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NO. 360652-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

(Yakima County Superior Court Cause No. 16-2-01465-39)

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

Plaintiffs/Respondents,

vs.

PAUL PATNODE

Defendant/Appellant.

RESPONDENTS' BRIEF

Quinn N. Plant
WSBA #31339
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
(509) 575-0313

*Attorneys for Respondents
Junghee Kim Spicer, David
Spicer and Yakima Arts
Academy*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
I. INTRODUCTION.....	1
II. COUNTERSTATEMENT OF THE ISSUES ON APPEAL	2
III. STATEMENT OF THE CASE.....	4
A. The Spicers and their home-based piano instruction business.....	4
B. Conduct of Paul Patnode.	8
1. Conduct prior to Thanksgiving 2015.	8
2. Conduct giving rise to the Spicers' claim of intentional of infliction emotional distress.	8
C. The 2016 anti-harassment order.	12
D. The lawsuit.....	13
1. Trial testimony.	13
a. Aimee Packard.....	13
b. Charlene Cruz.....	15
c. Jaden Anderson.....	16
d. Junghee Spicer.....	17
e. Paul Patnode.	18
IV. ARGUMENT	18
A. The trial court appropriately found that Mr. Patnode committed the tort of intentional infliction of emotional distress. .	19
1. The trial court did not err in considering as evidence conduct that Junghee did not personally observe.....	20

2.	Reasonable minds could differ as to whether Mr. Patnode's conduct was sufficiently outrageous.	23
a.	The conduct persisted for approximately four months and stopped only after the court issued an anti-harassment order.	24
b.	Mr. Patnode deliberately tried to frighten children and their parents.	26
c.	Mr. Patnode's conduct was outrageous.	26
3.	The trial court did not err in finding that Junghee suffered severe emotional distress.	27
B.	The trial court's findings of fact are supported by substantial evidence.	29
1.	Mr. Patnode has not objected to several findings of fact.	30
2.	Standard of review.	30
3.	The trial courts findings of fact are supported by substantial evidence.	30
a.	Finding of Fact No. 7 is supported by substantial evidence.	30
b.	Finding of Fact No. 9 is supported by substantial evidence.	31
c.	Finding of Fact No. 11 is supported by substantial evidence.	31
d.	Finding of Fact No. 16 is supported by substantial evidence.	32
e.	Finding of Fact No. 18 is supported by substantial evidence.	32

f. Finding of Fact No. 19 is supported by substantial evidence.	33
g. Finding of Fact Nos. 20-22 are supported by substantial evidence.	33
h. Finding of Fact No. 23 is supported by substantial evidence.	33
i. Finding of Fact Nos. 26 and 27 are supported by substantial evidence.	34
j. Finding of Fact No. 31 is supported by substantial evidence.	34
k. Finding of Fact No. 32 is supported by substantial evidence.	35
l. Finding of Fact No. 33 is supported by substantial evidence.	35
m. Finding of Fact No. 34 is supported by substantial evidence.	36
V. CONCLUSION	36

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Washington State Cases</u>	
<i>Birklid v. Boeing Co.</i> , 127 Wn.2d 853, 867, 904 P.2d 278 (1995),	27
<i>Cambers-Castanes v. King County</i> , 100 Wn.2d 275, 288, 669 P.2d 451 (1983)	20
<i>Greene v. Greene</i> , 97 Wn. App. 708, 714, 986 P.2d 144 (1999).	30
<i>Grimsby v. Samson</i> , 85Wn.2d 52, 530 P.2d 291 (1975).....	20, 26
<i>Jackson v. Peoples Federal Credit Union</i> , 25 Wn. App. 81, 604 P.2d 1025 (1979),	25
<i>Kloepfel v. Bokor</i> , 149 Wn.2d 192, 66 P.3d 630 (2003),.....	21, 25, 28, 29
<i>Lund v. Caple</i> , 100 Wn.2d 739, 675 P.2d 226 (1984).....	22
<i>Lyons v. U.S. Bank Nat. Ass'n</i> , 181 Wn.2d 775, 792, 336 P.3d 1142 (2014).....	20
<i>Phillips v. Hardwick</i> , 29 Wn. App. 382, 628 P.2d 506 (1981).....	27
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 203, 961 P.2d 333 (1998).....	23
<i>Reyes v. Yakima Health District</i> , 191 Wn.2d 79, 91, 419 P.3d 819 (2018).....	26
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 64, 59 P.3d 611 (2002).....	19, 23

<i>Salvidar v. Momah</i> , 145 Wn. App. 365, P.3d 1117 (2008),.....	25
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 879, 73 P.3d 369 (2003).....	30
<i>Town of Selah v. Waldbauer</i> , 11 Wn. App. 749, 753, 525 P.2d 262 (1974).....	30

Secondary Sources

Restatement (Second) of Torts § 46	20, 21, 22, 27
------------------------------------------	----------------

Out Of State Cases

<i>Cullison v. Medley</i> , 570 N.E.2d 27 (Ind. 1991).....	22
<i>Duran v. Detroit News, Inc.</i> , 200 Mich.App. 622, 504 N.W.2d 715 (1993).....	22
<i>Haverbush v. Powelson</i> , 217 Mich.App. 228, 551 N.W.2d 206, (1996).....	21, 22, 25, 29
<i>Hess v. Treece</i> , 286 Ark. 434, 693 S.W.2d 792 (1985),	21, 24, 25, 27, 28, 29
<i>Lybrand v. Trask</i> , 31 P.3d 801 (Alaska 2001),	25
<i>M.B.M. Co. v. Counce</i> , 268 Ark. 269, 596 S.W.2d 681 (1980).	21
<i>Mitchell v. Stevenson</i> , 677 N.E.2d 55 (Ind. Ct. App. 1997)	22
<i>Roberts v. Auto-Owners Ins. Co.</i> , 422 Mich. 594, 374 N.W.2d 905 (1985).....	22
<i>Wiehe v. Kukal</i> , 225 Kan. 478, 592 P.2d 860 (1979),.....	25

I. INTRODUCTION

Appellant Paul Patnode appeals from a judgment entered in superior court arising from efforts he undertook in the winter of 2015/16 to deter respondent Junghee Spicer from teaching piano lessons at her home. Mr. Patnode undertook a deliberate and protracted effort to frighten and intimidate Ms. Spicer, the children taking piano lessons from Ms. Spicer, and the children's parents. These efforts stopped only after the Spicers obtained an anti-harassment order against Mr. Patnode in March 2016.

