

FILED
Court of Appeals
Division III
State of Washington
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No. 360652

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PAUL PATNODE

Appellant

v.

JUNGHEE KIM SPICER and DAVID SPICER, and YAKIMA ARTS
ACADEMY, LLC,

Respondents

APPELLANT'S REPLY BRIEF

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I. REPLY FACTS

David and Junghee Spicer and Paul Patnode initially had a cordial, neighborly relationship. RP 72; RP 228-29. Before he complained to Yakima County about the Spicers' home music business, Mr. Patnode attempted to have informal conversations with the Spicers about the problems that the Spicers' home music business caused him. RP 229-30; RP 305-08. The Spicers' and Mr. Patnode's relationship deteriorated after Mr. Patnode complained to Yakima County that the Spicers were operating an unauthorized home business. RP 72; RP 229; RP 309-10.

After Mr. Patnode complained to Yakima County about the Spicers' music business, the parties became engaged in a nearly four-year-long dispute that included complaints to local government authorities about one another, litigation, petitions for anti-harassment protection orders against one another, and calls to the police on one another. *See, e.g.*, RP 73; RP 289-91; RP 309-12; RP 316-17; RP 320-21; RP 351; CP 320; CP 322; Ex. 2; Ex. 3; Ex. 4; Ex. 27; Ex. 30; Ex. 31; Ex. 33.

From approximately Thanksgiving of 2015 to March 24, 2016, Mr. Patnode's Ford F-250 pickup truck and his daughter's boyfriend's Hummer SUV were parked on the Spicers' side of the street between the parties' houses. RP 52; RP 340; RP 347; Ex. 37; Ex. 39; Ex. 52. The record does not support Finding of Fact No. 18 to the extent that the

finding suggests that Mr. Patnode routinely parked additional vehicles on the Spicers' side of the street. CP 321. Mr. Patnode testified that the box truck shown in Exhibit 52 was not his and that it was never parked on the street overnight. RP 349-50. The sedan was not Mr. Patnode's, and the sedan's owner rarely parked her vehicle on the street. RP 350-51. The Spicers offered no evidence as to how long vehicles other than the F-250 and Hummer were parked on the street. RP 52-53. Exhibit 52 was taken during a gathering at the Patnodes' home and does not depict how vehicles were normally parked. RP 348-49. In any event, the Spicers' conductional use permit required them to provide off-street parking for customers. Ex. 9.

Ms. Spicer observed Mr. Patnode remotely start his F-250 approximately 12 times from Thanksgiving of 2015 to March 24, 2016. RP 80; CP 321. She never heard a car alarm sound from one of Mr. Patnode's, or his invitees', vehicles. RP 57. Mr. Patnode removed his F-250 and his daughter's boyfriend's Hummer from the Spicers' side of the street on March 24, 2016. RP 60; RP 360; Ex. 16. The F-250 and Hummer were not parked on the Spicers' side of the street from March 24, 2016 through trial. RP 360. At trial, Ms. Spicer testified that Mr. Patnode had not harassed her or her students since March 24, 2016. RP 124; RP 132-33.

The City of Selah required the Spicers to obtain a major home occupation permit for their music lesson because of increased traffic to their home and violations of the conditional use permit they obtained from Yakima County. Ex. 10. The City of Selah planning department issued a notice of intent to approve the Spicers' major home occupation permit. Ex. 11. In response, the Patnodes filed an appeal and submitted signatures from 48 of the parties' neighbors who joined the Patnodes in opposing the Spicers' major home occupation permit. RP 364; Ex. 12, p.7 (Staff Report p. 6). The Spicers then withdrew their application for a major home occupation. Ex. 13. Junghee Spicer stopped teaching piano lessons from her home after June of 2016 because she was not legally authorized to teach piano lessons from her home after June of 2016. RP 87; Ex. 13.

