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Court of Appeals  
Division III  
State of Washington  
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No. 360652

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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PAUL PATNODE

Appellant

v.

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

Respondents

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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error<sup>1</sup>**

1. The trial court erred in ruling that Ms. Spicer established her outrage claim against Paul Patnode. CP 327-28.

2. The trial court erred in concluding, in Conclusion of Law No. 6, that Mr. Patnode's conduct in remotely starting his Ford F-250 diesel pickup truck (F-250) and in causing a car alarm to sound between Thanksgiving 2015 and March 24, 2016, when Ms. Spicer and her students and their parents were walking by the truck, is outrageous conduct, that Mr. Patnode knew his conduct would cause Ms. Spicer severe emotional distress and intended to cause her severe emotional distress, and that Ms. Spicer suffered severe emotional distress as a result of Mr. Patnode's conduct. CP 327.

3. The trial court erred in entering Finding of Fact No. 7. CP 318. To the extent that the court's finding is limited to the number of students taught per month, substantial evidence shows that Ms. Spicer taught students piano lessons on a weekly basis for an entire month. CP 112-24; *see* RP 91; RP 125-26. The number of students per week was the same as students per month. CP 112-24; *see* RP 91; RP 125-26.

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<sup>1</sup> All assignments of error related to specific findings of fact refer to findings of fact contained in the Amended Findings of Facts, Conclusions of Law and Order. CP 317-328.

4. The trial court erred in entering Finding of Fact No. 9. CP 319. To the extent that the court found that Mr. Patnode complained only once to the Spicers in February 2012, substantial evidence shows that he complained to them more than once before complaining to Yakima County. RP 302-08.

5. The trial court erred in entering Finding of Fact No. 11. CP 319. Substantial evidence shows that he was more than five feet away from Ms. Swart and her children and that he was attempting to document violations of the Spicers' conditional use permit. RP 273; RP 284; RP 328-29; Ex. 36. Substantial evidence does not support the finding that Mr. Patnode taking pictures of the conditional use permit violation scared Ms. Swart's 12-year-old daughter, as opposed to the verbal interaction between Mr. Patnode and Ms. Swart that Ms. Swart initiated. RP 273-77; RP 283-84; RP 328-29.

6. The trial court erred in entering Finding of Fact No. 16 (CP 320), to the extent that the last sentence of Finding of Fact No. 16 suggests that the Spicers and Yakima Arts Academy, LLC (YAA) YAA ultimately moved all piano lessons as a result of Mr. Patnode's conduct. Substantial evidence shows that Ms. Spicer, through YAA, continued to teach lessons from the Spicers' home through June of 2016 and that Ms. Spicer knew that the Spicers and YAA did not have authority to teach music lessons

out of the Spicers' home after June of 2016. RP 87; RP 91; RP 113-14; Ex. 10; Ex. 13.

7. The trial court erred in entering Finding of Fact No. 18. CP 321. Substantial evidence does not support a finding that the box truck and sedan were parked along the sidewalk on the Spicers' side of the street more than once or twice from Thanksgiving 2015 to April of 2016, or that the box truck was ever parked there overnight. RP 347-51.

8. The trial court erred in entering Finding of Fact No. 19. CP 321. Substantial evidence does not support the finding that Mr. Patnode "regularly and repeatedly" remotely started his F-250 pickup and repeatedly set off his vehicle alarm. There is no substantial evidence in the record to support the finding that students were frightened while they were with Ms. Spicer when the F-250 was remotely started. No students testified that they were frightened or that they were with Ms. Spicer when the truck was remotely started.

9. The trial court erred in entering Finding of Fact No. 20. CP 321. The finding of fact merely recites what Ms. Packard testified to. The court did not enter specific findings of fact with respect to the substance of her testimony. Substantial evidence does not support Ms. Packard's testimony that the F-250's engine "revved", as opposed to merely starting up. RP 344. Substantial evidence does not support the finding that Ms.

Spicer taught lessons to Ms. Packard's children at the Packard's home solely because of her concerns related to the F-250 remotely starting and car alarms sounding. RP 150-51. YAA offered lessons locations other than the Spicers' home at the time. RP 91-93.

10. The trial court erred in entering Finding of Fact No. 21. CP 322. The finding of fact merely summarizes Mr. Anderson's testimony. The court did not enter specific findings of fact with respect to the substance of his testimony.

11. The trial court erred in entering Finding of Fact No. 22. CP 322. The finding of fact merely summarizes Ms. Cruz's testimony. The court did not enter specific findings of fact with respect to the substance of her testimony.

12. The trial court erred in entering Finding of Fact No. 23. CP 322.

13. The trial court erred in entering Finding of Fact No. 26. CP 323. The finding of fact merely summarizes Ms. Spicer's testimony and contradicts the court's findings and conclusions that she and YAA did not lose any customers because of Mr. Patnode. CP 324; CP 327.

14. The trial court erred in entering Finding of Fact No. 27. CP 324. The finding of fact merely summarizes Ms. Spicer's testimony and

contradicts the court's findings and conclusions that she and YAA did not lose any customers because of Mr. Patnode. CP 324; CP 327.

15. The trial court erred in entering Finding of Fact No. 31. CP 325. The Spicers and YAA were teaching music lessons at alternative locations long before Thanksgiving of 2015. RP 91-93; RP 96-97; RP 127-28; Ex. 7; Ex. 32. Teaching at the students' homes also allowed Ms. Spicer to teach more than the 30 students per week allowed under her conditional use permit. RP 91-92. She continued to teach lessons out of her home for many of her students through June of 2016. RP 61; RP 91; Ex. 18, p. 178. The City of Selah did not authorize her to teach students from her home after June of 2016. RP 87; Ex. 10; Ex. 11.

16. The trial court erred in entering Finding of Fact No. 32. CP 325.

17. The trial court erred in entering Finding of Fact No. 33. CP 326.

18. The trial court erred in entering Finding of Fact No. 34. CP 326.

**B. Issues Pertaining to Assignments of Error**

1. Whether substantial evidence supports the court's finding that Mr. Patnode "regularly and repeatedly" remote started his F-250

pickup and remotely set off his vehicle alarm when students and their parents were walking to and from lessons at the Spicers' house when, over the period of four months, Ms. Spicer observed Mr. Patnode remotely start his vehicle approximately 12 times, Mr. Spicer observed Mr. Patnode's F-250 being remotely started approximately 6 times, two parents witnessed the F-250 being remote started several times and heard the car alarm sound several times out of Ms. Spicer's presence, and one student claimed—although the trial court did not find—that he observed the F-250 being remote started numerous times, outside of Ms. Spicer's presence, during the four-month period?

2. Whether the trial court erred in determining that Mr. Patnode's conduct in parking vehicles on the Spicers' side of the street and remotely starting his F-250 or remotely activating a car alarm at various times when Ms. Spicer, her students, or their parents walked by the vehicle during an approximately four-month period is outrageous conduct?

3. Whether substantial evidence supports the trial court's finding that Ms. Spicer was the direct recipient of Mr. Patnode's conduct even though she was not present for, and did not observe, more than approximately 12 instances of Mr. Patnode's F-250 being remotely started and never heard the car alarm, David Spicer observed the F-250 remote starting approximately six times, and Ms. Spicer was not an immediate

family member of any student or parent who observed the F-250 remotely starting or a car alarm sounding?

