassment of Jackson Condrey when the order expires.**

On appeal, Dana argues that the trial court did in fact order a restraining order that exceeded one year and that the resulting order form includes the following finding: “If the duration of this order exceeds one year, the court finds that the Respondent is likely to resume unlawful harassment of the petitioner when the order expires.” (CP 107.) She also argues that, in general, trial courts are authorized to enter restraining orders that exceed one year, and that they are authorized to do so against minors. Neither of these arguments address the issue raised by the Fuchs on appeal; rather the *Appellant’s Opening Brief* argued that the record contains no substantial evidence to support a finding that harassment was likely to continue after one year or the subsequent conclusion that an extended antiharassment order was required. On appeal, Dana provides no citation to authority or reference to any substantial evidence in the record to refute this argument, which is unsurprising given that no such evidence exists. Her arguments should be disregarded. Saviano at 84; Logan at 911, n.1. Dana failed to meet her burden, and her petition for a restraining order should have been denied.

C) The trial court erred when it denied Connor’s parents’ request for reconsideration and the opportunity to present testimonial evidence.

On appeal, Dana fails to acknowledge the Fuchs’ argument that the trial court erred when it failed to address or consider the arguments made

with respect to the application of the relevant statute or the absence of substantial justice. The trial court's failure to consider this as a proper basis for consideration is therefore undisputed on appeal.

On appeal, Dana relies on an unpublished authority in violation of GR 14.1, which only permits citation to unpublished opinions of the Court of Appeals that were filed on or after March 1, 2013 and requires that a copy of the opinion be included in the brief as an appendix. Thomas v. University of Washington was published in 2010, and no copy was provided. Were this Court to find the reasoning in that opinion persuasive, however, it indicates that a motion for reconsideration "may be granted if, among other reasons, the litigant produces newly discovered material evidence, or if material evidence was available but not produced before the motion was granted, that the litigant made diligent though unsuccessful attempts to obtain it." In this case, Dana filed her petition on August 7, 2015, and the matter was heard on September 16, 2015, a little over a month later. The documents submitted by the Fuchs on reconsideration included the statement of a private investigator as well as numerous other statements from other parties. One month is an extraordinarily short period of time to gather evidence related to such a significant issue, particularly when the accused party is put in the position of proving a negative. In this case, the evidence put forward by Dana was

contained in her own communications in her possession, school records sufficient to dispute Dana's self-serving statements were not immediately available to the Fuchs; when they were obtained, they confirmed that no such extensive documentation and school involvement took place and that ongoing bullying had not been independently observed by the school. The Fuchs also immediately hired a private investigator, and a month is a particularly short period within which to conduct an investigation and complete a statement for review by the trial court. Pursuant to Dana's own authority on appeal, the trial court ought to have considered the Fuchs' additional evidence on reconsideration.

While Dana acknowledges that CR 59(a)(7) allows for an argument "[t]hat there is no evidence or reasonable inference from the evidence to justify the verdict or decision, or that it is contrary to law" as a sufficient basis for reconsideration, she does not actually address the Fuchs' argument that the trial court should have granted reconsideration on this basis.

The trial court erred when it denied the Fuchs' request for reconsideration, and Dana does not herself dispute the Fuchs' argument on appeal.

II. CONCLUSION

There is a glaring lack of substantial evidence to support the trial court's entry of a restraining order against a minor child in this case. Dana failed to meet her burden to prove her allegations in the underlying proceeding and on appeal; therefore, the Fuchs respectfully request that the ruling of the trial court be reversed and the antiharrassment order against Connor Fuchs be dropped and removed from his record.

RESPECTFULLY SUBMITTED this _____ day of September, 2016,



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NO. 339815-III

CERTIFICATE OF SERVICE

On September 26, 2016, a true and correct copy of the *Appellant's Reply Brief* was hand-delivered to the individual listed below:

Robert Cossey
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RESPECTFULLY SUBMITTED THIS 26th DAY OF SEPTEMBER, 2016.



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