The Spicers misstate the record when they claim that the court expressly found Mr. Patnode's testimony that contradicted the Spicers' witnesses was not credible. Mr. Patnode requested that the court enter a finding of fact summarizing his testimony, as the court did for the Spicers' witnesses. *See* RP 477-82; CP 321-23. The trial court expressly refused to enter a finding that Mr. Patnode's testimony was not credible. RP 478-79.

II. ARGUMENT

A. Whether Mr. Patnode’s conduct was sufficiently extreme and outrageous to constitute outrage is a question this court determines as a threshold question of law.

The fact that the trial court ruled that Mr. Patnode’s conduct was sufficiently extreme and outrageous to constitute outrage does not compel this court to conclude that reasonable minds could differ as to whether Mr. Patnode’s conduct rises to the level of outrage. The court of appeals determines “the threshold question of law” as to whether conduct is sufficiently outrageous, even after a finder of fact has weighed the evidence and ruled on the issue. *See Robel v. Roundup*, 148 Wn.2d 35, 52, 59 P.3d 611 (2002) (following bench trial, the Supreme Court nonetheless ruled on the “threshold question of law” as to whether reasonable minds could differ that conduct was sufficiently extreme under Washington law); *Saldivar v. Momah*, 145 Wn. App. 365, 390, 186 P.3d 1117 (2008) (holding, after bench trial, that trial court erred because conduct at issue was not “so outrageous in character, [and] so extreme in degree as to go beyond all possible bounds of decency’ and . . . ‘utterly intolerable in a civilized community.’”).

This court should consider the threshold issue of law as to whether Mr. Patnode’s conduct is sufficiently extreme and outrageous in light of

the exceedingly high standard for outrage claims in Washington. *See Robel*, 148 Wn.2d at 51; *Repin v. State*, 198 Wn. App. 243, 267, 392 P.3d 1174 (2017). Further, in making the threshold determination of law, this court should consider only evidence of conduct that Washington law recognizes as a potential basis for an outrage claim.

B. The trial court erroneously considered conduct that occurred outside of Ms. Spicer's presence in ruling that Mr. Patnode's conduct constituted outrage.

Washington law does not support the trial court's determination that Ms. Spicer was a direct recipient of Mr. Patnode's conduct that occurred outside of her presence. To establish outrage when conduct is directed toward a third person, the plaintiff must be present at the time of the alleged outrageous conduct and she must be an immediate family member of the person who is the object of the defendant's actions. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998) (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 60, 530 P.2d 291, 295 (1975) (citing RESTATEMENT (SECOND) OF TORTS § 46, cmt. 1 (1965)); *see Chambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983) (plaintiff must show she personally was either the object of the defendant's actions or an immediate family member who was present at

the time of such conduct) (emphasis added) (citing *Grimsby*, 85 Wn.2d at 59-60). “Such presence is a crucial element of a claim for outrage when the conduct is directed at a third person.” *Lund v. Caple*, 100 Wn.2d 739, 742, 675 P.2d 226 (1984) (citing RESTATEMENT (SECOND) OF TORTS § 46(2)(a)). Under Washington law, a plaintiff is not the “object” of alleged outrageous conduct if she is not present when the conduct occurs.

Washington’s Supreme Court has rejected Ms. Spicer’s argument that a plaintiff can be the “object” of a defendant’s conduct even if she was not present when the conduct occurred. In *Reid*, the court held that a person must be present when conduct occurs to establish outrage. *Reid*, 136 Wn.2d at 204. The plaintiffs in *Reid* were family members who sued Pierce County when medical examiners appropriated photographs of the plaintiffs’ deceased relatives and displayed them to others without permission. *Reid*, 136 Wn.2d at 198-200. Like the Spicers, the *Reid* plaintiffs argued that although they were not physically present when the alleged outrageous conduct occurred, the County nonetheless was liable because “the actions of the County employees were directed toward them.” *Reid*, 136 Wn.2d at 202-03. The Supreme Court rejected the argument that a plaintiff could establish outrage based on conduct that was “directed toward the plaintiff” but that occurred outside the plaintiff’s presence. *Reid*, 136 Wn.2d at 203. Although the court believed the

conduct at issue was sufficiently outrageous, the court refused to overlook the “presence” element and held that the plaintiffs could not maintain an action for outrage. *Reid*, 136 Wn.2d at 203.

