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DIVISION III
STATE OF WASHINGTON
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Court of Appeals, Division III, No. 339815

Spokane Country Superior Case Number: 15-2-03217-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DANA M. CONDREY,

Respondent/Petitioner,

v.

NEIL CONNOR FUCHS,

Appellant/Respondent.

APPELLANT'S OPENING BRIEF

JULIE C. WATTS/WSBA #43729
Attorney for Appellant
The Law Office of Paul B. Mack
422 W. Riverside Ave., Suite 1407
Spokane, WA 99201
(509) 624-2161

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

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I. SUMMARY OF ARGUMENT

When multiple students engaged in horseplay in the school gym, one student was injured. Despite the legislature's explicit intent to avoid using antiharassment protection orders to regulate "schoolyard scuffles," the trial court entered an excessive two-year protection order against one of the students. The trial court's decision is not supported by substantial evidence and is contrary to the legislative intent regarding the entry of antiharassment protection orders against minors.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred when it failed to enter written findings of fact and conclusions of law;
- B. The trial court erred when it found an "overall pattern of behavior that has been going on for several years and the injuries noted by the County Sheriff Deputy on June 10, 2015" (CP 82);
- C. The trial court erred when it concluded that "the weight of the evidence in this case persuades me that the Petitioner is entitled to an order that should be in place until approximately June 15, 2017 when the parties graduate" (CP 82);
- D. The trial court erred when it granted Dana Condrey's request for an antiharassment protection order against Connor Fuchs;
- E. The trial court erred when it granted Dana Condrey's request for an antiharassment protection order that exceeded one year; and
- F. The trial court erred when it denied Neil and Teri Fuchs' request for reconsideration and additional evidentiary proceedings.

III. ISSUES PRESENTED

- A. **Whether 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.**
- B. **Whether the trial court erred when it granted an antiharassment order that exceeded one year without evidence to support a finding that Connor Fuchs was likely to resume unlawful harassment of Jackson Condrey when the order expires.**
- C. **Whether the trial court erred when it denied Neil and Teri Fuchs' request for reconsideration and for an opportunity to submit testimonial evidence.**

IV. STATEMENT OF THE CASE

AUGUST 7, 2015: Dana Condrey filed a *Petition for an Order for Protection (Respondent Under Age 18)* seeking a protection order for her minor son, Jackson Condrey, against another minor child, Connor Fuchs. (CP 1-8.) In her petition, Dana¹ alleged that Connor was being investigated by the Spokane County Sheriff's office for assault in the second degree based on an incident that took place on June 10, 2015 in the Freeman High School gym. *Id.* She described the incident and stated that Connor had "restrained" Jackson with his arms behind his back, took several steps forward, and, when Jackson "attempted to break free," "both

¹ Because multiple individuals in this proceeding share the same last name, first names are used for clarify; no disrespect is intended.

involved then fell forward onto gym floor” with Jackson’s face breaking the fall and resulting in “bruising to right orbit and ruptured right eardrum.” Id. Dana further alleged that several hours previous to the incident, Connor had walked past Jackson going into a classroom and said, “What’s up, faggot?” Id.

In addition to the gym incident, Dana alleged that in 2014, Connor had frequently made harassing comments to Jackson during school, including ‘faggot,’ ‘pussy,’ ‘homosexual,’ and ‘gay,’ and she alleged that those comments were a reference to Jackson’s involvement in men’s volleyball. Id. She claimed that in 2013, Connor had punched, tripped, kicked, and spit on Jackson, and that he had also pulled a chair out from under him. Id. She stated that in 2012, Connor had hit Jackson in the head with his book-bag from a standing position while Jackson was seated, and that in 2011, Connor pushed and hit Jackson in between classes and engaged in “verbal harassment” and “physical abuse.”² Id.

Throughout her petition, Dana repeatedly emphasized her frustration that her complaints had seemingly been ignored by Freeman school officials and by Connor’s parents. Id. She requested that the trial court enter a no-contact order to protect Jackson from Connor, and that the order

² Dana, who was not present for any of the events she described, did not disclose to the trial court the source of the information she presented in the petition, though she signed her petition under penalty of perjury and indicated that the foregoing information was true and correct. (CP 8.)

last longer than one year. Id. She also requested that an emergency temporary order be entered to provide protection during the next fourteen days until the date of the hearing because otherwise Connor would be able to attend fall sports practices with Jackson prior to school starting in September. Id. Dana asked that she be appointed the guardian ad litem for Jackson and that Neil and Teri Fuchs, Connor's parents, be appointed as his guardians ad litem. Id.

On the same day, the trial court granted Dana's request for a temporary protection order as well as her request for appointment of guardians ad litem. (CP 9-10.) As a result, Connor was restrained from coming within two blocks of Jackson's home and from attending Freeman High School or any sports practices located there. (CP 9-10.)

AUGUST 14, 2015: A week later, Dana filed a copy of a police report with the trial court. (CP 16-21.) The report indicated that Dana had called the Spokane County Sheriff's Office on June 12, 2015 and reported an assault based on the incident in the school gym two days prior. (CP 16-21.) Deputy Ryan Truman responded to the call and contacted Dana and Jackson at their home. (CP 17.) When he arrived, Deputy Truman noticed that Jackson had some bruising around his right eye. (CP 17.) Dana told the deputy that Connor had been bullying Jackson for several years ("consisting of name calling and minor assaults and roughhousing"),

and that when Jackson came home with a black eye and ear pain, Dana learned that Connor had “assaulted” Jackson at school. (CP 17.) Deputy Truman then spoke with Jackson, who told him that he had been “harassed and bullied” by Connor at school for several years, and on June 10, while he was in the school gym “playing and wrestling with some other students,” Connor had come up behind him and grabbed him. (CP 17-18.) Jackson told Deputy Truman that he had struggled to pull away from Connor and then “tried to kick behind him to get Connor to let go,” with the result that both Connor and Jackson had lost their balance and fell forward. (CP 18.) Because Jackson’s arms had been behind his back at the time, the right side of his face struck the floor first. (CP 18.) Jackson told the deputy that “he toughed it out and finished gym class and did not report the assault or his injury.” (CP 18.)

Dana told the deputy that she had taken Jackson to the emergency room and was told by the doctor that Jackson had no facial fractures, but that he did have a ruptured eardrum. (CP 18.) Dana had also been told that Jackson had no loss or impairment of hearing and that his eardrum would heal on its own. (CP 18.) Dana told the deputy that she contacted the school principal on June 11 about the incident, and she and the school officials reviewed the surveillance tape of the video footage, which she believed reflected exactly what Jackson had told her. (CP 19.)