4. Whether the trial court erred in concluding that Mr. Patnode's conduct in remote starting his F-250 and sounding a vehicle alarm was directed at Ms. Spicer when she was not present for, and did not observe, more than approximately 12 instances of Mr. Patnode's F-250 being remotely started and never heard the car alarm, David Spicer observed the F-250 remote starting approximately six times, and was Ms. Spicer not an immediate family member of any student or parent who observed Mr. Patnode's conduct?

5. Whether substantial evidence supports the trial court's finding that Ms. Spicer suffered severe emotional distress as a result of Mr. Patnode parking vehicles on the street alongside the Spicers' house from Thanksgiving 2015 to March 24, 2016, and remote starting his F-250 pickup and remotely setting off the vehicle alarm when she claimed she was scared, upset, and afraid that Mr. Patnode may harm her, her family, or her students, because his conduct in remoting starting his car made her concerned that he might "take the next step" and physically harm somebody, although she admitted that Mr. Patnode's conduct in remote starting his vehicle, in and of itself, did not make her fearful that he would harm her, her family, or her students, and he never actually threatened her,

her family, or her students with physical harm and never physically harmed her, her family, or her students?

6. Whether the trial court erred in concluding that the emotional distress that Ms. Spicer suffered was sufficiently severe to establish the tort of outrage when she claimed she was scared, upset, and afraid that Mr. Patnode may harm her, her family, or her students, because his conduct in remotely starting his car made her concerned that he might “take the next step” and physically harm somebody, despite the fact that she admitted that Mr. Patnode’s conduct in remote starting his vehicle, in and of itself, did not make her fearful that he would harm her, her family, or her students, and that he never threatened her, her family, or her students with physical harm and never physically harmed her, her family, or her students?

7. Whether the trial court erred in concluding that the emotional distress that Ms. Spicer suffered was sufficiently severe to establish the tort of outrage when Ms. Spicer began taking antianxiety medication long before the conduct the court concluded constituted outrage occurred, and when she was taking more antianxiety medication at the time of trial than she was during the time of the conduct the court concluded constituted outrage occurred, despite the fact that she claimed that Mr. Patnode did not harass her after March 24, 2016?

8. Whether substantial evidence supports the trial court's finding that Mr. Patnode's conduct caused the Spicers and YAA to move their music lesson business to various other locations when the conduct that the court ruled constituted outrage occurred between approximately Thanksgiving 2015 and March 24, 2016, and the Spicers and YAA began renting additional space to conduct lessons in September of 2014, the Spicers conducted lessons at a church in 2012 and 2013, the City of Selah required the Spicers to obtain a major home occupation permit, and the Spicers withdrew their application for a major home occupation and leased another space to provide lessons thereafter?

## **II. STATEMENT OF THE CASE**

Paul and Melissa Patnode live across Lyle Loop Road from Junghee and David Spicer, in a Selah, Washington residential neighborhood. Clerk's Papers (CP) 319; Report of Proceedings (RP) 296; Ex. 15; Ex. 52. Mr. Patnode moved into his house in 2005 and the Spicers moved into their house across the street from Mr. Patnode in 2006. CP 318.

The Spicers are music teachers. CP 318. In 2009, Ms. Spicer began teaching private piano lessons to four or five students per week at the Spicers' house. RP 25; CP 318. Ms. Spicer taught mostly children.

RP 25; CP 318. In 2012, Ms. Spicer expanded her piano lesson business and began taking on more students. CP 318.

In early 2012, Mr. Patnode complained to the Spicers on two occasions about the increase in traffic and noise in the neighborhood from Ms. Spicer's customers, about her customers using his driveway to turn around, and about her customers running over and breaking a sprinkler in his front yard. RP 302-06; CP 319. The Spicers did nothing to address Mr. Patnode's concerns. RP 308; RP 310; CP 319. Ms. Spicer continued to add additional piano students. RP 308; CP 318.

Mr. Patnode complained to Yakima County Public Services about the Spicers' home business in June of 2012. RP 289; RP 309; CP 319; Ex. 27. Yakima County required the Spicers to obtain a conditional use permit for their home-based, private piano instruction business. RP 27; Ex. 27; Ex. 30. The July 11, 2012 conditional use permit limited the number of students the Spicers could teach and, among other things, provided that "[a]ny need for customer parking created by the minor home occupation shall be provided off street." Ex. 8, p. 31. Yakima County issued a modified conditional use permit on August 24, 2012 that allowed the Spicers to teach one additional student per day and expanded the permissible hours and dates operation. Ex. 9. The modified conditional

use permit also required the Spicers to provide off-street parking for customers. Ex. 9, p. 37.

Shortly after Mr. Patnode complained to Yakima County about the Spicers' business, Ms. Spicer complained to Yakima County Animal Control about Mr. Patnode's dogs. RP 310-11. In July of 2012, Ms. Spicer contacted Yakima County Code Enforcement and alleged that Mr. Patnode had illegally created an apartment in his house. RP 312. A Yakima County Code Enforcement officer inspected Mr. Patnode's house. RP 312. The County took no action against Mr. Patnode on either complaint. RP 312.

Also in July of 2012, Ms. Spicer sought and obtained an anti-harassment protection order against Mr. Patnode. CP 320; Ex. 2. Mr. Patnode had asked a parent of Ms. Spicer's student to slow down on the street and had asked another parent not to use his driveway as a turnaround. RP 314-15. The 2012 anti-harassment protection order stated that "[Mr. Patnode] shall not contact people parking on sidewalk along [Ms. Spicer's] property." Ex. 2, p. 7. At that time, however, the Spicers' conditional use permit required the Spicers to provide off-street parking for their customers, implicitly forbidding the Spicers from allowing their customers to park in the street, next to the sidewalk along the Spicers' property. Ex. 8.

Approximately a month or two after Ms. Spicer obtained the anti-harassment protection order against Mr. Patnode, Mr. Patnode applied for an anti-harassment order against Ms. Spicer. RP 316. Before the hearing on Mr. Patnode's petition, the parties agreed that Ms. Spicer would withdraw her anti-harassment order against Mr. Patnode if he agreed to withdraw his petition for an anti-harassment order. RP 317.

Mr. Patnode continued to complain to Yakima County about the Spicers violating their modified conditional use permit. RP 320-21. Specifically, he complained that Ms. Spicer's students' parents continued to park in the street between the Patnodes' and Spicers' houses to drop off and pick up students, that the Spicers were offering lessons for other instruments in addition to piano, and that lessons were occurring outside the permitted hours. RP 320-22; Ex. 27. Yakima County Code Enforcement Officer, Janna Jackson, instructed Mr. Patnode to document the alleged violations and provide evidence to Yakima County Code Enforcement. RP 290-91. Mr. Patnode took notes, saved video footage from his home security video surveillance system, and took photographs of perceived violations with his cell phone. RP 322. For several months, he continued to provide Yakima County Code Enforcement with photographs and video footage documenting violations of the modified conditional use permit. RP 323-24; Ex. 27.