In *Lund*, 100 Wn.2d at 742, the court held that the plaintiff husband could not establish outrage because he was not present when the defendant pastor had a sexual relationship with the plaintiff’s wife. The *Lund* court noted that Washington courts have adopted Restatement (Second) of Torts § 46(2), which requires a plaintiff’s presence when conduct is directed to a third party. *Lund*, 100 Wn.2d at 741-42. The Supreme Court also required a plaintiff’s presence to establish outrage in *Schurk v. Christensen*, 80 Wn.2d 652, 656-57, 497 P.2d 937 (1972), where the plaintiff mother was not present when the defendant molested her daughter.

The phrase “object of a defendant’s conduct”, in the context of outrage claims involving conduct directed toward third parties, means a person who actually observed or experienced the defendant’s conduct firsthand, or who was otherwise present when the defendant’s conduct occurred. Comment 1 to the Restatement (Second) of Torts §46 is instructive on conduct directed at a third person: “Where the extreme and outrageous conduct is directed at a third person, as where, for example, a husband is murdered in the presence of his wife, the actor may know that

it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff.” In the Restatement’s example, the murdered husband is the “object” of the defendant’s conduct. Ms. Spicer was not present for the conduct that Aimee Packard, Charlene Cruz, and Jaden Anderson testified they observed. Ms. Spicer was, therefore, not the “object” of the conduct and the court erred in ruling that she was the object of conduct that she was not present for. CP 327.

The Spicers inaccurately cite *Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630 (2003) for the proposition that a court should consider a defendant’s conduct toward third parties, in the plaintiff’s absence, in analyzing an outrage claim. The Spicers misstate the holding in *Kloepfel*. The *Kloepfel* opinion’s fact section merely noted that the defendant called the homes of men who the plaintiff knew, among other conduct that the plaintiff actually experienced. *Kloepfel*, 149 Wn.2d at 194. The court did not state that calls to third parties were evidence of outrageous conduct and did not analyze whether the defendant’s conduct was sufficiently outrageous to warrant liability. *Kloepfel*, 149 Wn.2d at 195-203. At issue in *Kloepfel* was whether a plaintiff must prove objective symptomology to establish outrage. *Id.* *Kloepfel* did not overrule the “presence” element.

The Arkansas, Michigan, and Indiana cases that the Spicers cite do not apply the same standard as Washington courts in analyzing outrage

claims. Nothing in the opinions that the Spicers cite suggest that Arkansas, Michigan, or Indiana law requires a plaintiff to show she was present when the alleged outrageous conduct occurred. *See Grimsby*, 85 Wn.2d at 60. The Arkansas case suggests that, under Arkansas law, a plaintiff need not be present during the outrageous conduct. *Hess v. Treece*, 693 S.W.2d 792, 795-96 (Ark. 1985).

In *Hess*, 693 S.W.2d at 794-95, for over two years, the defendant frequently fabricated complaints to the plaintiff's employer, actually interfered with the plaintiff's ability to do his job, hired people to watch the plaintiff and report on his whereabouts, and abused his position of power as city director to try to get the plaintiff, who was a city employee, terminated. The defendant in *Hess* did not argue that the plaintiff's presence during the alleged outrageous conduct was required, and the court did not analyze whether Arkansas law, like Washington law, requires the plaintiff's presence during the outrageous conduct. *See Hess*, 693 S.W.2d at 796.

Haverbush v. Powelson, 551 N.W.2d 206, 233-35 (Mich. 1996) involved an escalating series of acts over a two-year period that were primarily directed toward and experienced by the plaintiff and that included threats of violence, writing threatening letters, leaving an axe and hatchet on the plaintiff's vehicle after threatening to harm the plaintiff's

girlfriend with an axe, leaving lingerie on the plaintiff's vehicle and at his home, and making unwanted sexual advances.