The respondents' claims against Mr. Patnode were resolved following a bench trial in January 2018. The trial court heard testimony from the Spicers and Mr. Patnode. The parents of three piano students and one juvenile piano student also testified. After hearing all the evidence, the trial court ruled in favor of Ms. Spicer on her claim of intentional infliction of emotional distress. (CP 297-98). The trial court found that Mr. Patnode engaged in "outrageous conduct," that Ms. Spicer was the "object" of this conduct, and that Mr. Patnode's conduct was "directed at Ms. Spicer through her piano students and their parents." (*Id.*).

The trial court's findings of fact are supported by substantial evidence. These findings in turn support the trial court's determination that Mr. Patnode committed the tort of intentional infliction of emotional

distress. Mr. Patnode's arguments on appeal are without merit. The trial court's findings of fact, conclusions of law and order should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES ON APPEAL

1. Whether substantial evidence supports the trial court's finding that Mr. Patnode "regularly and repeatedly" remote started his Ford F-250 pickup truck and remotely set off his vehicle alarm when students and their parents were walking to and from lessons at the Spicers' house when the finding is supported by testimony by Junghee Spicer, David Spicer and three non-party witnesses, including a juvenile who testified to experiencing the foregoing "every time" he took piano lessons for approximately four months.
2. Whether the trial court erred in determining that Mr. Patnode's conduct was outrageous where he undertook a deliberate scheme to frighten and intimidate Junghee Spicer, children taking piano lessons from Ms. Spicer, and the parents of children taking piano lessons from Ms. Spicer, over an extended period of approximately four months.
3. Whether substantial evidence supports the trial court's finding that Junghee Spicer was the object of Mr. Patnode's outrageous conduct where said conduct was directed at Ms. Spicer, children taking piano lessons from Ms. Spicer, and the parents of children taking piano lessons from

Ms. Spicer, and pursued for the purpose of deterring Ms. Spicer from teaching piano lessons out of her home.

4. Whether the trial court erred in concluding that Mr. Patnode's conduct was directed at Junghee Spicer where such conduct was intended to frighten and intimidate Ms. Spicer, children taking piano lessons from Ms. Spicer, and the parents of children taking piano lessons from Ms. Spicer, and pursued for the purpose of deterring Ms. Spicer from teaching piano lessons out of her home.

5. Whether the trial court erred in concluding that Junghee Spicer suffered severe emotional distress where she was fearful for her safety and the safety of her young piano students, where she suffered anxiety and insomnia, where she had to take a new anti-anxiety medicine, and where she ultimately decided to move.

6. Whether the trial court erred in concluding that the emotional distress suffered by Junghee Spicer was sufficiently severe so as to constitute outrage where Ms. Spicer was fearful for her safety and the safety of her young piano students, where she suffered anxiety and insomnia, where she had to take a new anti-anxiety medicine, and where she ultimately decided to move.

7. Whether the trial court erred in concluding that the emotional distress suffered by Ms. Spicer was sufficiently severe so as to constitute

outrage where she was fearful for her safety and the safety of her young piano students, where she suffered anxiety and insomnia, where she had to take a new anti-anxiety medicine, and where she ultimately decided to move.

8. Whether substantial evidence supports the trial court's finding that Mr. Patnode's conduct caused the Spicers and YAA to move their piano business to another location is supported by substantial evidence where the Spicers testified to abandoning a permit application that would have allowed them to continue teaching home-based piano lessons because of harassment by Mr. Patnode.

III. STATEMENT OF THE CASE

A. The Spicers and their home-based piano instruction business.

At times pertinent to this lawsuit, respondents Junghee and David Spicer lived at 101 Lyle Loop Road in Selah, Washington, with their two children. (RP at 25:5). The Spicers are a musical family. Junghee¹ is an accomplished pianist with a doctoral degree in music performance. (RP at 17:22-23). David taught band, orchestra and choir for more than 30 years, most recently at Wilson Middle School in Yakima. (RP at 220:11-12; RP at 220:20). The Spicers' son plays the violin and piano. (RP at 23:10).

¹ For ease of reference, respondents Junghee and David Spicer will be referred to herein by their first names.

The Spicers' daughter plays the cello. (RP at 23:16). In or about 2009, Junghee began to teach piano lessons to four or five students at the Spicer's home on Lyle Loop Road. (RP at 25:11-15). These students were primarily family friends. (*Id.*). At that time, David Spicer was the family's primary breadwinner. (RP at 26:15).

David suffered a stroke in 2009. (RP at 25:23; 26:2). His efforts to return to work following the stroke were unsuccessful, and he retired from his career as a music teacher in 2012. (RP at 26:12).

As a result of David's retirement, the family needed additional income. (RP at 26:20). In response to these circumstances, Junghee decided to expand her nascent piano instruction business. (RP at 26:20). She considered teaching at a location other than home. (RP at 26:25). However, David's medical condition precluded Junghee from being away from home for extended periods of time. (RP at 27:1-2). For this reason, Junghee decided to expand her home-based piano instruction business. (RP at 25:19-21). Most of Junghee's piano students were young children, and particularly young girls. (RP at 56:17).

In connection with efforts to expand the home-based piano instruction business, Junghee obtained a conditional use permit from Yakima County. (Ex. 8). In August 2012, Junghee applied for and

obtained an amendment to the conditional use permit that expanded the hours during which she could provide piano instruction. (Ex. 9).