On January 18, 2013, Yakima County denied the Spicers' request to further modify her conditional use permit to allow her teach piano lessons before noon. Ex. 25; Ex. 26. In denying the Spicers' modification application, Yakima County noted that the Spicers were in violation of the modified conditional use permit by teaching outside of the conditioned hours of operation, that music could be heard across the street within a neighbor's yard, and that Yakima County received reports from neighbors about the Spicers' business interfering with the residential use of the their properties. Ex. 26. Ms. Spicer admitted to Yakima County Code Enforcement Officer, John Walkenhauer, that she was teaching piano lessons outside of permitted hours, although she claimed she did not know she could not teach morning classes. RP 94; Ex. 27, p. 288. She also conducted morning rehearsals at her house for her students, and morning interviews for prospective students. RP 108-09.

In December of 2012, Mr. Patnode filed a lawsuit against the Spicers alleging that the Spicers' home business violated the parties' housing development's covenants, conditions, and restrictions (CCRs). RP 73; CP 320. The court dismissed Mr. Patnode's complaint on the Spicers' summary judgment motion. RP 74; CP 320.

In 2014, the City of Selah annexed the parties' neighborhood. RP 330-31; CP 319. The City of Selah believed that the August 24, 2012

conditional use permit continued to govern the Spicers' home business after annexation. CP 319-20. Mr. Patnode began complaining to the City of Selah about violations of the Spicers' conditional use permit and continued to document violations and provide documentation to the City of Selah, at the City's request. RP 328-30; RP 333-34; CP 319-20; Ex. 36.

On September 8, 2014, the Spicers formed Yakima Arts Academy, LLC (hereinafter, "YAA"). CP 320. From that point on, Ms. Spicer taught all of her piano lessons through YAA. RP 96; CP 320. Beginning September 1, 2014, YAA leased space in Yakima and began teaching piano lessons at that location in addition to teaching lessons from the Spicers' house. RP 64-65; RP 97; CP 320. The Spicers had previously taught lessons at a church, in addition to their house. RP 93; Ex. 32.

Around Thanksgiving 2015, Mr. Patnode parked his Ford F-250 diesel pickup truck and his daughter's Hummer SUV on the street between the parties' houses, along the sidewalk on the Spicers' side of the street. RP 52; RP 340; RP 347; CP 321; Ex. 39; Ex. 52. Mr. Patnode's F-250 had a remote start module that allowed him to start his truck remotely. RP 339-40. He could not remotely start the Hummer. RP 347.

Shortly after Mr. Patnode parked the F-250 and Hummer on the Spicers' side of the street, Ms. Spicer wrote Mr. Patnode a sarcastic note about parking the F-250 and Hummer on the Spicers' side of the street and

placed the note in Mr. Patnode's mailbox. RP 75-76; Ex. 33. Ms. Spicer knew it was not illegal for Mr. Patnode to park vehicles on the Spicers' side of the street, and she never discussed with Mr. Patnode her displeasure with him parking vehicles on the Spicers' side of the street. RP 76.

Ms. Spicer first observed Mr. Patnode's F-250 being remotely started in December of 2015. RP 79. From December of 2015 through March 24, 2016, at the latest, Ms. Spicer observed the F-250 remotely starting approximately 12 times. RP 80; CP 321. Ms. Spicer observed the F-250 start when she walked by the truck as she was walking students out after lessons or walking them in before their lessons. RP 57. Mr. Patnode was not in the F-250 when Ms. Spicer observed the truck remotely starting. RP 57. Ms. Spicer observed the F-250 remotely starting about six times from Thanksgiving 2015 through March 24, 2016. RP 224; CP 321. Ms. Spicer never heard the F-250's or the Hummer's alarm sound. RP 57.

During the winter of 2015-2016, Mr. Patnode watched Mr. Spicer intentionally use his snow blower to blow snow off of the sidewalk into Mr. Patnode's F-250 and his daughter's Hummer. RP 353.

In March of 2016, Ms. Spicer filed a petition for an anti-harassment order against Mr. Patnode based on him parking vehicles on

the Spicers' side of the street and remote starting the F-250. CP 322; Ex. 3. The Yakima County Superior Court entered a temporary protection order on March 10, 2016 preventing Mr. Patnode from being within twenty feet of the Spicers' property line. Ex. 3. On March 24, 2016, the court modified the temporary order by reducing the restriction to fifteen feet from the Spicers' property, requiring Mr. Patnode to remove his vehicles from the Spicers' side of the street, and prohibiting him from remote starting any vehicle on the Spicers' side of the street or causing a car alarm to sound. Ex. 16. Mr. Patnode moved the F-250 and the Hummer from the Spicers' side of the street on March 24, 2016. RP 360.

On April 5, 2016, the court entered an anti-harassment protection order in favor of Ms. Spicer and against Mr. Patnode. Ex. 4. The trial court took judicial notice that, following a hearing, the Yakima County Superior Court orally concluded that Mr. Patnode was remotely starting his F-250 and setting off vehicle alarms on purpose, repeatedly, to harass the Spicers and make their lives more difficult. CP 322. The April 5, 2016 anti-harassment order provided that "Mr. Patnode shall not park any of his vehicles, [and] people living at Mr. Patnode's residence shall not park their vehicles on the street adjacent to the Spicers' residence; Mr. Patnode shall disconnect the remote start alarm module; The 15 foot restriction in [the] 3/24/16 order is stricken." Ex. 4.

Mr. Patnode complied with the April 5, 2016 anti-harassment order. RP 60; RP 362. Ms. Spicer testified that Mr. Patnode did not harass her or her students after March 24, 2016. (RP 124).

On March 23, 2016, the City of Selah informed the Spicers that because they were offering lessons beyond the scope of what was allowed under their conditional use permit, because traffic to their home had increased beyond what was originally permitted, and because the Spicers' customers were parking on the roadway and not off-street, the City of Selah would require them to submit an application for a major home occupation. Ex. 10. The Spicers applied for a major home occupation, which would allow YAA to continue to operate out of their home. RP 113; Ex. 11. On April 25, 2016, the City of Selah published notice of its intent to approve the Spicers' application with conditions, including requiring the Spicers' customers to park in the Spicers' driveway only and to offer lessons for only five hours per day. Ex. 11, p. 43. The Patnodes appealed the notice of intent to approve the major home occupation, and 47 other people in the parties' neighborhood signed a petition in support of the Patnodes' appeal. RP 364; Ex. 12, p. 56.

Ms. Spicer, through YAA, taught lessons out of the Spicers' house through June of 2016. RP 91; RP 113-14. On July 5, 2016, the Spicers withdrew their application for a major home occupation with the City of

Selah. RP 87; Ex. 13. At that point, the Spicers believed that YAA no longer had authority to operate a home piano lesson business out of the Spicers' home. RP 87. In September of 2016, YAA began providing music lessons at locations in Gleed and Yakima, Washington. CP 325.

On May 24, 2016, the Spicers filed this lawsuit against Mr. Patnode. CP 3-8. The Spicers filed an amended complaint, adding YAA as a party, on January 13, 2017. CP 17. The Spicers and YAA claimed that Mr. Patnode tortiously interfered with their contractual relationships with their customers. CP 20-21. The Spicers brought a claim against Mr. Patnode for intentional infliction of emotional distress. CP 21-22.