Deputy Truman then left Jackson and Dana to find Connor's father, Neil Fuchs. (CP 18.) Neil was in his driveway when Deputy Truman pulled up; the deputy told Neil what he was investigating and asked to speak to Connor. (CP 18.) Based on the deputy's comments, Neil declined to have Connor speak to law enforcement without an attorney present and told the deputy that he had seen the video footage of the gym incident and did not believe it showed anything but "boys just wrestling and they fell by accident." (CP 18.) Neil told the deputy that he was under the impression that the boys were friends and that he had had no idea there was any bullying going on. (CP 18.)

In addition to the police report, Dana also submitted copies of letters and emails she and her husband, Richard had written to third parties.³ (CP 15-34.) She included an email that had been written by Richard two and a half years previously, in January of 2013, that he sent to Connor's father, Neil. (CP 24.) The email complained of "bullying" by Connor (though Richard noted in the message that he and Dana did "understand there are two sides to every story and are not saying Jackson doesn't have some responsibility for some of the things that have occurred"). (CP 24.) Richard asked Neil to instruct Connor "to have no interactions with Jackson unless absolutely necessary," acknowledging that there would

³ With the exception of the police report, none of these documents were submitted pursuant to a declaration signed under penalty of perjury or pursuant to RCW 9A.72.085.

need to be “common sense” exceptions for “times in class that they’ll need to talk to each other in order to complete an assignment” or “during football or basketball when they’ll need to communicate or be in close proximity to one another.” (CP 24.) At the end of his email, Richard attached a copy of a message that Dana had written to a “Mrs. Poindexter” addressing disruptions Jackson had caused in her class. (CP 24.) In that message, Dana blamed Connor for the disruptions, saying that “it has taken two long years for Jackson to become more verbally assertive,” and that “[u]nfortunately, he is having difficulty determining when and where this is appropriate.” (CP 24.) Dana went on to emphasize that “while I am frustrated that Jackson is lashing out and being disruptive, I cannot ignore that he has endured two years of bullying and feels he has exhausted his options to make it stop,” and that “[d]ue to frustration that the situation is not improving, Jackson frequently states that he wants to punch Connor to simply ‘make it stop.’” (CP 24-25.) Dana acknowledged that “[w]e as parent will continue to talk with Jackson at length and hold him accountable for bad behavior like speaking out in class and being disruptive,” but she observed that this is “very alarming, because Jackson has never been a physically aggressive child.” (CP 24-25.) She concluded, “[i]t is my hope that the negative behaviors Jackson is exhibiting will resolve once the bullying is addressed.” (CP 25.) Dana

provides very clear instructions to Ms. Poindexter, saying that even though Connor “stated that he considered Jackson one of his closest friends,” she did not approve of the boys being “counseled by staff to work out their differences and continue being friends” because “[a]s parents we have not and will not support or nurture a friendship between the two boys, nor do we want Jackson to be encouraged at school to be friends with Connor.” (CP 25.)

In the same filing, Dana submitted a recent email that she had written to the school principal on June 10, 2015, in which she explained that previously, “[a]fter much reaching and research Richard and I made a decision in the last year to stop intervening and allow Jackson to find his voice and speak up for himself,” though she noted that “[u]nfortunately, the situation has not resolved.” (CP 28.) She said that she could no longer maintain that position, however, because while “Jackson is trying to downplay the situation,” she “as a nurse” could not “look past today’s incident.” (CP 29.) She stated that Connor had “jumped into a situation where a group of boys were ‘messaging around’ and took things too far.” (CP 28.) She explained that Connor had approached Jackson from behind and restrained his arms while Jackson struggled to break free, but she confirmed that “Jackson did ultimately kick Connor and the two fell face forward.” (CP 29.) She noted that “Jackson admits that prior to the fall he

and several friends were ‘goofing off’ during PE,” that “Jackson admits he picked Jimmy Sells up off the ground,” that “he and Logan Holt were lightly pushing each other,” and that while “Jackson acknowledges that his behavior could have caused harm to other students,” Dana distinguished Jackson’s behavior from Connor’s by saying “[t]he difference being that Jackson considers these other individuals his friends.” (CP 28-29.)

In passing, Dana referenced other harassment by unidentified “male students” and noted that Jackson is generally “accident/injury prone.” (CP 29.)

Dana also filed a subsequent letter that she had written to the school principal on June 13, 2015. (CP 30.) In that message, Dana noted that she and Richard had previously been satisfied to let the matter be addressed by the school, but had in the interim been encouraged by Connor’s doctor to make a report to the police. (CP 30.) Dana explained that after contacting the police, they indicated to the deputy that addressing the issue through the school would likely be adequate, but he had offered to make a visit to Connor’s parents to get their side of the story. (CP 31.) Dana explained that “Richard and I are completely appalled by Neil’s reaction” and commented that Neil’s “[d]enial that there was injury or that his son is responsible is unbelievable.” (CP 31.) Dana then explicitly stated, “[g]iven his response, we have made the decision as a family to file assault

charges.” (CP 31.) She stated that she did not believe that Neil took “any of this seriously,” and she noted (not for the last time) that Neil’s attitude was particularly troubling “as President of the Freeman School Board.”⁴ (CP 31.) Dana emphasized that her “anger and sadness” was caused by “a parent who is supposed to be a pillar of our community,” and who “refuses to relate or understand the pain and frustration Jackson has suffered.” (CP 31.) She went onto say that her “heart breaks for Connor” because “he has been raised in an environment void of compassion.” (CP 31.) Nevertheless, Jackson’s parents decided to press charges against Connor; Dana observed that while Deputy Truman suggested there was “a strong case to file 4th degree assault charges, a misdemeanor,” she believed that there was an arguable basis to claim a ‘hate crime’ based on Connor’s alleged use of the word ‘faggot’ and ‘homosexual,’ which would result in a felony and mandatory jail time.⁵ (CP 31.) Dana closed her letter to the

⁴ Dana and Jackson reference Neil’s involvement with the school board at least 6 times in their materials. (CP 4, 24, 31, 114, and 118.)

⁵ Jackson’s parents chose to press charges, as confirmed by Dana’s petition to the trial court for an antiharassment order where she alleges under penalty of perjury that the offense under investigation was a second-degree assault charge. RCW 9A.36.021 defines assault in the second degree. A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or (c) Assaults another with a deadly weapon; or (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or (e) With intent to commit a felony, assaults another; or (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the

school principal by making inquiries as to “what consequences were given to Connor” and indicating that “[w]e, and Jackson, are very curious what Neil Fuchs reaction was in your office to the video tape.” (CP 32.)

SEPTEMBER 11, 2015: Jackson filed his own declaration. (CP 40.) Jackson stated that “[o]n June 10, 2015, there was a significant amount of horse play in the gym,” and he discussed his interactions with other students at length, each of which (with the exception of Connor) he identified as his friend. (CP 41-46.)