Mitchell v. Stevenson, 677 N.E.2d 551, 563-64 (Ind. 1997) involved a defendant who, after reaching a settlement agreement with the plaintiffs that gave one of the plaintiffs control over the decedent's gravesite, disinterred the decedent's remains and moved them to a new grave site without telling the plaintiffs in retaliation for the plaintiffs filing a will contest. The court did not analyze whether conduct that occurred outside the plaintiffs' presence could constitute outrage. *Mitchell*, 67 N.E.2d at 563-64. Nothing in the opinion suggests that Indiana law requires a plaintiff's presence during the alleged outrageous conduct.

In addition to applying a different legal standard, the out-of-state cases that the Spicers cite are factually distinguishable. Unlike Mr. Patnode, the defendant in *Hess* held "a position of greater influence, if not actual authority" over the plaintiff, which factored into the court's holding that sufficient evidence supported the jury's verdict finding outrageous conduct. *Hess*, 693 S.W.2d at 796; *cf. Grimsby*, 85 Wn.2d at 59 (courts consider the position the defendant occupied in determining whether conduct is sufficient extreme and outrageous to constitute outrage). Unlike the defendant in *Haverbush*, Mr. Patnode never physically threatened Ms. Spicer and the conduct that the trial court found constituted

outrage did not involve any physical interaction or communication between Mr. Patnode and Ms. Spicer. RP 129, 131; CP 326-28. The conduct in *Hess* and *Haverbush* occurred over a two-year period as opposed to approximately four months. And unlike the defendant in *Mitchell*, Mr. Patnode did not violate a court order; rather, Ms. Spicer testified that he complied with the March 24, 2016 temporary restraining order and did not harass her after that. RP 113; 132. Additionally, Mr. Patnode's conduct in remote-starting his vehicle is nowhere near as despicable as the defendant in *Mitchell* disinterring a person's remains and surreptitiously moving them to another location to spite the decedent's daughter, mother, and sister.

In his Appellant's Brief, Mr. Patnode mistakenly suggested that the court could potentially consider the approximately 12 times that Ms. Spicer observed Mr. Patnode's conduct and the approximately 6 times that Mr. Spicer observed Mr. Patnode's conduct in determining whether Mr. Patnode's conduct was sufficiently extreme and outrageous. Appellant's Brief at pp. 37, 40, 42. But the record does not contain evidence that suggests that Ms. Spicer was present for the approximately six instances that Mr. Spicer observed or that, if she was, they were not included in the approximately 12 instances that she testified to. Accordingly, because Ms. Spicer was present for only approximately 12 instances in which Mr.

Patnode remotely started his F-250, the court must limit its consideration to whether Mr. Patnode remotely starting his F-250 approximately 12 times over approximately four months is sufficiently extreme in nature and degree to constitute outrage. *Reid*, 136 Wn.2d at 203.

C. Reasonable minds could only conclude that Mr. Patnode remotely starting his F-250 approximately 12 times in four months in Ms. Spicer’s presence is not sufficiently outrageous conduct.

Remotely starting a vehicle approximately 12 times over a four-month period is not sufficiently outrageous in character, and is not sufficiently extreme in degree, to constitute outrage. “It is not enough that a ‘defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.’” *Grimsby*, 85 Wn.2d at 59. To constitute outrage, the conduct must have been “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Saldivar*, 145 Wn. App. at 389. “The conduct must be more than insults, indignities, threats, annoyances, petty oppressions or other trivialities.” *Saldivar*, 145 Wn.

App. at 390. “[M]ajor outrage is essential to the tort.” RESTATEMENT (SECOND) OF TORTS § 46, cmt. f.