The trial court entered partial summary judgment for the Spicers and YAA and ruled, on collateral estoppel grounds based on the court's findings in the hearing that resulted in the April 5, 2016 anti-harassment order, that:

As a matter of law, the defendant (1) engaged in a knowing and willful course of conduct directed at plaintiff Junghee Spicer in the fall 2015 and continuing to the spring of 2016; (2) the conduct of defendant seriously alarmed, annoyed, harassed or was detrimental to plaintiff Junghee Spicer; (3) the conduct of defendant served no legitimate or lawful purpose; and (4) the conduct of defendant was of such a nature as would cause a reasonable person to suffer substantial emotional distress; and (5) the conduct of defendant actually caused substantial emotional distress to plaintiff Junghee Spicer.

CP 158-60; CP 324.

At trial, Ms. Spicer testified that Mr. Patnode's conduct between 2012 and 2016 caused her emotional distress and that as a result of Mr. Patnode's conduct from 2012 to 2016, she was fearful for her safety, for the safety of her children, and for the safety of her students. RP 71. She testified that she was scared that Mr. Patnode would harm her, her family, or her students. RP 131. Ms. Spicer admitted that Mr. Patnode remote starting his vehicle did not harm her, but claimed it scared her because she was concerned that Mr. Patnode would "go to the next step and actually physically harm somebody." RP 131. Mr. Patnode never threatened physical harm to, or physically harmed, Ms. Spicer, Mr. Spicer, their children, or their students. RP 129; RP 131.

Ms. Spicer claimed that Mr. Patnode caused her to suffer from anxiety and insomnia, and that she began taking antianxiety medication in 2013. RP 71; RP 132. At some time after Mr. Patnode began remote starting his F-250, Ms. Spicer began to take an additional antianxiety medication. RP 132; CP 326. As of the trial in this matter, Ms. Spicer was taking a third antianxiety medication, even though she testified that Mr. Patnode had not harassed her since before March 24, 2016, almost 22 months before trial. RP 132; CP 326.

Two parents and one student testified that they observed Mr. Patnode's F-250 remotely starting on multiple occasions from

Thanksgiving 2015 to March 24, 2016 when they arrived at or left the Spicers' house for piano lessons. RP 146-49; RP 152; RP 211-12; RP 260. Aimee Packard, a parent of five students, testified she observed the F-250 remotely start, including the headlights turning on, three times. RP 145-46; RP 148-49; RP 152. Charlene Cruz, a student's parent, testified that she observed the truck remotely starting and heard a car alarm sounding when she dropped her daughter off for lessons on multiple occasions. RP 260; RP 262-63. Jaden Anderson, one of Ms. Spicer's students, testified that every time he had a music lesson from Thanksgiving of 2015 to April of 2016, a car alarm sounded and the F-250 was remotely started and blowing exhaust on his pant leg. RP 211-12; RP 214-15. Mr. Patnode denied intentionally starting the F-250 to scare or harass the student, and testified that given that the F-250 was parked in differing positions, sometimes with its exhaust pointing toward the street and not the sidewalk, it was not possible that the F-250 blew exhaust on the student every time the student walked by the truck. RP 342. The trial court did not enter findings of fact related to the substance of Mr. Anderson's testimony. CP 322. The parents did not take their children out of lessons with Ms. Spicer and Mr. Anderson did not quit taking lessons from Ms. Spicer. RP 153-54; RP 215; RP 264.

The trial court found that Mr. Patnode did not cause any of the Spicers' or YAA's customers to breach or terminate their contracts with the Spicers or YAA, and that Mr. Patnode did not cause the Spicers or YAA to lose business, lose a referral, or suffer reputation damage. CP 324-25. The court found that Mr. Patnode did not cause the Spicers or YAA to suffer damages as a result of any breach or termination of any contract with their customers, or as a result of lost business, lost referrals, or reputation damage. CP 325. Accordingly, the court ruled that the Spicers and YAA failed to prove their tortious interference claims. CP 327.

The court found that Ms. Spicer suffered severe emotional distress as a result of Mr. Patnode parking vehicles on the street alongside the Spicers' house from approximately Thanksgiving 2015 to March 24, 2016 and regularly and repeatedly remote starting his F-250 pickup and remotely setting off a vehicle alarm while Ms. Spicer or her students or their parents walked by the truck. CP 325-26. The court found that Mr. Patnode's conduct was intentional and that he sought to interfere with the Spicers' music business. CP 326. Despite acknowledging that Ms. Spicer was not present for each instance in which Mr. Patnode remote-started his F-250 or set off the vehicle alarm, the court found that Ms. Spicer was the "direct recipient" of Mr. Patnode's conduct. CP 326. The trial court

further found that Ms. Spicer was fearful for her safety and for the safety of her students, and that she suffered insomnia and anxiety as a result of Mr. Patnode's conduct. CP 326.

The court ruled that Mr. Patnode's conduct in remote starting his F-250 and remotely setting off the car alarm, where students and their parents were walking to and from lessons at the Spicers' house, was outrageous conduct that was directed at Ms. Spicer and that went beyond all possible bounds of decency, and was atrocious and utterly intolerable in a civilized society. CP 327. Additionally, the court ruled that Mr. Patnode's conduct was intentional, that he knew it would cause Ms. Spicer emotional distress, and that his conduct in fact caused Ms. Spicer to suffer severe emotional distress. CP 327-28. Accordingly, the court determined that Ms. Spicer established her claim for outrage and awarded her \$40,000 in emotional distress damages against Mr. Patnode. CP 328.

Mr. Spicer failed to establish his outrage claim because he admittedly did not suffer severe emotional distress as a result of Mr. Patnode's conduct. RP 245-46; CP 326; CP 328.

The court entered judgment for Ms. Spicer, against Mr. Patnode, for \$40,000. CP 300. Mr. Patnode moved for reconsideration, arguing that the damages award was excessive. CP 304-07. The trial court denied Mr. Patnode's motion for reconsideration. CP 309.

### III. ARGUMENT

#### A. Standard of Review

Where the trial court has weighed the evidence, this court must determine whether substantial evidence supports the trial court's findings. *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996) (citing *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982)). "Substantial evidence" exists when there is a sufficient quantum of proof to support the trial court's findings of fact. *Adams County*, 128 Wn.2d at 882 (citing *In re Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973)). If substantial evidence supports the trial court's findings, this court must determine whether the findings then support the conclusions of law. *Adams County*, 128 Wn.2d at 882.

Substantial evidence does not support the trial court's findings with respect to the severity and frequency of Mr. Patnode's conduct, that Ms. Spicer was a direct recipient of all conduct the court found outrageous, that Ms. Spicer suffered severe emotional distress as a result of Mr. Patnode's conduct from Thanksgiving 2015 to March 24, 2016, or that Mr. Patnode's conduct caused the Spicers and YAA to move their music lessons to locations other than the Spicers' home. Regardless, the facts found by the trial court are not sufficient to support the trial court's

conclusion that Mr. Patnode engaged in extreme and outrageous conduct and that Ms. Spicer suffered sufficiently severe emotional distress.

**B. Conduct that Ms. Spicer or her immediate family members did not observe cannot form the basis for Ms. Spicer's outrage claim.**

The trial court erred in basing its ruling that Mr. Patnode committed the tort of outrage, in part, on conduct that was directed to third parties outside of the Spicers' presence. A person claiming outrage must establish that "they personally were either the object of the [defendant's] actions or an immediate family member present at the time of such conduct." *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983) (citing *Grimsby*, 85 Wn.2d at 59-60). Absent that showing, a plaintiff who is not present when the purportedly outrageous conduct occurred may not maintain an action for the tort of outrage. *See Reid v. Pierce Cty.*, 136 Wn.2d 195, 203, 961 P.2d 333 (1998).