Jackson indicated that he pushed/shoved other students multiple times. (CP 42, 45, 46.) Jackson was pushed/shoved many times by other students, sometimes from behind. (CP 42, 45, 46.) Many students were wrestling in the gym that day, and Jackson himself wrestled with multiple students. (CP 42-45.) In almost every instance, Jackson indicated that the interaction was appropriate because the person involved was his friend.

The events that took place *prior* to the incident with Connor included the following: Another student slapped Jackson on the rear end. (CP 42.) Jackson noted that he was not threatened by that behavior. Another student pinned Jackson’s arms behind his back. (CP 43.) Jackson stated that he had “never once [felt] like I was in trouble or going to be hurt.”

equivalent of that produced by torture; or (g) Assaults another by strangulation or suffocation. (2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony. (b) Assault in the second degree with a finding of sexual motivation under RCW9.94A.835 or 13.40.135 is a class A felony.

(CP 43.) Another student pretended to punch Jackson in the stomach while his arms were pinned behind his back, and Jackson confirmed: “I knew he would not attempt to hurt me.” (CP 43.) Another student jumped on Jackson’s back, and Jackson flipped that other student over. (CP 43.) He indicated that he had been comfortable with that interaction by saying, “The two of us walked to the right of the camera together, laughing.” (CP 43.) In one instance, Jackson swung another student around, horizontal to the ground. (CP 43.) He states that this interaction was appropriate because “[w]e were laughing as this was going on.” (CP 43.) Another student put his arm around Jackson’s neck in a chokehold, and Jackson indicated that he was not “threatened” because that student “has never physically injured me and we are friends.” (CP 43.)

All of the foregoing activity took place prior to the incident with Connor. Jackson then described the incident with Connor, saying that he had been wrestling with another student when Connor came up behind him and put his arms behind his back. (CP 43.) Jackson then described how he struggled to free his arms and told Connor to stop. (CP 43.) Then, for the first time, Jackson alleged that Connor “brings his right leg around my leg and pulls my right foot out from under me,” which he described as “an obvious take down attempt.” (CP 44.) This testimony stands in stark contrast to what Jackson had previously said to his mother (CP 1-8, 29),

the deputy (CP 17-18), and the school (CP 57), which was that he had warned Connor that he would kick him and then kicked him, and it was that motion that through them both off balance and caused the fall.

After the incident with Connor, Jackson described the rest of his activity in the gym. He corrected an allegation that he had hit another student on the head, saying that he had only swung his hand at another student and “grazed over the top of his head touching his hair.” (CP 44.) Jackson clarified that while the footage showed him congratulating Connor and receiving congratulations from Connor, slapping hands, and standing right next to him during a huddle, his behavior cannot be characterized as *friendly* toward Connor because he had only engaged in that activity for “participation points.” (CP 44-45.) Another student jumped directly into Jackson while attempting to dunk a basketball over him, after which Jackson was shown holding the left side of his head. (CP 45.) Jackson then engaged in a pushing/wrestling interaction with another student, which he described as “good fun.” (CP 45.) Jackson then “playfully” pushed a different student who he explained had “ribbed” him for being “the only competitive men’s volleyball player that attends Freeman High School.” (CP 45.) Jackson also engaged in tackling and dog piling on another student (“a good friend”). (CP 45.) Then, at the end of the video, the footage shows Connor running into Jackson from behind,

and Jackson responding by pushing him; Jackson described his behavior, saying, “[o]ut of anger and frustration that Connor will not stop I did get angry and push him.” (CP 45-46.)

Jackson explained that “[m]y body language and positioning on the video illustrates that I purposely stay away from Connor,” and that “this is what I have been instructed to do to create boundaries.” (CP 46.) Jackson noted that he was actually “quite embarrassed to have to have my parents talk with the Fuchs and the school,” because “[a]s the Court could imagine, I am a teenage boy who shouldn’t have to rely on my parents to protect me.” (CP 47.)

As an attachment to his declaration, Jackson provided an email that had been sent from Connor’s parents to Richard on January 9, 2013, two and a half years prior to the gym incident. (CP 48.) In that email, Teri⁶ wrote that she was “shocked” to read the email from Richard because “[w]e had absolutely no idea there was any problem between our boys.” (CP 48.) In her email, Teri referenced the fact that Jackson had recently asked Connor to join him for trick-or-treating a few months prior, and she stated, “[a]s far as we knew, they have been friends.” (CP 48.) Teri then agreed the boys should avoid each other and offered sympathy that

⁶ The email is sent from Neil’s email address, but he testified that Teri had written the message. (CP 67.)

Jackson felt that he had been picked on (referencing a similar event that had happened with Connor); she closed by saying, “we are truly sorry if our son had any part in making it more difficult for him.” (CP 48.)

SEPTEMBER 14, 2015: Neil submitted a declaration to the trial court. He stated that when he viewed the footage with the school principal, they had both concluded that all the students were horsing around, and that the incident where Connor fell on top of Jackson was clearly an accident. (CP 64.) The principal told Neil that Jackson’s parents had acknowledged that Jackson was also horsing around. (CP 64.) Neil explained that he had told the principal that he and his wife felt bad that Jackson had gotten hurt and had even offered to contribute to any medical expenses since both boys had been involved in the horseplay but only Jackson had been hurt. (CP 64.) Neil testified that on June 13, 2015, he attended another meeting with the school principal and Officer Ron Nye, who was the resource officer for Freeman School District. (CP 66.) They had watched the video footage again, and Officer Nye concluded that the incident between Jackson and Connor was an accident caused by the horsing around, and that he would call Deputy Truman and let him know his conclusion. (CP 66.)

Neil also noted in his declaration that back when Connor was in middle school, Neil had asked the teachers to put Connor and Jackson on

opposite sides of the room, but he was made aware by the school that Jackson would sit at the same table as Connor when given a choice. (CP 67.) At that time, he told the school that he could only keep Connor away from Jackson, but he could do nothing to make Jackson stay away from Connor. (CP 67.)

Teri also filed a declaration on the same day. (CP 55.) She stated that she remembered Connor coming home in 2013 and saying that Jackson kept trying to hang around him even though his parents had told him not to. (CP 56.) She observed that Neil had been shown a video at the school after Jackson's parents had asked them to instruct Connor to stay away from Jackson that showed Jackson approaching Connor and sitting down by him. (CP 56.) She noted that, "[o]ur knowledge of the relationship between Connor and Jackson truly sounded like normal Middle School boyish behavior, and at no point was any disciplinary action taken by the school." (CP 56.) She explained that when she talked to Connor about the gym incident, he was genuinely surprised because he considered Jackson to be his friend and denied any mean-spirited action toward him. (CP 55.) She said Connor told her that Jackson never said that Connor was bothering him in any way. (CP 55.) The school principal told them that both boys had agreed that they should not have been messing around in class and that both boys had agreed that Jackson was

also at fault. (CP 57.) Like Neil, she noted that they had offered to have Connor write an apology note for his part in the horseplay and to contribute to medical expenses since both boys were at fault. (CP 59.)