The trial court found that Mr. Patnode remotely started his F-250 approximately 12 times in Ms. Spicer’s presence. CP 321. From approximately Thanksgiving 2015 to March 24, 2016 is approximately 17 weeks. Accordingly, on average during the course of the approximately 17-week period, Ms. Spicer observed Mr. Patnode remotely start his F-250 less than once per week. Ms. Spicer never observed any of the vehicles’ alarms sounding. RP 57.

The defendants’ conduct in *Phillips v. Hardwick*, 29 Wn. App. 382, 628 P.2d 506 (1981) was more egregious than remotely starting a pickup less than once per week for approximately 17 weeks. In *Phillips*, the plaintiff buyers contracted to purchase the defendant sellers’ residence. *Phillips*, 29 Wn. App. at 384. Because construction on the sellers’ new home was not completed by closing, the buyers agreed to lease the property to the sellers until the earlier of December 1 or the date that the sellers vacated the property. *Phillips*, 29 Wn. App. at 384. On November 30, the sellers told the buyers they could not be out by December 1. *Phillips*, 29 Wn. App. at 384. On December 2, the sellers told the buyers they were not going to be out by December 3 and there was nothing the

buyers could do about it since the sellers were tenants who had a right to notice before eviction. *Phillips*, 29 Wn. App. at 384.

On December 3, the buyers saw that the house appeared vacant so they arranged for 16 friends to help them move on December 4. *Phillips*, 29 Wn. App. at 384. On December 4, the buyers moved a car-load of furniture to the house and left to retrieve another load. *Phillips*, 29 Wn. App. at 384. When the buyers returned, the sellers and two sheriff's deputies were at the house and a dispute arose regarding who had the right to possession. *Phillips*, 29 Wn. App. at 384-85. After a lengthy dispute, and although the sheriff's deputies told the sellers they did not have the right to possession, the sellers refused to move out and one of the sellers spent the night at the house, despite the fact that the house was empty. *Phillips*, 29 Wn. App. at 385. The buyers were forced to retrieve all of their possessions they had brought to the house and move them back to their old house. *Phillips*, 29 Wn. App. at 385. The sellers moved out permanently on December 5. *Phillips*, 29 Wn. App. at 385. The buyers filed an action against the sellers for unlawful detainer and outrage the next day. *Phillips*, 29 Wn. App. at 385.

The court held that that substantial evidence supported the trial court's finding of outrage based on the sellers' actions on December 4 in requiring the buyers to remove all their furniture and possessions when

sellers had no intention of continuing to reside in the house and knew that the buyers had rented their other house and that the intentional delay would result in the buyers being unable to move. *Phillips*, 29 Wn. App. at 389. The delay caused the buyers damages and prevented them from enjoying their new house for the holiday season. *Phillips*, 29 Wn. App. at 389. The court noted that the sellers “compounded the issue” by summoning the sheriff’s deputies and insisting they had a right to possession. *Phillips*, 29 Wn. App. at 389.

Although the defendant’s conduct in *Phillips* is more outrageous than remotely starting a vehicle in that it involved face-to-face disputes in the presence of law enforcement and caused actual damages to the plaintiffs, *Phillips* is likely the low bar for conduct that constituted outrage in Washington. *Phillips* was decided only 6 years after Washington adopted the tort of outrage in *Grimsby*. The *Phillips* court relied largely on a factually similar Colorado case, except unlike the defendant in *Phillips*, the defendants in the Colorado case also caused physical damage to the property. *Phillips*, 29 Wn. App. at 338-89. In the 37 years that Washington law on outrage has developed since *Phillips* was decided, Washington courts have clarified that “the standard for an outrage claim is . . . very high (by which [the court] mean[t] that the conduct supporting the claim must be appallingly low). . . .” *Robel*, 148 Wn.2d at 51. This

court has recently recognized that “[t]he requirement for outrageousness is not an easy one to meet” and that “[t]he level of outrageousness required is extremely high.” *Repin*, 198 Wn. App. at 267.