The trial court erred in considering conduct observed only by people other than the Spicers in ruling that Mr. Patnode committed outrage. Ms. Spicer observed Mr. Patnode remotely start his F-250 approximately 12 times as she was walking students out or walking in with them. RP 57; RP 80. She never heard a car alarm. RP 57. Mr. Spicer testified that he observed Mr. Patnode's truck remotely start

approximately six times, and nothing in the record shows that he heard any car alarms sounding. RP 224. Two parents and a student testified about the F-250 remotely starting and car alarms sounding while they were at the Spicers' house. RP 146-49; RP 152; RP 211-12; RP 260-63. But none of them testified that Ms. Spicer was present when they observed that the F-250 remotely starting or heard the car alarm.

Accordingly, the only conduct that can form a basis for Ms. Spicer's outrage claim is Mr. Patnode parking his F-250 and his daughter's Hummer along the curb on the Spicers' side of the street from Thanksgiving 2015 to March 24, 2016 and remotely starting his F-250 approximately 12 times when Ms. Spicer was present with students or parents, and approximately 18 times at most,<sup>2</sup> including the times Mr. Spicer observed the F-250 remotely starting. As a result, substantial evidence does not support the trial court's finding of fact that all of Mr. Patnode's conduct was directed at Ms. Spicer, that Ms. Spicer was the "direct recipient" of Mr. Patnode's conduct even though she was not present for, and did not observe, all instances when Mr. Patnode remote-started his F-250 or remotely set of the vehicle alarm. CP 326. And substantial evidence does not support the trial court's conclusion that Ms.

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<sup>2</sup> The record is unclear as to whether Mr. Spicer was with Ms. Spicer during any of the approximately 6 times he observed the F-250 remotely starting.

Spicer was the object of the entirety of Mr. Patnode's course of conduct from approximately Thanksgiving of 2015 to March 24, 2016. CP 327.

**C. This court should reverse the trial court's ruling that Mr. Patnode committed outrage because Mr. Patnode's conduct does not rise to the level of outrageous conduct as a matter of law.**

This court should reverse the trial court's determination that Mr. Patnode committed the tort of outrage because, as a matter of law, Mr. Patnode's conduct did not rise to the level of outrageous conduct. To prevail on a claim of outrage, also known as intentional infliction of emotional distress, a plaintiff must establish "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003).

Washington courts have stated that the elements of an outrage claim generally are questions of fact. *Repin v. State*, 198 Wn. App. 243, 266, 392 P.3d 1174 (2017). But even where the trial court has weighed the evidence, the court of appeals may determine as a matter of law if reasonable minds could differ on whether the conduct is sufficiently extreme and outrageous to result in liability. *See, e.g., Saldivar v. Momah*,

145 Wn. App. 365, 389-91, 186 P.3d 1117 (2008) (on appeal following bench trial, court held that conduct did not rise to the level of outrageous conduct and reversed trial court's ruling that counterclaimant established tort of outrage), *superseded by statute on other grounds as stated in Bevan v. Meyers*, 183 Wn. App. 177, 184, 334 P.3d 39 (2014); *see Robel v. Roundup Corp.*, 148 Wn.2d 35, 52, 59 P.3d 611 (2002) (following bench trial, threshold question of law existed as to whether reasonable minds could differ on whether conduct was sufficiently extreme to warrant imposition of liability); *cf. Reyes v. Yakima Health Dist.*, \_\_ Wn.2d \_\_, 419 P.3d 819, 826 (2018) (holding that conduct was not outrageous as a matter of law). Accordingly, this court should determine, as a threshold matter of law, whether the conduct that the trial court determined constituted outrage was sufficiently outrageous to impose liability. *See Saldivar*, 145 Wn. App. at 390.

To constitute outrage, the conduct at issue “must be ‘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.’” *Reyes*, 419 P.3d at 825 (quoting *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). “Consequently, the tort of outrage ‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ In this area plaintiffs

must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” *Kloepfel*, 149 Wn.2d at 196 (quoting *Grimsby*, 85 Wn.2d at 59). “[M]ajor outrage is essential to the tort.” RESTATEMENT (SECOND) OF TORTS § 46, cmt. f (1965).

“The requirement of outrageousness is not an easy one to meet.” *Repin*, 198 Wn. App. at 267 (citing *Christian v. Tohmeh*, 191 Wn. App. 709, 736, 366 P.3d 16 (2015)). A plaintiff cannot prevail on an outrage claim merely by showing 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 (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d). The level of outrageousness required to establish the tort of outrage is extremely high. *Repin*, 198 Wn. App. at 267 (citing *Reigel v. SavaSeniorCare LLC*, 292 P.3d 977, 990 (Colo. 2011)).

Where, as here, a defendant’s conduct is not sufficiently extreme and outrageous to constitute outrage as a matter of law, Washington courts have reversed a fact finder’s decision that the conduct constituted outrage. In *Saldivar*, following a bench trial, the court reversed the trial court’s ruling that the defendant/counterclaimant physician established his outrage

claim. In that case, a woman and her husband fabricated allegations of sexual abuse against the physician and filed a lawsuit against him alleging that he sexually abused her. *Saldivar*, 145 Wn. App. at 384-85, 390. The trial court dismissed the plaintiffs' claims after they rested at trial, finding that the plaintiff who claimed she was sexually abused was not credible and that she lied on the stand. *Saldivar*, 145 Wn. App. at 383-84. The physician testified that he lost his job because of the sexual abuse allegations, that he suffered a stroke because of stress associated with the accusations, that his medical license lapsed because he could not afford to renew it after losing his job, and that the allegations rendered him uninsurable and unemployable. *Saldivar*, 145 Wn. App. at 384. The trial court found for the physician on his outrage counterclaim. *Saldivar*, 145 Wn. App. at 384.

On appeal, the court reversed the trial court, holding that the plaintiffs' conduct was not sufficiently outrageous to support an outrage claim. *Saldivar*, 145 Wn. App. at 390. The court noted that the physician could not support a claim of outrage merely by accusing the plaintiff of fabricating her claims to obtain money from him under false pretenses. *Saldivar*, 145 Wn. App. at 390. The court held that the plaintiffs' conduct in filing suit alleging sexual abuse, even if they had done so with malicious intent, was not sufficiently extreme and outrageous to justify

liability for intentional infliction of emotional distress. *Saldivar*, 145 Wn. App. at 390.