The Spicers' conditional use permit required that any need for customer parking be provided off-street. (*Id.*, at p. 31). Junghee instructed the parents of her piano students to park in her driveway. (RP at 29:24). She did not understand the conditional use permit to prohibit parents from dropping their children off or picking their children up from piano lessons along the sidewalk adjacent to their home. (RP at 31:25).

In late 2012, Junghee again applied to modify the conditional use permit in a manner that would have allowed her to teach piano lessons in the morning. (RP at 32:12-13). Based on her discussion with staff at Yakima County at the time she submitted her application, Junghee believed that the application would be approved. (RP at 33:9). She taught piano lessons in the morning for several weeks until she learned that the application had been denied. (RP at 33:13; 34:3). She thereafter discontinued morning piano lessons. (RP at 34:3).

Mr. Patnode lived across the street from the Spicers and objected to Junghee teaching piano lessons from home. Early on, in an effort to address some of Mr. Patnode's complaints about noise, the Spicers moved their piano studio into a backroom of their basement. (RP at 34:10-14). They also applied soundproofing foam to insulate the room in which piano

instruction occurred. (RP at 34:12-13). Later, the Spicers hired a private investigator to confirm that piano music was not audible at Mr. Patnode's residence. (RP at 34:17).

In February 2014, Lyle Loop Road was annexed to the City of Selah. (RP at 34:20). Following annexation, Junghee went to the City of Selah and inquired whether she needed a permit from Selah to operate a home-based piano instruction business out of her home. (RP at 35:11-12). Based on this conversation, Junghee understood that Selah did not require a permit application relating to the home-based business. (RP at 35:16).

Approximately two years later, the Spicers received a letter from the City of Selah informing them that they needed to apply for a major home occupation permit. (Ex. 10). Junghee thereafter applied for a major home occupation permit. (RP at 37:1). The City of Selah issued a notice of intent to approve the permit in April 2016. (Ex. 11). Mr. Patnode filed an appeal. (*See* Ex. 12 at p. 50). The city's planning staff recommended that the application be approved. (*Id.*, at p. 51). By this time, however, Ms. Spicer had decided to abandon piano instruction at her home due to harassment by Mr. Patnode and, for this reason, withdrew the application. (RP at 38:25; 39:3-7).

B. Conduct of Paul Patnode.

Mr. Patnode sought to obstruct the Spicers' piano business since its inception in 2012.

1. Conduct prior to Thanksgiving 2015.

As early as 2012, Mr. Patnode began confronting the parents of Junghee's piano students as they dropped off and picked up their children from piano lessons. (RP at 222:6-12). In July 2012, the Spicers petitioned the Yakima County District Court for the issuance of an anti-harassment order against Mr. Patnode. (Ex. 1). Two parents of piano students testified at a hearing on the petition. (RP at 49:7-8). The Yakima County District Court issued an order for protection from unlawful civil harassment against Mr. Patnode on July 16, 2012. (Ex. 2). The order prohibited Mr. Patnode from confronting piano students and their parents on the sidewalk adjacent to the Spicers' home. (*Id.*). The Spicers voluntarily terminated the order for protection from unlawful civil harassment in December 2012. (RP at 50:19).

In December 2012, Mr. Patnode filed an unsuccessful lawsuit against the Spicers for allegedly violating neighborhood covenants. (RP at 51:10-12).

2. Conduct giving rise to the Spicers' claim of intentional infliction of emotional distress.

Beginning around Thanksgiving of 2015, Mr. Patnode initiated a campaign of harassment directed at the Spicers utilizing several motor vehicles. More specifically, he sought to frighten and intimidate Junghee, her piano students, and the parents of piano students, as they walked on the sidewalk adjacent to the Spicers' house to and from piano lessons.

Mr. Patnode did this by parking a series of vehicles along the sidewalk directly adjacent to the Spicers' residence. (Ex. 37 Ex. 52; RP at 52:19-53:22). The vehicles were parked directly in front of the entrance to the Spicers' piano studio. (See Ex. 15; RP at 54:20-55:11). The vehicles most regularly parked in front of the entrance to the piano studio included a Hummer and Ford F-250 pickup truck. (See Ex. 37). Mr. Patnode also parked a sedan and a box truck adjacent to the Spicers' home. (Ex. 52; RP at 53:14-22).

The following photographs were taken by the Spicers and were admitted at trial as plaintiff's Exhibit 52. The photographs show Mr. Patnode's vehicles lined up alongside the Spicer's house, directly outside the entrance to the piano studio.

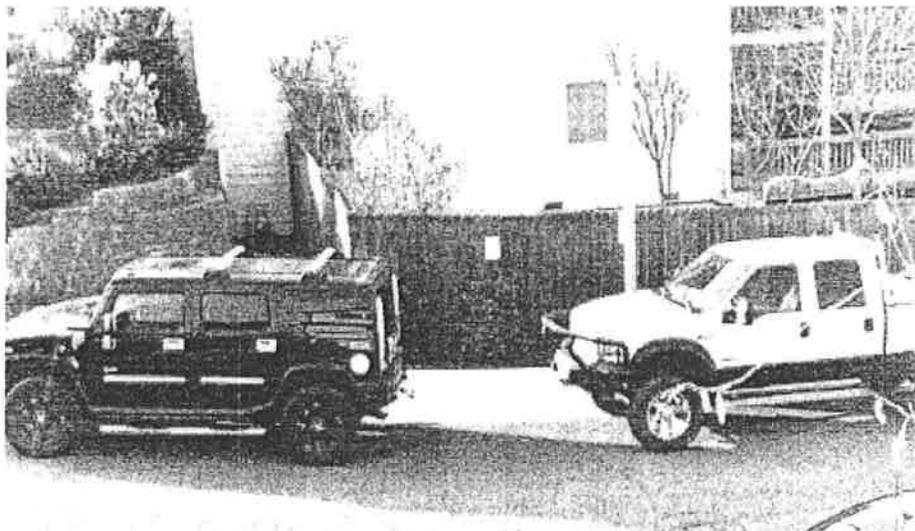


(Exhibit 52).