Deputy Ron Nye also submitted a declaration to the trial court stating that he had viewed the video footage and that it “appeared to me that horseplay was happening when the incident occurred,” and to the best of his knowledge he had never had any dealings with Jackson or Connor nor had he been informed of any bullying or harassment prior to the gym incident. (CP 75.)

Connor himself also submitted a declaration to the trial court. (CP 76.) He disputed all the allegations made by Jackson, and he stated that he had initially tried to stay away from Jackson several years ago when he was asked to avoid him, but that Jackson had not stayed away from him. (CP 76.) Jackson always sat next to him and hung out with his group of friends. (CP 76.) He explained that he had interpreted that behavior to mean that while *Jackson’s parents* did not want them to be friends, *Jackson* did want to be friends. (CP 76.) In 8th grade, Connor and Jackson had frequently worked in the same groups and on the same projects where they had picked their own partners. (CP 76.) In 9th grade, Connor continued to be friends with Jackson and testified that Jackson had *never* asked him to stay away or indicated that Connor bothered him or

that he did not want to work with him. (CP 76.) Connor testified that he had had no idea or reason to believe that he and Jackson were *not* friends. (CP 77.) He noted that while Jackson had had a lot of friends in their classes to choose from, Jackson had consistently chosen to work with Connor. (CP 77.) Connor also explained that within his group of friends, “[w]e all goof off and call each nicknames and even bad things,” but “I have never called Jackson anything other than ‘Jackson’ or ‘JC.’” (CP 78.) Connor noted that many of the students that Jackson had identified as his friends had called Jackson ‘gay,’ ‘pussy,’ or ‘fag.’ (CP 78.) Connor also noted that, in fact, *Jackson* used to call *Connor* a ‘pussy’ or ‘gay’ when Connor was in wrestling. (CP 78.)

Connor explained that he had never had any problems with Jackson, and they “always hung around together before class started.” (CP 78.) He said, “For the most part our class messed around and horsed around during class with no injuries.” (CP 78.) In particular, Jackson “horses around in class with his ‘friends’ on a regular basis,” and is “involved in the same amount and kind of horseplay as [Connor] if not more.” (CP 79-80.)

Connor explained that during the gym incident, when he had come up behind Jackson, Jackson tried to flip him over his back the same way he had flipped another student on the video footage. (CP 78.) Then, Jackson reached back and tripped him. (CP 78.) Connor noted that no

one had paid any attention to them during the gym incident or afterwards. (CP 78.) They had all thought the incident was normal behavior because they were all horsing around and because they were all friends. (CP 78.) Connor said that if Jackson's friends had thought Connor was bullying Jackson or hurting him, they would have told him to stop or interfered somehow, but they didn't because everyone knew he had not been trying to hurt Jackson. (CP 79.) After that incident, Jackson joined everyone else to run a mile and then played volleyball; he never complained that he was injured. (CP 79.) Connor and Jackson had played volleyball on the same team that day and had helped each other set and spike; they had even congratulated each other on good plays. (CP 79.) Connor noted that while everyone was waiting for a game to finish, another friend had attempted to jump over Jackson and, in mid-air, knocked into Jackson, who fell into the bleachers. (CP 79.) It was after that incident that Jackson grabbed the left side of his face like he had been hurt. (CP 79.)

Connor's parents also submitted their *Memorandum of Authorities*, which argued that Dana had failed to prove unlawful harassment under the statute. (CP 69.) This document argued that it was plainly evident that Jackson had engaged in the horseplay in the gym and acted as if he and Connor were friends, so Connor could not have known that the interaction with him was unwanted. (CP 72.)

SEPTEMBER 16, 2015: The trial court heard the matter. At hearing, Dana's attorney informed the trial court that no criminal charges of any kind were going to be filed against Connor. (RP 7.) At the time of hearing, the trial court had not yet reviewed the video footage, and it indicated that it would review the video carefully and issue a letter opinion. (RP 22.)

SEPTEMBER 21, 2015: The trial court issued its letter opinion:

Dear Counsel:

I have had a chance to watch the video of the gym incident. Overall I would not say that the events depicted are decisive. The larger context in my mind is the overall pattern of behavior that has been going on for several years and the injuries noted by the County Sheriff Deputy on June 10, 2015. I would conclude that the weight of the evidence in this case persuades me that the Petitioner is entitled to an order that should be in place until approximately June 15, 2017, when the parties graduate.

The circumstances here may not have even gotten to this point if the boys were attending a larger school where they could more easily avoid each other. I really cannot blame the Freeman school authorities since there are some practical limits as to what they can do on their own.

I think it is appropriate to leave in place the terms as modified in the August 19, 2015 order. I will ask counsel to please contact Ashley Callan for presentment in Juvenile Court.

Sincerely,

Judge Salvatore F. Cozza

(CP 82.)

OCTOBER 26, 2015: Connor’s parents filed a *Request for Reconsideration and/or Additional Evidentiary Proceedings* and seven additional declarations. (CP 84-104.) Connor requested that the trial court read the supplementary declarations and allow Connor and Jackson to testify under oath about their history. (CP 102.) Many of these declarations were written by students who had been in school with Connor and Jackson for years, and they indicated that the two boys were friends and that there had never been any bullying or harassing behavior by Connor toward Jackson. Connor also submitted a statement by Timothy McCann, a private investigator who interviewed four teachers, each of whom reported no knowledge of any problems or altercations between Connor and Jackson. (CP 92-94.) Mr. McCann also interviewed Washington State Patrol Trooper Chris Holt regarding his son, Logan Holt’s statements about the gym incident, which were that “the wrestling and running around prior to the start of class was horseplay.” (CP 94.)

Pursuant to that request, Connor’s parents argued that the trial court had failed to consider the additional factors governing restraining orders entered against minors as contained in RCW 10.14.040(7) and begged the trial court to reconsider. (CP 101.) Connor’s parents argued that the entry of an ongoing protection order would have a dramatic and deleterious effect on his future with respect to “college applications, being in the

military, applying to become a law enforcement officer, obtain[ing] a professional license, becom[ing] a teacher.... The negative effects are practically endless,” and that there had been no evidence presented to support a finding of “persistent criminal-like behavior over a long period of time.” (CP 101-02.)

OCTOBER 28, 2015: An *Order for Protection* was entered against Connor. (CP 105-107.)

NOVEMBER 4, 2015: Dana filed a supplemental declaration and an *Objection to Motion for Reconsideration and/or Additional Evidentiary Proceedings*, as well as a supplemental declaration written by Jackson. (CP 109–137.)