Mr. Patnode’s conduct in remotely starting his F-250 in Ms. Spicer’s presence is, at most, irritating, annoying, or discourteous. *See Saldivar*, 145 Wn. App. at 390. His conduct was not so outrageous in character and extreme in degree as to constitute outrage. *Grimsby*, 85 Wn.2d at 59; *Saldivar*, 145 Wn. App. at 390. Reasonable minds could not differ that Mr. Patnode remotely starting his F-250 approximately 12 times over four months was not so outrageous in character and extreme in degree as to constitute outrage.

D. The record does contain substantial evidence to support the court’s finding that Ms. Spicer suffered severe emotional distress.

Substantial evidence does not show that Ms. Spicer suffered sufficiently severe emotional distress to establish outrage. “‘Emotional distress’ includes ‘all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.’” *Kloepfel*, 149 Wn.2d at 203 (quoting RESTATEMENT (SECOND) OF TORTS, §46, cmt. j). “[L]iability arises only when the emotional distress is extreme.” *Sutton v. Tacoma*

Sch. Dist. No. 10, 180 Wn. App. 859, 324 P.3d 763 (2014). The “severe emotional distress” required to establish outrage is emotional distress that is so severe “that no reasonable man could be expected to endure it.” *Kloepfel*, 149 Wn.2d at 203.

The severity of Ms. Spicer’s claimed emotional distress is unreasonable and unjustified. Claimed severe emotional distress “must be reasonable and justified under the circumstances,” and liability for exaggerated and unreasonable emotional distress arises only if it “results from a peculiar susceptibility to such distress of which the actor has knowledge.” RESTATEMENT (SECOND) OF TORTS §46 cmt. j. A reasonable person would not have suffered severe emotional distress as a result of observing their neighbor with whom she had a four-year ongoing dispute remotely starting his pickup approximately 12 times during a four-month period, even while in the presence of young students. Mr. Patnode’s F-250 was no louder than an ordinary diesel truck. RP 223. Ms. Spicer testified that Mr. Patnode remotely starting his vehicle only scared her because she conceived that he would “go to the next level” and hurt someone. RP 131. The record shows that Mr. Patnode never threatened physical harm to anyone, and that he was not physically present and had no interaction with Ms. Spicer during the approximately 12 times that Ms. Spicer observed his F-250 remotely start. RP 57; RP 80; RP 129-31.

Nothing in the record suggests that Ms. Spicer was peculiarly susceptible to severe emotional distress or that Mr. Patnode knew she was.

Additionally, Ms. Spicer is not entitled to a presumption or inference of severe emotional distress because the record does not support a finding that Mr. Patnode engaged in extreme and outrageous conduct and that he intentionally or recklessly inflicted emotional distress on Ms. Spicer. *See Sutton*, 180 Wn. App. at 873 (in absence of direct evidence of severe emotional distress, severe emotional distress can “be fairly presumed” if first two elements of outrage are established).

This court should reject Ms. Spicer’s attempt to draw an analogy between the severity of emotional distress she suffered and the severity of the emotional distress the *Kloepfel* plaintiff suffered. In *Kloepfel*, the defendant, who was plaintiff’s ex-boyfriend, engaged in extreme protracted conduct that included threatening to kill her while he was under a no contact order, violating no contact orders, threatening to kill the man she was dating, calling her home 640 times, and calling her work 100 times. 149 Wn.2d at 194. The court held “no rational person could endure the constant harassment [she suffered] without suffering severe emotional distress.” *Kloepfel*, 149 Wn. 2d at 202. The defendant’s conduct in *Kloepfel* is far more extreme than Mr. Patnode’s conduct.