As illustrated in these photographs, Mr. Patnode positioned the vehicles so that parents could no longer drop their children off for piano

lessons directly in front of the entrance to the Spicers' piano studio. (RP at 78:5-9). Instead, parents had to drop their children off either in front of Mr. Patnode's vehicles or behind Mr. Patnode's vehicles. (*Id.*). The students were thus compelled to walk past the vehicles to enter the piano studio. (RP at 55:4-11; 78:5-9). This process occurred in reverse when the piano lessons were concluded.

The following photograph was entered at trial as defendant's Exhibit 37 and shows the entrance to the piano studio bracketed by two of Mr. Patnode's vehicles.



(Ex. 37).

When students and their parents walked by his vehicles, Mr. Patnode remotely started his F-250 pickup truck and remotely triggered a

vehicle alarm for the purpose of frightening and intimidating Junghee, the piano students, and their parents.

C. The 2016 anti-harassment order.

This conduct persisted for approximately four months until the Spicers petitioned the court for an anti-harassment order against Mr. Patnode in March 2016. (RP at 58:19-20). Yakima County Superior Court Judge Blaine Gibson presided over a hearing on the petition on April 5, 2016. (RP at 59:12; CP 52). Several witnesses testified, including Junghee and one of her minor piano students. (RP at 59:20-22; 60:1).

At the conclusion of the hearing, Judge Gibson issued the following oral ruling:

JUDGE GIBSON: ...I am convinced that Mr. Patnode is in fact doing this on purposes [sic] for the purposes of harassing the Spicers, and it's happened repeatedly. It's done for the purpose of making their lives more difficult... (CP 57).

The anti-harassment order prohibited Mr. Patnode from parking his vehicles along the sidewalk adjacent to the Spicers' home. (Ex. 4). It also directed Mr. Spicer to disconnect his "remote start alarm module." (*Id.*).

D. The lawsuit.

The Spicers filed the present lawsuit against Mr. Patnode in May 2016. They alleged claims of intentional interference with contractual relationships and also intentional infliction of emotional distress. The Spicers amended their complaint in January 2017 to add Yakima Arts Academy, LLC, as a plaintiff. A bench trial occurred on January 17 and 18, 2018, before Yakima County Superior Court Judge Gayle Harthcock. The following testimony was provided at trial by non-party witnesses.

1. Trial testimony.

a. Aimee Packard

Aimee Packard is a mother of five children who took piano lessons from Ms. Spicer. (RP at 146:1). At the time of the lawsuit, three of her children took piano lessons from Ms. Spicer. (RP at 146:7).

Ms. Packard testified to several incidents in which she and her children experienced Mr. Patnode's harassment. (RP at 146:23). With respect to one incident, Ms. Packard testified as follows:

AIMEE PACKARD: . . . It was dark and cold. And I pulled up with my lights facing a really large truck right -- parked kind of right up on the sidewalk just a tad in front of the gate where we normally went in. And right as a pulled up, I -- the truck in front of me revved up the engine, and

the lights were flashing -- the bright lights were flashing in my car. And it took me off guard and startled me, and I said to my kids, Well, hold on just a second. And so I -- it concerned me. And I, you know, just had a red flag.

So I told my kids to wait, and I got out and kind of looked around and didn't see anyone and didn't see anybody near or in the truck. And so I took my kids that were taking piano and got them out and had to get the other kids. I mean, I was nervous. I didn't know in today's day and age what can happen. So I had to get all my kids out of the car, walk them in to Ms. Spicer's studio and then come out, load everybody, you know, the other three up -- or two at the time and head out.

But then when I picked them up, the same thing happened. The truck started up and revved its engine up, and the lights were flashing on me. So I got out and went in and picked up my children. But I told my husband later that night. I don't know if you want me to keep going, but -
- (RP at 147:1-148:12).

Ms. Packard testified that both she and her husband had other, similar experiences. (RP at 149:7-9). Ms. Packard could recall three

instances where "the remote start would happen with the lights and, you know, revving up the engine." (RP at 149:22-23). Ms. Packard also experienced instances where Mr. Patnode remotely set off a vehicle alarm. (RP at 150:3).

These experiences made Ms. Packard concerned about the safety of taking piano lessons at the Spicers' residence. (RP at 150:6).

b. Charlene Cruz

Charlene Cruz is a mother of four children, three of whom have taken piano lessons from Ms. Spicer. (RP at 259:2, 8). During times pertinent to this lawsuit, only one of Ms. Cruz's children was taking piano lessons from Ms. Spicer. (RP at 259:11). Ms. Cruz provided the following testimony at trial:

CHARLENE CRUZ: I think [my daughter] was about, oh, about 13 I would guess, or maybe it was a little before that, it started around November, I think. Anyway, we would -- we would -- I would sort of drive down the side of [the Spicers'] yard, and I would drop her off, and she would walk in. And then I would watch her walk in through the gate. But it started that when someone walked by this big truck the engine would start and then the horn would start

honking, and it would just honk and honk and honk for a long time. (RP at 260:7-16).

Ms. Cruz described the honking as "like a car alarm going off." (RP at 262:4). "It's like honk, honk, honk. It's just continual." (RP at 262:6-7).