In her supplemental declaration, Dana provides great detail about her interaction with Freeman Schools (“Jackson made consistent and accurate reports of harassment and physical intimidation that my husband and I in turn reported to Freeman schools”), but she does not, at any time, identify any interaction with Connor himself; in fact, she confirms that she went to great lengths to avoid having the matter brought to the attention of Connor or his family:

- “Jackson was hesitant to report bullying even at this young age as it was humiliating and he feared social consequences.” (CP 117.)
- “These behaviors were not witnessed by [the teacher] in the classroom which is common with covert bullying.” (CP 117.)

- “... we believe we acted reasonably and responsibly by notifying the school and keeping this a private family matter.” (CP 117.)
- “... we as parents let the school know that we had concerns for our son’s safety and future injury.” (CP 117.)
- “Again, we asked for the school to intervene.” (CP 117.)
- “We agreed to work with the school to help Jackson develop the social skills to stand up for himself.” (CP 117.)
- “We kept this a private family matter due to the sensitive nature.” (CP 117.)
- “...we are uncertain of the actions taken by the school to prevent future harassment.” (CP 117.)
- “...we continued to depend on the school as our ally.” (CP 118.)
- “I was disappointed the school informed Neil Fuchs of our classroom request and did not protect Jackson’s best interest by keeping it private.” (CP 119.)
- “Due to the sensitive nature of Jackson’s distress and humiliation, we as parents, continued to keep this a private matter.” (CP 119.)
- “We stayed committed to work through the proper channels at the school, and not publically discuss our son’s situation with other parents or students.” (CP 119.)
- “We continued to work with the school as our best avenue to resolve the issues and kept the problem a private matter.” (CP 120.)
- “Again in 8th grade, we kept the ongoing harassment a private matter on Jackson’s behalf.” (CP 121.)
- “At Jackson’s request we stopped intervening and reporting to the school on Jackson’s behalf.” (CP 121.)

- “Jackson requested that as parents we follow his lead and allow him to assert himself verbally without drawing more attention to the situation.” (CP 122.)
- “Jackson became very withdrawn and was no longer forthcoming about the ongoing bullying.” (CP 122.)

Regarding the gym incident, Dana stated: “Despite his injuries Jackson had a difficult time reporting the incident to school officials because he was ashamed and humiliated in front of the entire PE class.” (CP 122.) She argued that “[i]t is unclear even to this day what disciplinary action was taken by the school against Connor.” (CP 122.)

To conclude, Dana stated that “[a]s parents we found the lack of intervention on the schools’ part shocking and disappointing,” and explained that “[i]t is at this time that we made the difficult decision to report the assault to the Spokane County Sheriff’s department.” (CP 123.)

In the entirety of her declaration, Dana acknowledges that she only communicated any concern to Connor’s parents on *one* occasion in 2013 (through the email that was included in the record) and that the response from Connor’s parents (which is also in the record) was to agree to her request. (CP 120.)

Dana did, however, make a point of saying that because Neil had sought evidence from the school related to the serious allegations being made against his child, she believed that, “[n]ow not only has Jackson

been a victim of bullying he is now being harassed by an influential adult, Neil Fuchs, who has called into the court of public opinion Jackson's character." (CP 124.) She explained: "...we will take the high road and not seek support for Jackson by requesting students write declarations," noting "we have consistently handled this issue privately and confidentially." (CP 124.) She closed by saying that "[f]urther dividing the small Freeman community and pitting family against family is not a respectable avenue to resolving the issue," and "[w]e find it unfortunate that resolution could not be found years ago by working through the proper channels at the school." (CP 124.)

Dana also submitted emails from 2011 that she had written to the school wherein she told two teachers that Jackson "was upset we reported the incidents to the school because he considers Connor a friend." (CP 134.) She also noted that "[w]e will continue to reinforce that Jackson needs to stand up for himself and be direct with Connor when asking for unwanted behavior to stop." (CP 134.) An email from Richard written to the school said, "we told Jackson last night that I sent you an e-mail and he was very upset" and "[h]e is afraid of being called a tattle-tale by his classmates, and even more afraid of being called into the principal's office." (CP 135.) Richard's email observed "[w]hat surprised us the most was that he'd rather be bullied the rest of the year than getting

Connor into trouble,” and “[w]e explained to him that addressing the issue now may result in them being better friends in the long run.” (CP 135.) In another email, Richard said, “We have not encouraged Jackson to fight back but to loudly, in front of other kids, tell Connor to quit hitting him,” and he noted that “[f]or whatever reason, Jackson has felt embarrassed to do this and has even said that he doesn’t want to hurt Connor’s feelings.” (CP 136.) He also said, “Our message to Jackson was to pull Connor aside first thing the next morning and explain to him that he didn’t want to get hit, pushed or picked on anymore,” but “[t]he next morning, Jackson said he was uncomfortable talking to Connor so he didn’t.” Richard commented that “[w]e know that there are always two sides to every story,” and “we realize he sometimes instigates things too.” (CP 136.)

In Jackson’s declaration, he also outlined the action he has taken in the past. At no time did he ever directly communicate to Connor that he did not want to be friends with him or to interact with him.

- “I have made honest and consistent reports of bullying by Connor Fuchs to Freeman school since I was in the 5th grade. It would not make sense for me to carry on a lie for five years.” (CP 109.)
- “I have never lied to my parents or exaggerated what has happened between me and Connor.” (CP 110.)
- “I have tried to avoid Connor, ignore him, and walk away for the entire school year during 9th grade.” (CP 110.)

- “In elementary and middle school I reported the harassment, it didn’t stop.” (CP 110.)
- “I was told by the elementary principal and counselor to try to be friends with Connor because he wanted to be my friend.” (CP 111.)
- “Some weeks were worse than others and I would get angry and tell my parent. Other times I tried to hide it, tried to be normal and pretend I was fine.” (CP 111.)
- “If Connor or his parents had tried to work things out with my parents to stop the bullying we would not be in this situation.” (CP 112.)
- “Going back to 5th grade my parents and I have been consistent in reporting to the school that Connor and I aren’t friends, his verbal and physical harassment is unwanted, and I have done my best to avoid him.” (CP 112.)
- “Not saying that Connor was the only one, but Connor was the worst of all the guys who made fun of me for playing volleyball.” (CP 113.)
- “It makes me angry that because I acted like a good person and responsible student other people perceive me as a liar. I don’t know how I was supposed to act different to make this stop; no one has walked in my shoes. Connor Fuchs and his lawyer have all sorts of ideas of how I should have acted or what I should have done differently but they aren’t me and don’t have the right to judge me.” (CP 110.)

NOVEMBER 16, 2015: Connor’s parents filed three more declarations, including one from Connor’s coach and one from a private investigator. (CP 138-141.)