In *Jackson v. Peoples Federal Credit Union*, 25 Wn. App. 81, 84, 90, 604 P.2d 1025 (1979), the court of appeals reversed a jury verdict on the plaintiff's outrage claim because the defendant's conduct was not sufficiently extreme and outrageous. In *Jackson*, the plaintiff brought an outrage claim against a creditor who attempted to repossess an automobile from the plaintiff. *Jackson*, 25 Wn. App. at 82. Two of the creditor's employees used their car to block the plaintiff's vehicle at his place of employment. *Jackson*, 25 Wn. App. at 83. When he attempted to leave work, a one-hour confrontation ensued during which he claimed the creditor's employees made disparaging remarks and threatened to have him arrested. *Jackson*, 25 Wn. App. at 83. The creditor knew the plaintiff was diabetic. *Jackson*, 25 Wn. App. at 83-84. The plaintiff's physician testified that the episode aggravated the plaintiff's diabetes. *Jackson*, 25 Wn. App. at 84. At trial, the trial court denied the creditor's motion to dismiss after the plaintiff rested, and the jury returned a verdict in the plaintiff's favor on his outrage claim. *Jackson*, 25 Wn. App. at 84.

The court of appeals held that the creditor's conduct did not rise to the level of clearly and obviously excessive. *Jackson*, 25 Wn. App. at 88. The court analyzed the plaintiff's claim in light of the Restatement

(Second) of Torts § 46 and Washington creditor-debtor collections law. *Jackson*, 25 Wn. App. at 87-88. The court noted that while the creditor's employees should have avoided disturbing the peace, the conduct did not rise to the level of conduct necessary to establish the tort of outrage in collection cases. *Jackson*, 25 Wn. App. at 88. The court further held that while the creditor knew that the plaintiff was diabetic, the creditor did not know the plaintiff was peculiarly susceptible to emotional distress and that it was highly probable that the creditor's employees' conduct would cause severe distress. *Jackson*, 25 Wn. App. at 89. Accordingly, the court held that the plaintiff failed to establish sufficiently extreme conduct to constitute outrage, as a matter of law. *Jackson*, 25 Wn. App. at 90.

Courts in other states have also reversed a jury verdict or a trial court's findings where the conduct at issue was not sufficiently outrageous. *See Family Dollar Trucking, Inc. v. Huff*, 474 S.W.3d 100, 107 (Ark. 2015) (reversing jury verdict because conduct was not sufficiently extreme to constitute outrage where plaintiffs' former employer prosecuted them despite knowing they were innocent, causing them to suffer mental anguish, humiliation, and emotional distress); *Kroger Texas Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796-97 (Tex. 2006) (reversing jury verdict because conduct was not extreme and outrageous); *Suntken v. Den Ouden*, 548 N.W.2d 164, 168 (Iowa 1996) (reversing trial

court's ruling, after bench trial, that defendant committed outrage because conduct was not sufficiently extreme to support a finding of intentional infliction of emotional distress).

This court should hold, as a matter of law, that Mr. Patnode's conduct was not sufficiently extreme and outrageous to warrant the imposition of liability for outrage. Mr. Patnode's conduct is not as extreme and outrageous as the conduct in cases where Washington courts have held that a defendant's conduct did not meet the high bar necessary to establish outrage.

In *Strong v. Terrell*, 147 Wn. App. 376, 385, 195 P.3d 977 (2008), the court rejected a plaintiff employee's outrage claim and held that a reasonable person could not conclude that the defendant supervisor's conduct was sufficiently outrageous. The plaintiff claimed that over a two-year period, her supervisor verbally abused her on a daily basis by screaming at her and criticizing her work in a sarcastic and unprofessional manner, pointedly told "blonde jokes", made fun of and ridiculed her about her personal life, disparaged the house she purchased, made fun of her husband's employment, and told her that her son would find out that he had a "bum" mother because she placed him in therapy. *Strong*, 147 Wn. App. at 381, 386. The plaintiff claimed that her supervisor's behavior caused her to vomit and to have anxiety attacks, depression, and heart

palpitations. *Strong*, 147 Wn. App. at 381. The supervisor resigned following an investigation that resulted in a recommendation to terminate the supervisor. *Strong*, 147 Wn. App. at 381. The court affirmed summary judgment dismissal of the plaintiff's claims, holding that the supervisor's conduct did not exceed all possible bounds of decency, when measured against an objective reasonableness standard, and that no reasonable person could conclude that the supervisor's conduct was sufficiently outrageous. *Strong*, 147 Wn. App. at 386.

In *Snyder v. Medical Service Corp. of Eastern Wash.*, 98 Wn. App. 315, 322, 988 P.2d 1023 (1999), the court held that although the plaintiff's supervisor insulted, threatened, and annoyed her, showed unkindness to her, and "acted with a callous lack of consideration" toward her, the supervisor's conduct was not sufficiently outrageous. The plaintiff in *Snyder* claimed that during a 10-month period, her supervisor harassed her and subjected her to rude, discourteous, disruptive, threatening, intimidating, and coercing conduct, and that her employer failed to do anything about it. *Snyder*, 98 Wn. App. at 320. The plaintiff's supervisor threatened to discipline her if she discussed her salary with the supervisor again and told her that she would "literally hunt [her] down and kill [her]" if she told anyone she received a raise. *Snyder*, 98 Wn. App. at 319. The plaintiff was intimidated by, and scared of, her supervisor. *Snyder*, 98

Wn. App. at 319. The plaintiff's supervisor mocked her in front of other employees during an employee meeting. *Snyder*, 98 Wn. App. at 319. After the meeting, her supervisor "snapped", walked toward her, poked her in the chest, and told her that she would not tolerate insubordination from her. *Snyder*, 98 Wn. App. at 319. The plaintiff, who had PTSD, was forced to take time off due to anxiety caused by her supervisor and ultimately quit because she could not tolerate working with her supervisor any longer. *Snyder*, 98 Wn. App. at 320.

The *Snyder* court held that "the level of incivility demonstrated [by the supervisor] does not reach a level to support a claim of outrage." *Snyder*, 98 Wn. App. at 322. Additionally, the court noted that neither the plaintiff's supervisor nor her employer knew that she was susceptible to emotional injury. *Snyder*, 98 Wn. App. at 322. The court held that reasonable minds could only conclude that the plaintiff failed to establish sufficiently extreme and outrageous conduct to make out a case for outrage. *Snyder*, 98 Wn. App. 322.

Courts from other jurisdictions have held that the conduct of one neighbor toward another is not sufficiently extreme and outrageous to establish an intentional infliction of emotional distress in cases where the claimed outrageous conduct is more extreme than Mr. Patnode's conduct.

In *Lybrand v. Trask*, 31 P.3d 801, 804-05 (Alaska 2001), the court held that a neighbor's harassing conduct was not sufficiently outrageous to support an intentional infliction of emotional distress claim. Like Washington, Alaska adopted the standard for outrage in Restatement (Second) of Torts §46. *Lybrand*, 31 P.3d at 803, n. 4; *Grimsby*, 85 Wn.2d at 59. The Lybrands lived adjacent to and uphill from the Trasks. *Lybrand*, 31 P.3d at 802. A dispute between the parties arose when debris from the Lybrand property entered the Trask property while the Lybrands were rebuilding and improving their home. *Lybrand*, 31 P.3d at 802. Ms. Trask painted large print biblical passages on her roof, such as "DO UNTO OTHERS" and "LOVE THEY NEIGHBOR", painted a large crucifix on her roof, and painted the message "YOU'RE WELCOME GEORGE L." *Lybrand*, 31 P.3d at 803. The Lybrands' neighbors and the mayor of Ketchikan "decried" the Trasks' roof's appearance at trial. *Lybrand*, 31 P.3d at 804. The appearance of the Trask's roof also caused a \$75,000 reduction in the assessed value of the Lybrand property. *Lybrand*, 31 P.3d at 804. The court held that Ms. Trask's conduct did not meet the threshold required for an outrage claim because the conduct was not sufficiently outrageous. *Lybrand*, 31 P.3d at 804-05.