Ms. Cruz testified that she was concerned for her daughter's safety. (RP at 264:3).

c. Jaden Anderson

At the time of trial, Jaden Anderson was a 16 years old. (RP at 211:2). Mr. Anderson testified that when he took lessons, his mother, father or grandmother would park in the Spicers' driveway to drop him off, and he would walk to the entrance to the piano studio. (RP at 212:12-15). He described his experiences as follows:

JADEN ANDERSON: ... So every time I would go to take my lesson, I would walk to the right of Dr. Spicer's house, and there's a little gate. And right as I walked through the gate, there would be incessant honking noise from one of the vehicles. And the other would -- its engine would be revved, and the exhaust and fumes would shoot out of the exhaust pipe at 180 degrees straight angle, and it hit me in the pant leg essentially. (RP at 211:18-25; 212:1).

d. Junghee Spicer

During trial, Junghee testified that she observed Mr. Patnode remotely start his vehicles and set off a vehicle alarm more than a dozen times. (RP at 56:14). She gave the following trial testimony:

JUNGHEE SPICER: Oh, a lot of my students are young girls. When they come to the house, when they have to walk by the truck, he would all of a sudden remote start the trucks, and his trucks are -- the diesel truck is very loud . . .

(RP at 56:17-21)

Junghee testified that as a result of this conduct by Mr. Patnode, she began driving to some students' houses and also pursued an anti-harassment order. (RP at 58:18-20). Junghee also began to look for other locations to teach piano lessons. (RP at 61:25). By the time of trial, she was no longer teaching piano lessons out of her home. (RP at 62:17).

Junghee testified that Mr. Patnode's conduct made her fearful for her safety and the safety of her piano students. (RP at 71:4-7). She testified to anxiety and insomnia. (RP at 71:16). She testified that as a result of Mr. Patnode's conduct she began taking an additional medication for anxiety. (RP at 71:16-17; RP at 132:11). Junghee also testified that, due to fear of Mr. Patnode, the Spicers planned to move from their residence at 101 Lyle Loop. (RP at 71:19-22).

e. Paul Patnode.

During trial, Mr. Patnode testified that he never intentionally started any vehicle for the purpose of intimidating or threatening any of the Spicers' piano students or their parents. (RP at 344:14). The trial court "found Mr. Patnode to be less than credible in his testimony..." (RP at 478:21-22).

IV. ARGUMENT

Mr. Patnode advances three points on appeal. He argues that the trial court erroneously considered events that occurred outside of Junghee's presence as evidence of outrageous conduct. (Appellant's Brief, at 24-26). He contends that Mr. Patnode's conduct was not sufficiently outrageous as a matter of law. (Appellant's Brief, at 26-40). Mr. Patnode argues that substantial evidence does not support the trial court's factual determination that Junghee suffered severe emotional distress as a result of Mr. Patnode's conduct. (Appellant's Brief, at 45-46). Mr. Patnode also challenges several factual determinations of the trial court, (Appellant's Brief, at 45-46), all of which are supported by substantial evidence, and most of which are not relevant to any legal questions raised on appeal.

Reasonable minds could disagree as to whether the conduct of Mr. Patnode was sufficiently extreme to result in liability. For this reason, the trial court properly found in favor of Junghee on her claim of intentional

infliction of emotional distress. *See Robel v. Roundup Corp.*, 148 Wn.2d 35, 64, 59 P.3d 611 (2002) ("Although whether the defendant's conduct is sufficiently outrageous is a question of fact for the jury, before a claim of outrage can go to the jury, the court must first determine 'if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.'" (citation and internal quotation marks omitted). The trial court's legal conclusions are supported by appropriate findings of fact, each of which is supported by substantial evidence.

A. The trial court appropriately found that Mr. Patnode committed the tort of intentional infliction of emotional distress.

Mr. Patnode's primary challenge in this lawsuit is directed at Conclusion of Law No. 6 ("COL 6"), in which the trial court found that Mr. Patnode's conduct was "outrageous," that Junghee was the "object" of the conduct, and that Mr. Patnode's conduct was at times "directed at Ms. Spicer through her piano students and their parents." (CP 297).

Washington adopted the tort of intentional infliction of emotional distress, as set forth in the Restatement (Second) of Torts § 46, in *Grimby v. Samson*, 85 Wn.2d 52, 530 P.2d 291 (1975). The tort, often referred to as "outrage," requires proof of three elements: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3)

actual result to plaintiff of severe emotional distress. *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 792, 336 P.3d 1142 (2014).

1. The trial court did not err in considering as evidence conduct that Junghee did not personally observe.

Mr. Patnode argues that his conduct, insofar as it was directed at frightening and intimidating piano students and their parents, is not evidence of intent to cause severe emotional distress to Ms. Spicer. (Appellant's Brief at 24-26). This argument misapprehends the appropriate inquiry, which focuses on the "object" of a defendant's conduct. *Cambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983) (plaintiff must show that "they personally were either the object of the respondents' actions or an immediate family member present at the time of such conduct.").

The tort of intentional infliction of emotional distress is implicated where outrageous conduct is directed at or motivated by an intention to harm the plaintiff. Restatement (Second) of Torts § 46; comment i (1965). A plaintiff may be the "object" of outrageous conduct in a context where he or she is not physically present when the conduct occurs.

Courts have routinely considered conduct by a defendant towards third parties as evidence of outrageous conduct. In *Kloepfel v. Bokor*, 149 Wn.2d 192, 66 P.3d 630 (2003), the trial court considered the fact that the

defendant had placed phone calls to the homes of men the plaintiff knew as evidence of outrageous conduct directed at the plaintiff. *Id.*, at 194-95. The plaintiff was the object of the defendant's conduct, even though the defendant pursued this object by way of harassing third parties having some connection to the plaintiff.

In *Hess v. Treece*, 286 Ark. 434, 693 S.W.2d 792 (1985), the defendant filed numerous complaints about the plaintiff with the plaintiff's employer, a municipal police department.² 693 S.W.2d at 796. The court found "ample evidence to show that Hess was the moving force behind the repeated police investigations of Treece, and the fact that there was little face-to-face contact between the two men does not prevent a finding of proximate cause." *Id.*

In *Haverbush v. Powelson*, 217 Mich.App. 228, 551 N.W.2d 206 (1996), the court considered the fact that the defendant had sent letters to the plaintiff's daughter and future in-laws as evidence of extreme and outrageous conduct towards the plaintiff.³ *Id.*, at 209.