Neil filed a declaration stating that, in all the time his son was in school, he had only ever been contacted one time about Connor’s

relationship with Jackson, when Connor was in the 7th grade. (CP 142.) He noted that the impetus for Jackson's parents to seek criminal charges and a protection order seemed to be based solely on the information they received from Deputy Truman, who appeared to have characterized Neil's negative reaction to his own suggestion that he could end up taking Connor to jail and charging him with a felony as a negative/dismissive reaction to *Jackson's parents'* concerns about Jackson's suffering (which as the record indicates, had not previously been his or Teri's reaction in the past). (CP 144.) Neil also noted that Dana's repeated references to his involvement with the school board and her allegations that Neil was using his position inappropriately, when taken with her newest suggestion that he and his wife were *harassing* Jackson, only served to confirm that Neil, not Connor, was the true target of her anger. (CP 145.) He argued that the entry of a protection order against Connor is clearly not the appropriate response to Dana's grievance against Neil. (CP 145.)

Connor's parents also filed a *Reply Brief in Support of Respondent's Request for Reconsideration of Final Antiharassment Order*. (CP 153.) They argued that Jackson's parents had only contacted the school *three* times in the last *five years*, and on each occasion, the school investigated and found nothing that would warrant discipline against Connor. (CP 156.) With so little evidence, Jackson's parents' repeated and passionate

argument to the trial court that Connor should be characterized as a serial abuser and subject to a two-year anti-harassment order was simply unreasonable. Because the trial court granted the protection order in the absence of evidence supporting its entry, substantial justice had not been done. (CP 156.)

NOVEMBER 23 2015: The trial court denied the request for reconsideration. (CP 159.) It found that “[t]he position of the arguments and materials submitted by the parties on reconsideration are essentially a restatement of the positions that were presented to the Court at the initial hearing and do not persuade this Court to make any alteration of its original determination.” (CP 159.)

DECEMBER 23, 2015: Connor filed his *Notice of Appeal* to this Court. (CP 161.)

V. ARGUMENT

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.

STANDARD OF REVIEW: When reviewing the issuance of a protective order, an appellate court reviews any contested findings for substantial evidence, questions of law *de novo*, and the issuance and scope

of the order for abuse of discretion. Trummel v. Mitchell, 156 Wn.2d 653, 668-69, 131 P.3d 305 (2006).

The trial court has abused its discretion if the decision is manifestly unreasonable or discretion is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A discretionary decision rests on ‘untenable grounds’ or is based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard; the court’s decision is ‘manifestly unreasonable if the ‘court, despite applying the correct legal standard to the support facts, adopts a view that ‘no reasonable person would take.’” Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006), quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

The issuance of an antiharassment protection order is governed by RCW 10.14, which states that if, after a hearing, the court finds by a preponderance of the evidence that unlawful harassment exists, a civil antiharassment protection order shall issue prohibiting such unlawful harassment. RCW 1.014.080(3.) “Unlawful harassment” is defined as “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(2).

In the note related to this section of the statute, the legislature *explicitly* stated its intent to avoid characterizing “schoolyard scuffles” as unlawful harassment:

The legislature finds that unlawful harassment directed at a child by a person under the age of eighteen is not acceptable and can have serious consequences. **The legislature further finds that some interactions between minors, such as “schoolyard scuffles,” though not to be condoned, may not rise to the level of unlawful harassment.** It is the intent of the legislature that a protection order sought by the parent or guardian of a child as provided for in this chapter be available only when the alleged behavior of the person under the age of eighteen to be restrained rises to the level set forth in chapter 10.14 RCW.

a. Dana fails to identify knowing and willful conduct by Connor.

Jackson and his parents expressed outrage at Connor’s parents (particularly his father, Neil), and they clearly articulated their dissatisfaction with the school’s management of the situation, but they did not ever, on any occasion, specifically allege that Connor engaged in any roughhousing/horseplay or name-calling with the intention of harming Jackson or causing him injury or distress or knowledge that he was harming Jackson or causing him injury or distress. While they claimed that Jackson was hurt by Connor’s behavior, 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 was unwanted by Jackson at the time it occurred.

b. Dana fails to identify a “course of conduct” by Connor directed at Jackson.

By statute, “course of conduct” is defined as “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.” RCW 10.14.020(1). “In an effort to accommodate the vagueness problem that has plagued antiharassment legislation in the past, conduct is tested both subjectively and objectively.” RCW 10.14.020; Burchell v. Thibault, 74 Wn.App. 517, 521, 874 P.2d 196 (1994).

In this case, a variety of written testimony was provided in support of Dana’s request for an antiharassment protection order against Connor, but a large portion of what was presented to the trial court consisted of statements testifying to legal conclusions rather than factual assertions. For example, Dana’s testimony primarily characterized Connor’s behavior as ‘harassment,’ ‘assault,’ ‘abuse,’ or ‘bullying’ rather than actually describing the behavior itself. She summarized in this fashion on forty separate occasions. (CP 2-5, 8, 17-18, 24-31.) While in most cases, Dana’s references clearly indicated that the behavior she described was Connor’s, in other instances, she discussed ‘harassment,’ ‘bullying,’ and

‘abuse’ at the hands of other students, too. (E.g., CP 28-29; “We are acutely aware that Jackson’s pursuit of men’s volleyball has made him an easy target for such insults from students, especially upper classmen,” “Jackson’s decision to discontinue playing football last fall made for an especially difficult year of harassment,” and “[h]e does not want his parents fighting his battles, fearing that our intervention will only cause him to be harassed more by male students.”) Jackson’s own testimony similarly referenced ‘harassment,’ ‘assault,’ ‘abuse,’ or ‘bullying’ on thirty-one separate occasions (averaging approximately four conclusory references per page of testimony) but made troublingly few factual assertions. (CP 17-18, 40-42, 44, 46-47.) Jackson’s father, Richard, did not directly testify to the trial court at all; however, Dana submitted letters Richard had written to third parties, and his statements similarly used conclusory summaries, referring to ‘assaults,’ ‘attacks,’ ‘abuse,’ and ‘bullying’ nine times in four pages. (CP 22-24, 33.)

The main issue presented to the trial court was the discrete event that took place in the school gym; while Dana attempts to reach back as far as 2011 or 2013 to reference other behavior as a way of expanding a singular event into a course of conduct, in doing so, she does little more than provide general conclusory statements and vague references to unspecified events over the years where Connor “shoved” or “hit” Jackson, but she

does not submit any detailed information that would allow meaningful review by any court or a substantive response from Connor.

c. Dana fails to prove any of the statutory factors for consideration by the trial court when determining whether a course of conduct has any legitimate or lawful purpose.