In *Wiehe v. Kukal*, 592 P.2d 860, 864 (Kan. 1979), the court held that a neighbor's assaultive behavior did not amount to outrageous

conduct under by Restatement (Second) of Torts § 46. *Wiehe* involved an altercation between neighbors that arose from a boundary dispute. *Wiehe*, 592 P.2d at 861. *Wiehe* became incensed when he saw his neighbors, Kukal and Hattley erecting a fence 10-to-15 feet over on his land. *Wiehe*, 592 P.2d at 861. *Wiehe* approached Kukal and Hattley while shouting at them and waiving a pitchfork towards Kukal in a threatening manner. *Wiehe*, 592 P.2d at 861. *Wiehe* called Kukal names, accused him of stealing *Wiehe's* land, and threatened to pull the fence out and sue Kukal. *Wiehe*, 592 P.2d at 861. Although he did not orally threaten violence, *Wiehe* backed Kukal up without touching him by waiving the pitchfork towards him. *Wiehe*, 592 P.2d at 861.

Ms. Kukal, who had observed the confrontation and feared for her husband's safety, screamed at Kukal to get away from *Wiehe*. *Wiehe*, 592 P.2d at 861. Ms. Kukal was nervous, frightened, and upset. *Wiehe*, 592 P.2d at 861. After that day, her health worsened, she began to cry a lot, lost weight, and developed depression. *Wiehe*, 592 P.2d at 862. Her physician treated her for depression and anxiety that her physician testified was directly related to the incident. *Wiehe*, 592 P.2d at 862. A jury returned a verdict on Ms. Kukal's outrage claim against *Wiehe*.

On appeal, the Kansas Supreme Court reversed, holding that although *Wiehe's* conduct consisted of a profane and disparaging

spontaneous verbal outburst, and although Wiehe assaulted Kukal, Wiehe's outburst was not "extreme and outrageous". *Wiehe*, 592 P.2d at 863. The court held that while Wiehe's conduct was "uncommendable", as a matter of law it was not sufficiently outrageous to support an outrage claim. *Wiehe*, 592 P.2d at 864.

Reasonable minds can only conclude that Mr. Patnode's conduct was not sufficiently outrageous to support an outrage claim. The trial court's conclusion that Mr. Patnode committed outrage was limited to conduct occurring between approximately Thanksgiving of 2015 and March 24, 2016. CP 326-28. The trial court did not find that any other conduct constituted outrage and expressly limited its ruling to the conduct in that time frame. CP 326-28.

The trial court's generalization as to the frequency of Mr. Patnode's conduct in remote starting his F-250 is not supported by substantial evidence. CP 325-27. Assuming no overlap, the Spicers testified that they observed him remote start his F-250 approximately 18 times from Thanksgiving 2015 to March 24, 2016. RP 57; RP 80; RP 224. Averaged over the four-month period, that equates to approximately four-to-five times per month, or approximately once per week. Mr. Patnode's truck also had a dead battery at times during the relevant time period, making it impossible to remotely start the vehicle. *See* RP 235. Mr.

Spicer testified that he saw Mr. Patnode jump starting the F-250 between Thanksgiving 2015 and March 24, 2016. RP 235.

Even if this court assumes that Ms. Spicer was the recipient of all of the conduct that the trial court found constituted outrageous conduct—and she was not—Mr. Patnode’s conduct is still not ‘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.’” *Reyes*, 419 P.3d at 825 (quoting *Grimsby*, 85 Wn.2d 52).

Mr. Patnode did not fabricate horrific accusations against Ms. Spicer, did not verbally accost, ridicule, or disparage her, did not threaten Ms. Spicer and made no physical contact with Ms. Spicer as it pertains to the conduct that the trial court based its ruling on. In fact, the Spicers neither saw nor spoke to Mr. Patnode as it relates to any of Mr. Patnode’s conduct that the trial court ruled constituted outrage. CP 327-28. And unlike in *Strong* and *Snyder*, Mr. Patnode was not in a position of authority over Ms. Spicer. *See Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977) (“When one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments, this abusive conduct gives added impetus to the

claim of outrageous behavior.”) (citing RESTATEMENT (SECOND) OF TORTS § 46, cmt. e).

Mr. Patnode’s conduct most closely resembles the conduct in *Lybrand*, where the neighbors felt harassed and annoyed when their neighbor painted biblical versus, a crucifix, and a sarcastic comment on their roof because of a dispute with the neighbor. *Lybrand*, 31 P.3d at 803. Unlike in *Lybrand*, however, Mr. Patnode did not cause the Spicers to lose money or property value. *See Lybrand*, 31 P.3d at 804; CP 324-25.

The Spicers obtained an adequate remedy for Mr. Patnode’s conduct when they obtained the order requiring Mr. Patnode to move the vehicles from the Spicers’ side of the street on March 24, 2016, and when they obtained the anti-harassment order on April 5, 2016. Ex. 4; Ex. 16. Ms. Spicer testified that Mr. Patnode moved the vehicles and stopped harassing her after March 24, 2016. RP 124. The trial court essentially determined that the court’s determination that Mr. Patnode’s conduct constituted harassment under chapter 10.14 RCW was necessarily sufficient to support a finding of outrage. CP 322, 327-28. But Washington law requires a much greater showing to establish outrage than to obtain an anti-harassment order. *See Grimsby*, 85 Wn.2d at 59 (A plaintiff cannot prevail merely by showing 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.’”) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d); *Repin*, 198 Wn. App. at 267 (the level of outrageousness required is extremely high).

Reasonable minds cannot differ as to whether Mr. Patnode parking vehicles on the Spicers’ side of the street and remotely starting his pickup truck approximately 18 times in four months when piano students were coming to or leaving from the Spicers’ house is outrageous conduct. RP 56; RP 80; RP 224. Even if the court were to consider instances that Mr. Patnode remotely started his F-250 or when car alarms sounded when Ms. Spicer was not present, his conduct does not rise to the level of outrageous. If the court holds that Mr. Patnode’s conduct meets the requisite level of outrageousness, the court will be set a new low bar in Washington for “extreme and outrageous conduct”.

**D. Substantial evidence does not support the trial court’s ruling that Ms. Spicer suffered severe emotional distress as a result of Mr. Patnode’s conduct.**

Ms. Spicer’s testimony shows that she suffered emotional distress as a result of what she feared might happen, not what actually happened.

RP 131. To prevail on an outrage claim, a plaintiff must show that she “actually suffered severe emotional distress as a result of the defendants conduct.” *Kloepfel*, 149 Wn.2d at 203, 66 P.3d 630. “The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.” RESTATEMENT (SECOND) OF TORTS § 46, cmt. j. Nothing in the record suggests that Ms. Spicer was peculiarly susceptible to emotional distress or that Mr. Patnode knew of her susceptibility.