² Arkansas courts have adopted the tort of intentional infliction of emotional distress as set forth in the Restatement (Second) of Torts § 46. See *M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681, 687 (1980).

³ Michigan courts have adopted the tort of intentional infliction of emotional distress as set forth in the Restatement (Second) of Torts § 46. See *Duran v. Detroit News, Inc.*, 200 Mich.App. 622, 504 N.W.2d 715, 720 (1993) (citing *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 374 N.W.2d 905 (1985)).

Finally, in *Mitchell v. Stevenson*, 677 N.E.2d 55 (Ind. Ct. App. 1997), the court upheld an intentional infliction of emotional distress claim when an individual unilaterally disinterred the deceased's remains without the family's knowledge; "they suffered extreme emotional trauma when they discovered the grave had been desecrated."⁴

In fact, presence is required as an element *only* when the plaintiff cannot show that they were the object of the defendant's outrageous conduct. *See e.g. Lund v. Caple*, 100 Wn.2d 739, 675 P.2d 226 (1984) (claim against church pastor who had affair with the plaintiff's wife; affirming summary judgment dismissal of outrage claim because plaintiff was not present when the conduct occurred and did not even learn of the conduct until several months later). In such cases, the plaintiff must demonstrate that they were present when the conduct at issue occurred. *Reid v. Pierce County*, 136 Wn.2d 195, 203, 961 P.2d 333 (1998) (claim arising from county employees' alleged misuse of autopsy photographs; affirming summary judgment dismissal because the plaintiffs were not present when the conduct occurred and learned of it only later through third parties).

⁴ Indiana courts have adopted tort of intentional infliction of emotional distress as set forth in the Restatement (Second) of Torts § 46. *See Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991).

Mr. Patnode seems to concede that Junghee was the object and direct recipient of his conduct when she was physically present during the conduct. (Appellant's Brief at 25-26). For reasons set forth more fully *infra*, section IV.B.3.1, the trial court's factual determination (at Finding of Fact No. 33) that Mr. Patnode's conduct was directed at Junghee, and that she was the direct recipient of this conduct even if not always present during the conduct (CP 296), is supported by substantial evidence.

Because Junghee was the object of Mr. Patnode's conduct, the trial court did not err in considering as evidence conduct by Mr. Patnode directed at piano students and their parents that Junghee did not personally observe.

2. Reasonable minds could differ as to whether Mr. Patnode's conduct was sufficiently outrageous.

So long as reasonable minds could disagree whether Mr. Patnode's conduct was outrageous, the trial court was entitled to determine whether Mr. Patnode's conduct was sufficiently outrageous so as to constitute the tort of outrage as a question of fact. *Robel*, 148 Wn.2d at 64. Under the facts of this case, reasonable minds could disagree, and the trial court did not err in finding Mr. Patnode's conduct to be outrageous as a question of fact.

- a. **The conduct persisted for approximately four months and stopped only after the court issued an anti-harassment order.**

This case involves a deliberate scheme implemented over a period of approximately four months. Mr. Patnode did not voluntarily refrain from harassing Junghee and her students. He stopped only when the Spicers ultimately obtained an anti-harassment order from the Yakima County Superior Court.

The extended duration of time for which this conduct occurred is an appropriate factor for the court to consider in evaluating Mr. Patnode's conduct. In *Hess*, the Supreme Court of Arkansas affirmed a verdict in favor of the plaintiff in the context of conduct less egregious than the conduct of Mr. Patnode. The defendant in *Hess* filed a number of complaints about the plaintiff, a police officer, with the plaintiff's employer. 693 S.W.2d at 794. Affirming judgment in favor of the plaintiff, the court emphasized that the defendant's "actions against [the plaintiff] continued over a period of two years or more." *Id.* at 796. The court distinguished cases relied upon by the defendant that "involved either acts or conduct of limited duration in time." *Id.*

In *Kloepfel*, the court similarly considered evidence of discrete acts that occurred over several years as evidence that cumulatively amounted to outrageous conduct. 149 Wn.2d at 194-95.

Finally, the Michigan Court of Appeals in *Haverbush* considered a series of discrete acts occurring over a period of time that, if considered in isolation may not have been sufficiently outrageous, but viewed collectively were "extreme and outrageous." 551 N.W.2d at 234.

Mr. Patnode makes the same mistake as the defendant in *Hess*, relying largely on cases that do not contain facts comparable to the sustained, months-long course of conduct at issue in this case.

The plaintiff in *Salvidar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008), complained of the prosecution of one, albeit baseless, lawsuit. The plaintiff in *Jackson v. Peoples Federal Credit Union*, 25 Wn. App. 81, 604 P.2d 1025 (1979), filed an outrage claim based on a minor confrontation with creditors who sought to repossess his car. In *Lybrand v. Trask*, 31 P.3d 801 (Alaska 2001), the defendant painted biblical messages on her roof aimed at harassing her neighbor. And in *Wiehe v. Kukal*, 225 Kan. 478, 592 P.2d 860 (1979), the defendant engaged the plaintiff in one episode of assaultive behavior, waving a pitchfork in his face while making threatening remarks.

Each of these cases involved one, isolated episode. The Spicers' lawsuit is not about a single, discrete incident. It arose from a deliberate course of conduct initiated by Mr. Patnode in or around Thanksgiving 2015. The harassment persisted for approximately four months, and

terminated only when the Yakima County Superior Court issued an order directing Mr. Patnode to stop and further ordering him to disconnect his remote alarm module.

b. Mr. Patnode deliberately tried to frighten children and their parents.

The tort of outrage implicates basic standards of behavior that our society is willing to tolerate. To constitute outrage, the conduct “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 v. Yakima Health District*, 191 Wn.2d 79, 91, 419 P.3d 819 (2018) (quoting *Grimsby*, 85 Wn.2d at 59). Pertinent here is that Mr. Patnode deliberately and intentionally sought to frighten and intimidate children. Our society should not expect Junghee, nor anyone else, to be “hardened” to this kind of conduct. *Grimsby*, at 59. Ms. Spicer was particularly sensitive to Mr. Patnode's conduct given her relationships with these students.

c. Mr. Patnode's conduct was outrageous.