RCW 10.14.030 provides factors for consideration by the court when determining whether a “course of conduct” has any legitimate or lawful purpose, including whether:

- (1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties;
- (2) The respondent was given clear notice that all further contact with the petitioner is unwanted;
- (3) The respondent’s course of conduct appears designed to alarm, annoy, or harass the petitioner;
- (4) The respondent is acting pursuant to any statutory authority, included but not limited to acts which are reasonably necessary to:
 - a. Protect property or liberty interests
 - b. Enforce the law; or
 - c. Meet specific statutory duties or requirements;
- (5) The respondent’s course of conduct has the purpose or effect of unreasonably interfering with the petitioner’s privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;
- (6) Contact by the respondent with the petitioner or petitioner’s family has been limited in any manner by any previous court order.

While the factual assertions made by Jackson and his family in their declarations were emphatically disputed by Connor, his parents, and a wide variety of other witnesses, this Court need not resolve any disputed facts or make any determinations of credibility on appeal in order to apply the factors in this case because the assertions made by Jackson and his family, even when *assumed to be true*, are wholly insufficient to prove unlawful harassment pursuant to RCW 10.14.

Here, Dana fails to identify any clear course of conduct by Connor; however, even if a course of conduct is assumed, only three of the statutory factors contained in RCW 10.14.030 are relevant in this case, and there is no evidence presented to the trial court that would support a finding under those factors.

It is undisputed that both parties initiated contact between them. Jackson claims that he only interacted with Connor because his participation points depended on it or because he could not otherwise participate in sports or even because he viewed it as the right thing to do, but regardless of Jackson's *reasons* for engaging with Connor, it is undisputed that he did.

It is similarly undisputed that Connor was not given clear notice that all further contact with Jackson was unwanted. There is evidence that in 2013, Connor had reason to believe that Jackson's *parents* did not want

him to have contact with Jackson, but Jackson's ongoing behavior did not support a conclusion that *Jackson* did not want to be friends. Further, Dana and Richard went to *extraordinary* lengths to make sure that Jackson's issues with Connor were "kept private," and Jackson specifically stated that the only manner in which he communicated his objection to contact with Connor was through "body language and positioning" in order to "create boundaries," and by trying "to avoid Connor, ignore him, and walk away." (CP 46, 110.) At best, this is not clear notice; but taken with the fact that Jackson acknowledged that he had treated Connor in a manner that reflected "good sportsmanship," it is not hard to imagine why Connor believed that Jackson was his friend.

There is no evidence that Connor's course of conduct was designed to alarm, annoy, or harass Jackson. In fact, there is not even any *allegation* that Connor had any such intention. Given the age and maturity of the parties, the fact that Connor's behavior (as well as that of all the other students described in this proceeding) is obnoxious is not evidence of an intention to alarm, annoy, or harass Jackson. The fact that Connor's behavior may appear rude (particularly to individuals who are not middle school boys), that is not sufficient evidence to conclude that Connor's intentions were nefarious. In fact, it can hardly be concluded that Connor's actions were, by definition, harassing, because Jackson himself

admits his enthusiastic participation in all the same behaviors. According to Dana and Jackson, it is not the *behavior* that is the determinative factor in determining whether the activity is harassment; rather, the variable that matters is whether the object of the behavior views the actor engaging in the behavior as a friend. This would be an entirely subjective test that could not be reasonably applied by any court in any circumstance, much less when regulating the actions of children.

There is similarly no evidence that Connor's course of conduct had the purpose of unreasonably interfering with Jackson's privacy or creating an intimidating, hostile, or offensive living environment for him.

It is undisputed that no previous court order limited contact by Connor with Jackson or his family.

d. The antiharassment statutes do not apply to this case.

By bringing this petition, Dana asked the trial court to regulate the conduct of children in the context of childhood activity pursuant to a statute designed to regulate adult conduct pursuant to an adult legal proceeding; this is precisely what the legislature expressly warned against when it said that "some interactions between minors, such as 'schoolyard scuffles,' though not to be condoned, may not rise to the level of unlawful harassment." While pushing and name-calling are activities that are hard to interpret as anything other than mean-spirited when they take place

between adults, the intention driving this behavior among children is much more difficult to assess. As Jackson and his family *repeatedly* admit, Jackson himself engaged in precisely the same type of behavior with the other students in the gym that day, and he described the interactions as “good fun” and referenced that he was laughing and smiling even as he was pushing and shoving. This is not uncommon among boys of his age; yet Jackson has not accused any of them of assault or harassment and none of them have made any such accusation against him.

While there is no published standard in case law that clearly articulates when horseplay between children is simply horseplay and when it rises to the level of assault, it is certainly apparent that it would be patently unjust to isolate the behavior of one child among many and call *his* behavior assault when it is identical in *every way* to the behavior of every other child in the room at the time in question, including the child making the accusation. Connor was not the first child to wrestle with Jackson that day, nor was he even the first child to hold Jackson’s arms behind his back. He was just the first one unfortunate enough to be involved when an accident finally happened, as accidents so often do when large groups of kids are horsing around. Perhaps even more unfortunately, Jackson’s parents also had a particular dislike for Connor’s

parents, which likely encouraged Jackson's parents to interpret Connor's behavior as more sinister than it was.

While "schoolyard scuffles" are not to be condoned, they simply cannot be accommodated through the antiharassment statute, which is not designed for this type of behavior; nor is it "designed to penalize people who are overbearing, obnoxious, or rude." Burchell at 522-23.

The legislature's indication that antiharassment protection orders are not intended to apply to children is further confirmed by the statute's language that prevents a parent from even *requesting* entry of an antiharassment order protecting a minor against another minor unless the trial court finds that an offense between the children had already been adjudicated or investigated. RCW 10.14.040(7). While the statute is silent as to what constitutes an "investigation" or an "offense" for this purpose, it is clear that Dana alleged that an "investigation" of an "offense" had taken place based solely on the police department's initial response to her own report. (CP 2, 6.) In her petition, Dana states that Connor was under "investigation" related to a second degree assault charge (CP 2), but elsewhere in the record, she characterizes the charge as a fourth degree misdemeanor assault (CP 30), and yet elsewhere, she talks about a felony 'hate crime' (CP 31). But no criminal charges of *any type* were *ever actually filed* against Connor (RP 7), and the trial court found

that the alleged “offense” (i.e., the event of June 10, 2015, depicted in the video) was not “decisive.”

The threshold requirement that a significant offense be adjudicated or investigated before a parent can seek a protection order for a minor effectuates the legislature’s explicit intention to avoid regulating “schoolyard scuffles” by children through the antiharassment statute. It is apparent from the statute that the legislature meant to involve the neutral judgment of a government actor in its assessment of whether the extreme remedy of a protection order against a minor was truly required. This threshold requirement serves as a barrier to all but the most serious circumstances, but this purpose is entirely thwarted when a petitioner simply makes her own report to the police department (as Dana did here) before representing to the court that there has been an “investigation” of an “offense.” Such an interpretation does nothing to limit antiharassment petitions against minors; rather, it simply ensures that any savvy litigant will simply call in and make a report prior to filing her petition. This does not further the intent of the statute; it simply increases police reports.