The severity of emotional distress suffered by the plaintiff in *Hess* is also distinguishable. The police officer in *Hess* endured two years of consistent harassment from the defendant, who eventually became his superior at work. *Hess*, 693 S.W.2d at 794-95. The defendant's conduct interfered with the plaintiff's ability to do his job and, fearing for his family's safety, he instituted safety measures and changed his lifestyle because of his fear. *Hess*, 693 S.W.2d at 795. Mr. Patnode's conduct in remotely starting a vehicle was much less severe than the defendant's conduct in *Hess*, and lasted only for approximately four months, as opposed to two years. He did not actually interfere with Ms. Spicer's ability to do her job, unlike the defendant's conduct in *Hess* that caused internal police investigations and subjected him to constant scrutiny from his superiors. CP 326-27; *Hess*, 693 S.W. 2d at 794. Nothing in the record suggests that Mr. Patnode stalked Ms. Spicer, that Ms. Spicer took security measures to protect herself or her family, or that her claimed fear of physical harm was rational. Additionally, Mr. Patnode did not occupy a position of authority over Ms. Spicer like the defendant in *Hess*. 493 S.W.2d at 441.

Ms. Spicer's exaggerated and unreasonable reaction to Mr. Patnode's conduct cannot, in and of itself, establish severe emotional distress. A defendant's conduct, not the degree of the plaintiff's distress,

“primarily limits claims for intentional infliction of emotional distress.” *Kloepfel*, 149 Wn.2d at 202. Substantial evidence in the record does not support a finding that Ms. Spicer suffered severe emotional distress.

E. Finding of Fact No. 23 is not supported by substantial evidence and is an improper finding.

Contrary to Ms. Spicer’s assertion, Mr. Patnode objected to the trial court incorporating Judge Gibson’s oral ruling into its findings of fact. CP 277-78; RP 486. A trial court’s oral ruling on a motion is not a proper finding of fact and is not binding “unless it is formally incorporated into findings of fact, conclusions of law, and judgment.” *State v. Hescok*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). Judge Gibson’s oral ruling at the hearing on the anti-harassment petition was not incorporated into his written findings and order. Ex. 4. Judge Harthcock taking judicial notice of Judge Gibson’s nonbinding oral ruling does transform Judge Gibson’s nonbinding oral ruling into a finding of fact. *Hescok*, 98 Wn. App. at 600 (a court’s oral ruling is not a finding of fact).

Judge Gibson expressly found unlawful harassment, but Finding of Fact No. 23 improperly elevates Judge Gibson’s oral ruling to evidence in support of the trial court’s finding despite the fact that Judge Gibson’s oral ruling is not record evidence. Additionally, the severity of conduct and

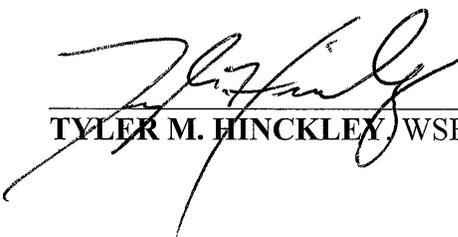
emotional distress required to establish outrage is much higher than what is required to establish unlawful harassment. *Compare* RCW 10.14.020 *with Reid*, 136 Wn.2d at 202-03; *Repin*, 198 Wn. App. at 265.

III. CONCLUSION

No reasonable fact finder could conclude that Mr. Patnode's conduct that occurred while Ms. Spicer was present was sufficiently outrageous and extreme to rise to the level of outrage. Additionally, the record does not support a finding that Ms. Spicer suffered sufficiently severe emotional distress to establish outrage. Based upon the above, and the arguments raised in his Appellant's Brief, Mr. Patnode respectfully requests this court to reverse the trial court's judgment against Mr. Patnode intentional infliction of emotional distress and hold that the record does not support a finding of outrage as a matter of law.

Respectfully submitted this 27th day of December, 2018.

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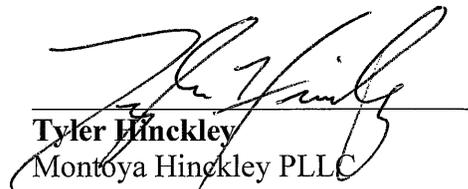
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