Washington courts have found less egregious behavior sufficient to constitute the tort of outrage. *See e.g., Phillips v. Hardwick*, 29 Wn. App. 382, 628 P.2d 506 (1981) (affirming jury verdict on outrage claim arising from the defendant's refusal to move out of house in accordance

with terms of purchase and sale agreement). So too have other jurisdictions that have also adopted the tort of intentional infliction of emotional distress as set forth in the Restatement (Second) of Torts § 46. *See Hess*, 693 S.W.2d 792.

Considering the factors outlined in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 867, 904 P.2d 278 (1995), Mr. Patnode's conduct was not privileged. The trial court found that Mr. Patnode caused Junghee severe emotional distress and this finding is supported by substantial evidence. There can be little doubt that Mr. Patnode was aware that that his conduct would cause severe emotional distress to Junghee, particularly given the nature and duration of the conduct. Under these circumstances, reasonable minds could disagree whether Mr. Patnode's conduct was sufficiently outrageous.

3. The trial court did not err in finding that Junghee suffered severe emotional distress.

A plaintiff alleging intentional infliction of emotional distress need not prove the existence of severe emotional distress by objective symptomatology. *Kloepfel*, 149 Wn.2d at 198. This is because "a plaintiff claiming intentional infliction of emotional distress must show extreme and outrageous conduct intended to cause emotional distress to the

plaintiff." *Id.*, at 201-02. Once these have been shown, "it can be fairly presumed that severe emotional distress was suffered." *Id.*, at 202.

An inference of severe emotional distress is justified when the plaintiff experiences constant harassment. The plaintiff in *Kloepfel* suffered a constant barrage of harassing phone calls and other various threats to her and others she knew. *Id.*, at 194. She did not seek professional care of a doctor or counselor. *Id.*, at 195. Her symptoms of emotional distress included nervousness, sleeplessness, hyper-vigilance, and stomach upset. *Id.* The plaintiff's symptoms of emotional distress, plus the defendant's sustained outrageous conduct, justified an inference of the plaintiff's severe emotional distress. *Id.*

The plaintiff in *Hess* was similarly found to have suffered severe emotional stress after testifying that the defendant's conduct interfered with his ability to do his job, that he became concerned for the safety of his family, and that he changed his lifestyle because of his fear. 693 S.W.2d at 795.

The evidence in this case is not distinguishable in any meaningful way from that found adequate in *Kloepfel* and *Hess*. Junghee testified to her symptoms of significant emotional distress as a result of Mr. Patnode's conduct. She became fearful for her safety as well as the safety of her young piano students. (RP at 71:4-7). She testified to experiencing

anxiety and insomnia as a result of Mr. Patnode's conduct. (RP at 71:16). Junghee testified to taking an additional anti-anxiety medication. (RP at 71:16-17; RP at 132:11). She testified that fear of Mr. Patnode was the primary reason for the Spicers' decision to move out of their home at 101 Lyle Loop Road. (RP at 71:20-24).

Fear of what might happen to oneself or others is sufficient to establish severe emotional distress. *See Haverbush*, 551 N.W.2d at 209 (severe emotional distress established, in part, due to concern about potential interference with wedding, to worry about damage to reputation, and to concern for patients' safety).

On appeal, Mr. Patnode suggests that Junghee's distress was unreasonable or disproportionate. (Appellant's Brief, at 41). Ms. Spicer is not required to prove she was peculiarly susceptible to emotional distress because this was highly unusual conduct.

The trial court's factual determination that Junghee suffered severe emotion distress is supported by substantial evidence.

B. The trial court's findings of fact are supported by substantial evidence.

Mr. Patnode challenges several findings of fact. The challenged findings are supported by substantial evidence. Any error is harmless.

1. Mr. Patnode has not objected to several findings of fact.

Mr. Patnode has raised no objection to finding of fact nos. 1-5, 8, 10, 12-15, 17, 24-25 and 28-30, and these findings may be accepted as a verity upon review. *Town of Selah v. Waldbauer*, 11 Wn. App. 749, 753, 525 P.2d 262 (1974).

2. Standard of review.

Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the findings of fact. *Greene v. Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). Substantial evidence exists where evidence is sufficient "to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

3. The trial courts findings of fact are supported by substantial evidence.

a. Finding of Fact No. 7 is supported by substantial evidence.

The trial court correctly found that CUP 2012-0101 authorized Ms. Spicer to teach 4-6 lessons per day. (CP 114). Students contracted for lessons on a monthly basis, with individual lessons occurring on a weekly basis. (See RP at 29:17-18; RP 45:21; RP 125:25). The trial court did not suggest to the contrary and, even if it did, any error in this regard is irrelevant to COL 6, and is therefore harmless.

b. Finding of Fact No. 9 is supported by substantial evidence.

The trial court correctly found that Mr. Patnode complained to the Spicers in February 2012. (RP at 309:10). To the extent the finding suggests the absence of other complaints by Mr. Patnode, any error is irrelevant to COL 6, and is therefore harmless.

c. Finding of Fact No. 11 is supported by substantial evidence.

The trial court found in Finding of Fact No. 11 that "Ms. Swart testified that [Mr. Patnode] was about five feet away." (RP at 289). This finding is supported by substantial evidence. Ms. Swart testified that Mr. Patnode was "[p]robably five feet" away from her when he was taking pictures. (RP at 273:24). Regardless of the actual distance, which cannot now be measured with certainty, the finding is consistent with Ms. Swart's testimony.

Mr. Patnode also argues that the trial court erred in finding that it was Mr. Patnode's conduct in confronting Ms. Swart and her children from a close distance and taking photos of them, rather than Ms. Swart's reasonable objections to this behavior that "frightened Ms. Swart's children, especially her 12 year old daughter." (CP at 319). However, the trial testimony was uncontroverted that Mr. Patnode initiated the

encounter. And Ms. Swart testified that her children "were pretty freaked out" by Mr. Patnode's conduct. (RP at 282:4-5).