Finally, a review of the record confirms that the impetus for Jackson’s family’s decision to pursue legal action was not their concern about

Connor's behavior but rather their anger toward Neil,⁷ who appeared to be an object of particular resentment because of his position as a volunteer on the school board (which is mentioned no less than six times in the materials submitted by Dana). Dana's resentment appears to be fueled by Deputy Truman's characterization of Neil's reaction to his investigation - in fact, it appears that Deputy Truman's insensitivity was the catalyst that escalated this situation. The deputy upset Neil by appearing unannounced in his driveway and inexplicably threatening to take his child to jail, after which he returned to Jackson's family and upset them by providing a description of Neil's reaction to the deputy's insensitive investigation as if Neil were being dismissive of Jackson's suffering. No doubt anyone would have sympathy for Dana and Richard's reaction to what must have been a troubling story from the deputy, but, even so, no amount of poor behavior by *Neil* could justify criminal charges and an antiharassment order against *his child*.

There is a complete absence of substantial evidence in the record to support a finding of unlawful harassment or the subsequent entry of an antiharassment order against Connor. This Court should reverse the trial court's decision and lift the protection order.

⁷ "Given [Neil's] response, we have made the decision as a family to file assault charges." (CP 31.)

It is worth noting that the trial court failed to include formal findings of fact and conclusions of law in its memorandum decision as required by CR 52(a)(4), which endorses memorandum opinions if findings and conclusions are included; however, the absence of formal findings and conclusions is not invariably fatal to review on appeal. Backlund v. University of Washington, 137 Wn.2d 651, 656 n.1, 975 P.2d 950 (1999). While appellate courts are entitled to remand for findings of fact to facilitate review, judicial economy - as well as ultimate fairness to the parties - is a sufficient reason for an appellate court to retain and dispose of a case. Id. Because the record in this matter confirms Dana's failure to present a *prima facie* case, this Court need not remand for entry of written findings of fact and conclusions of law by the trial court because any entry would necessarily be deficient given the absence of substantial evidence. Id. Avoiding remand in this case would particularly serve the interests of justice in this matter because the protection order in question expires two years from its entry, and the injury to Connor caused by this baseless protection order will not be timely addressed should this Court remand for findings and conclusions, which would necessarily be deficient. Additionally, it is the prevailing party's duty to procure formal written findings to support its position or "abide the consequences of their failure to do so;" therefore, to remand in this case would unfairly prejudice

Connor, who was not the party with the duty to procure written findings in the first place. People's National Bank of Washington v. Birney's Enterprises, Inc., 54 Wn.App .668, 670, 775 P.2d 466 (1989).

- 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.**

STANDARD OF REVIEW: The issuance and scope of a protection order is reviewed for abuse of discretion. Trummel at 668-69.

DURATION OF ORDER: An antiharassment protection order is to be effective for not more than one year unless the court also finds that the harasser is likely to resume unlawful harassment when the order expires. RCW 10.14.080(4).

The record in this case does not reflect that the trial court engaged in *any* inquiry as to Connor's future behavior. The purpose of antiharassment legislation is to facilitate the issuance of "protection orders preventing all further unwanted contact between the victim and the perpetrator," it is not intended to provide "redress for past injury." Burchell, at 522-23. An incidental victim who is not actually the target of harassment does not require protection from further unwanted contact. Id.

Further, because there is no substantial evidence to prove the existence of any unlawful harassment in the first place, there is clearly no

evidence to support a finding that Connor is likely to *resume* unlawful harassment after one year. Entry of a two-year protection order clearly exceeded the scope of the trial court's discretion. This Court should reverse the trial court's decision and lift the protection order.

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

STANDARD OF REVIEW: The denial of a motion for reconsideration is reviewed for abuse of discretion. Wilson v. Horsley, 137 Wn.2d 500, 974 P.2d 316 (1999).

Here, the trial court entirely declined to consider Connor's parents' arguments for reconsideration, the additional evidence presented by declaration, or their request to present testimonial evidence. The trial court provided no information regarding its analysis other than to say that the information provided in support of reconsideration was "essentially a restatement of the positions that were presented to the Court at the initial hearing and do not persuade this Court to make any alteration of its original determination."

This is troubling for several reasons.

First, the trial court did not address or discuss the arguments made by Connor's parents with respect to the application of the statute or the absence of substantial justice.

Second, the issue before the trial court was not, as it discusses, a matter of “position” – after all, it is not surprising that the parties had not changed their positions – rather, it was a matter of evidence. The standard by which a request for an antiharassment order is evaluated is by a preponderance of the evidence. Connor’s parents presented a significant amount of evidence, which the trial court did not include in a *weighing* analysis; rather, the court appeared to entirely dismiss the declarations because they did not provide *new* information. This is not the standard.

Finally, the trial court did not even *acknowledge* Connor’s parents’ request to provide testimonial evidence. This is clearly error. When an “outcome determinative” credibility issue is before the trial court, it is “preferable for the superior court judge or commissioner to hear live testimony of the parties or other witnesses, particularly where the presentation of live testimony is requested.” In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). “[I]ssues of credibility are ordinarily better resolved in the crucible of the courtroom, where a party or witness’ fact contentions are tested by cross-examination, and weighed by a court in light of its observations of demeanor and related factors.” Id. at 352.

VI. CONCLUSION

The legislature was clear about its intentions regarding the entry of antiharassment protection orders against minors. The trial court entirely disregarded the legislature's explicit warning against regulating "schoolyard scuffles" to enter an excessive two-year protection order against a minor child without substantial evidence in the record to support a finding of unlawful harassment. As a result, Connor will face substantial obstacles in his future when applying for jobs or joining the military, and many doors of opportunity will be unjustly barred against him. Neil and Teri Fuchs respectfully request this Court to reverse the trial court's decision and lift the protection order against Connor.

RESPECTFULLY SUBMITTED this 24th day of JUNE, 2016,



JULIE C. WATTS/WSBA #43729
Attorney for Appellants

FILED

JUN 24 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE**

In re:

**DANA CONDREY o.b.o. JACKSON
CONDREY,**

Respondent/Petitioner,

v.

NEIL CONNOR FUCHS,

Appellant/Respondent.

No. 15-2-03217-2

DECLARATION OF SERVICE

On June 24 2016, a true and correct copy of *Appellant's Opening Brief* dated and filed June 24, 2016) was hand-delivered to Ms. Condrey's attorney of record, the individual named below at the address listed:

Robert Cossey
902 N. Monroe
Spokane, WA 99201

RESPECTFULLY SUBMITTED THIS 24TH DAY OF JUNE, 2016,



Julie C. Watts, WSBA #43729
Attorney for Appellant