Substantial evidence does not support the trial court’s finding that Ms. Spicer actually suffered severe emotional distress as a result of Mr. Patnode parking vehicles on the Spicers’ side of the street and remotely starting his F-250. Ms. Spicer testified Mr. Patnode remote starting his truck scared her and made her fearful, not because of the actual remote starting of the truck, but because she imagined that he may “go to the next step and actually physical harm somebody.” RP 131. Overlooking the illogical and unsupported claim that physical harm is the “next step” after remotely starting a truck, nothing in the record suggests that Mr. Patnode would physically harm Ms. Spicer, her family, or her students. Ms. Spicer admitted that Mr. Patnode never threatened physical harm to, or physically

harm her or her family. RP 129. Moreover, no reasonable person would suffer severe emotional distress as a result of personally observing a pickup truck remote starting approximately 12 times, and their husband observing it approximately six times, over four months. RP 80; RP 224. Ms. Spicer's emotional distress was not justified and reasonable under the circumstances. RESTATEMENT (SECOND) OF TORTS § 46, cmt. j.

Additionally, substantial evidence does not support the trial court's finding that any emotional distress that Ms. Spicer suffered was sufficiently severe to satisfy the requirement for an outrage claim. "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). However, liability arises only when the emotional distress is extreme. RESTATEMENT (SECOND) OF TORTS § 46, cmt. j. "Severe emotional distress is, however, not 'transient and trivial' but distress such 'that no reasonable man could be expected to endure it.'" *Kloepfel*, 149 Wn.2d at 203 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j).

In *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 324 P.3d 763 (2014), the court held that the plaintiff failed to establish sufficiently severe emotional distress as a result of the defendant's

conduct. In that case, a teacher pinned a first grade special education student against the wall and was physically keeping her in the corner by chest bumping her all while yelling insults at the child, in her face, such that after the incident the child's face was covered was spit. *Sutton*, 180 Wn. App. at 863. The child's grandmother, who witnessed the incident, testified that the child was scared and felt angry, sad, and mad, and did not want to go back to the teacher's class. *Sutton*, 180 Wn. App. at 872. The court held that the grandmother's testimony was insufficient as a matter of law to create a question of fact on the existence of severe emotional distress. *Sutton*, 180 Wn. App. at 872, n. 2. The court further held that because there was no evidence regarding the intensity of the child's feelings or their duration, there was not enough direct evidence to create a factual issue as to whether the child suffered *severe* emotional distress. *Sutton*, 180 Wn. App. at 872. Finally, the court refused to infer severe emotional distress because it held that an inference of severe emotional distress based on the severity of the conduct is only appropriate where there is evidence of long-term outrageous conduct and only when the plaintiff has provided some evidence of significant emotional distress. *Sutton*, 180 Wn. App. at 874. The court held that there was no evidence that the child suffered emotional distress that was more than transient or

trivial and that, therefore, the child's outrage claim was properly dismissed. *Sutton*, 180 Wn. App. at 874.

Other than Ms. Spicer's testimony that she was scared of what she imagined Mr. Patnode might do, the only evidence of her emotional distress is her testimony that she suffered from anxiety and insomnia, and that she had to begin taking antianxiety medication. RP 7; RP 132. Ms. Spicer admitted, however, that she began taking antianxiety medication in 2013, long before the conduct that forms the basis for the trial court's finding of outrage occurred. RP 132. Ms. Spicer also testified that she was taking more antianxiety medication at the time of trial, January 17-18, 2018, than she was taking from Thanksgiving 2015 to March 24, 2016, despite the fact that she claimed Mr. Patnode did not harass her after March 24, 2016. RP 132. Given the record evidence detailing the parties' history of disputes dating back to 2012, it is much more likely that Ms. Spicer's anxiety was caused by the years-long dispute between the parties, including multiple lawsuits, police involvement, and petitions for anti-harassment orders, than it is that Mr. Patnode's conduct caused Ms. Spicer's anxiety from Thanksgiving 2015 to March 24, 2016.

Regardless, the fact that Ms. Spicer suffered insomnia and increased the amount of antianxiety medication that she took during the relevant time period does not elevate her anxiety to severe emotional

distress. And while the court ruled on summary judgment that Mr. Patnode caused Ms. Spicer to suffer “substantial emotional distress”, the court’s finding does not amount to distress so severe “that no reasonable [woman] could be expected to endure” it. CP 324; *Kloepfel*, 149 Wn.2d at 203 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j). The record does not contain substantial evidence to support a finding that Ms. Spicer suffered *severe* emotional distress. *Sutton*, 180 Wn. App. at 872. The record also lacks substantial evidence of sufficient long-term outrageous conduct to justify an inference of severe emotional distress. *Sutton*, 180 Wn. App. at 872.

**E. The trial court entered findings of fact not addressed above that are not supported by substantial evidence in the record.**

To the extent that the court determines they are relevant to the court’s decision as to whether Mr. Patnode’s conduct was sufficiently extreme to constitute outrage, or as to whether Ms. Spicer actually suffered sufficiently severe emotional distress, findings of fact 7, 9, 11, 16, 18, 20, 21, 22, 23, 26, 27 and 31 are not supported by substantial evidence in the record, as set forth in the Assignments of Error. Other findings of fact to which Mr. Patnode assigned error are addressed above.

Additionally, findings of fact 20, 21, and 22 are not proper findings of fact; rather, they are merely summarizations of witness testimony. The court did not enter specific findings of fact regarding the substance of those witnesses' testimony, and nothing in the findings suggest that the court accepted this witnesses' testimony and rejected conflicting testimony from Mr. Patnode, except that the court found that Mr. Patnode remote started his F-250 and set of his vehicle alarm on additional occasions when the Spicers were not present.

For the same reason findings of fact 26 and 27 are also not proper findings of fact, as they merely summarize Ms. Spicer's testimony. In fact, the trial court entered finding of fact 30 and conclusions of law 4 and 5, which contradict Ms. Spicer's testimony that is summarized in findings of fact 26 and 27. CP 324-25; CP 327.

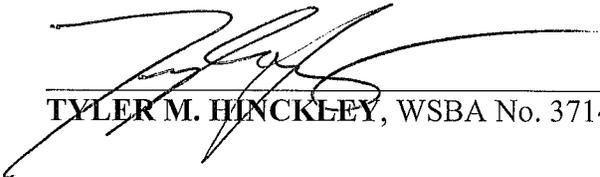
In finding of fact 23, the court improperly took "judicial notice" of the Yakima County Superior Court's oral ruling in the 2016 anti-harassment case. A court's oral ruling is not a finding of fact and a trial court's oral decision is not binding unless it is formally incorporated into findings of fact, conclusions of law, and judgment. *State v. Hescock*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999). The final result of hearing on Ms. Spicer's petition for an anti-harassment order is the anti-harassment order at Exhibit 4.

**V. CONCLUSION**

Based on the foregoing, Mr. Patnode respectfully requests this court to reverse the trial court's ruling and judgment that he committed the tort of outrage and remand this case for dismissal of Ms. Spicer's outrage claim.

Respectfully submitted this 28<sup>th</sup> day of September, 2018.

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Attorneys for Paul Patnode



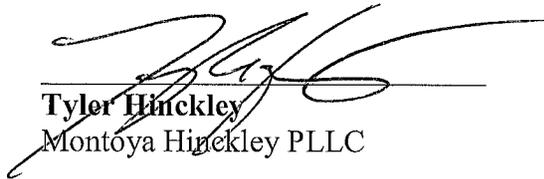
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