In any event, the events described in Finding of Fact No. 11 occurred in the fall of 2014, and are for that reason irrelevant to COL 6.

d. Finding of Fact No. 16 is supported by substantial evidence.

Contrary to Mr. Patnode's argument, the trial court did not find that the Spicers moved all piano lessons as a result of Mr. Patnode's conduct. The record is uncontroverted that the Spicers and YAA ultimately moved all piano lessons to other locations. (RP at 62:17).

e. Finding of Fact No. 18 is supported by substantial evidence.

Contrary to Mr. Patnode's argument, the trial court did not find that the box truck was parked overnight and made no explicit findings about the number of instances any particular vehicle was parked alongside the Spicers' home. (CP 321). The Spicers introduced trial exhibits depicting numerous vehicles parked alongside their home at various points of time. (Ex. 37; Ex. 52). Each witness testified to observing these vehicles. Mr. Patnode does not dispute that a Hummer, a box truck or a sedan were parked alongside the Spicers' home at various points in time. (RP at 334:21-22; 349:23; RP at 347:8). Finding of Fact No. 18 is supported by substantial evidence.

f. Finding of Fact No. 19 is supported by substantial evidence.

The trial court's finding that Mr. Patnode regularly and repeatedly remote started his F-250 pickup and repeatedly set off his vehicle alarm is consistent with the prior ruling of Judge Gibson when issuing the anti-harassment order. (CP at 57). It is also consistent with sworn testimony of Junghee Spicer, Aimee Packard, Charlene Cruz and Jaden Anderson. The trial court expressly found that Mr. Patnode's testimony to the contrary was not credible. (RP at 478:21-22).

The trial court's conclusion that Mr. Patnode's conduct frightened both Junghee and the children is also supported by substantial evidence. (RP at 71:4-7).

g. Finding of Fact Nos. 20-22 are supported by substantial evidence.

The trial court's Finding of Fact Nos. 20-22 are consistent with the testimony of non-party witnesses Aimee Packard, Jaden Anderson and Charlene Cruz. The findings are supported by substantial evidence.

h. Finding of Fact No. 23 is supported by substantial evidence.

Mr. Patnode does not explain his challenge to the trial court's Finding of Fact No. 23. Statements of Judge Gibson at the April 5, 2016, hearing were in the record before the trial court. (CP 179). Mr. Patnode

did not object to the trial court taking judicial notice of Judge Gibson's oral ruling.. The trial court's finding is consistent with Judge Gibson's ruling and order. (*See* CP 57; Ex. 4).

i. Finding of Fact Nos. 26 and 27 are supported by substantial evidence.

The trial court's Finding of Fact Nos. 26 and 27 are consistent with Junghee's trial testimony. (RP at 20:13; RP 21:15; 22:2, 19; RP 64:19-21; RP 65:7-8; RP 66:21; RP 68:11-14; 70:15-17) . The finding is, in any event, not relevant to any issue raised on appeal. Any error was harmless.

j. Finding of Fact No. 31 is supported by substantial evidence.

The trial court's finding that the Spicers responded to Mr. Patnode's harassment by moving music lessons to other locations is supported by substantial evidence. Junghee testified that due to harassment by Mr. Patnode, she began to look for a new location to teach piano lessons. (RP at 61:25). Junghee testified that she withdrew her application for a permit with Selah after it became apparent that "Mr. Patnode wasn't going to just let it rest, and he was going to do everything he could to make [her] life difficult." (RP at 39:3-5).

k. Finding of Fact No. 32 is supported by substantial evidence.

Mr. Patnode does not explain his challenge to the trial court's Finding of Fact No. 32. Junghee testified that Mr. Patnode's conduct made her fearful for her safety and the safety of her young piano students. (RP at 71:4, 7). She felt anxiety and insomnia. (RP at 71:16). She began to take a new anti-anxiety medication. (RP at 132:11). She decided to move. (RP at 71:19-20).

l. Finding of Fact No. 33 is supported by substantial evidence.

Finding of Fact No. 33 is supported by substantial evidence. Testimony at trial demonstrated that Mr. Patnode's conduct arose from his objection to Junghee's home-based piano instruction business. Testimony of Aimee Packard, Charlene Cruz and Jaden Anderson established that Mr. Patnode's conduct was both intentional and pursued with the objective of frightening and intimidating piano students and their parents. In so doing, Mr. Patnode sought to deter students from taking piano lessons from Junghee. The trial court's determination after hearing all of the evidence, including testimony by Mr. Patnode, that Mr. Patnode's conduct was directed towards Junghee and pursued with the objective of interfering with her piano business is supported by substantial evidence.

m. Finding of Fact No. 34 is supported by substantial evidence.

The trial court's Finding of Fact No. 34 is consistent with Junghee's testimony at trial. (RP at 71:4, 7, 16; RP at 132:11).

V. CONCLUSION

The trial court's findings of fact, conclusions of law and judgment should be affirmed.

Respectfully submitted this 27th day of November, 2018

MENKE JACKSON BEYER, LLP
Attorneys for Junghee and David Spicer



QUINN N. PLANT, WSBA # 31339

DECLARATION OF SERVICE

On the date set forth below, I emailed and deposited in the U.S. Mail a true and accurate copy of Respondent's Brief in Court of Appeals, Division III, Cause No. 360652 to the following parties:

Mr. Tyler M. Hinckley
Attorney at Law
Montoya Hinckley, PLLC
4301 Tieton Drive
Yakima WA 98908-3483
tyler@montoyalegal.com

Electronic filing by JIS Portal to:
Clerk of the Court
Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED THIS 27th day of November, 2018, at Yakima, Washington.



JANET L. ROSE

MENKE JACKSON BEYER, LLP

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