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No. 69302-6-I

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

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CHRISTINE NORTON On Behalf of L.T. and M.T.,  
Respondents,

v.

RUBEN TORRES,  
Appellant.

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 APR 11 PM 1:24

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Michael Hayden, Judge

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APPELLANT'S REPLY BRIEF

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**I.**  
**REPLY ARGUMENT**

- A. THIS COURT SHOULD STRIKE PAGES 14-15 OF THE RESPONDENTS' BRIEF WHERE RESPONDENTS REFERENCE MATTERS NOT A PART OF THE RECORD ON REVIEW

The DVD referenced by Respondents on page 14 and 15 was not admitted into evidence in the trial court. Thus, this Court cannot rely upon any assertion that Judge Hayden "could confirm" that Torres touched L.T. and M.T.'s breasts by watching the video "to confirm the twins' verbal references to their 'chest' and 'boobs.'" Brief of Respondents (BOR) at pages 15. The record on review consists only of the verbatim report of proceedings, the clerk's papers and exhibits entered in trial court. *See, e.g.,* RAP 9.1-9.13.

- B. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT ENTRY OF THIS ORDER UNDER RCW 7.90.010(4)(A)

Judge Hayden did not specify which section of the statute was violated by Torres. In the trial court, Respondents argued that the trial judge could enter an order under either RCW 7.90.010(4)(a) or (e). They have now settled on the argument that the order is supported under section (4)(a).

Under subsection (4)(a) the statute requires that unconsented touching be knowing or intentional. Judge Hayden did not find that the

touching was either knowing or intentional. He simply found it happened during tickling. But Judge Hayden's finding suggested that he found that if *any* touching of the girl's chests occurred – even incidentally or accidentally – an order could issue. This is not the case. It is not enough to say (as he said here) “I find that the touching did occur...” There must also be a finding that the touching was “knowing” or “intentional.” The judge's finding includes any touching that was accidental or incidental to the tickling. But accidental or incidental touching is not a basis for issuing a sexual assault protection order.

“Sexual conduct” means any of the following:

(a) Any *intentional* or *knowing* touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing.

In response to Torres's argument that Judge Hayden made no finding on this element, the Respondents appear to argue that the mere fact of any touching is sufficient.

But that ignores the statutory requirement of an “intentional” or “knowing” touching. It appears as though those terms were imported from the criminal code. In that context, RCW 9A.08.010(1)(a) states that: a person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010(b) provides that:

A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

Thus, the statute requires the intention to commit some sort of “offense.” It clearly requires something more than an accidental touching or the kind of non-sexual, normal human interaction in a family between a grandfather and his grandchildren – including hugging and tickling.<sup>1</sup> Certainly, the touching could be accidental or incidental and not give rise to the issuance of a sexual assault protection order.

This analysis is supported by the fact that Washington’s statute was based upon an Illinois statute. *See* attached House Bill Report for HB 1555. The Illinois statute provides that:

“Sexual conduct” means any *intentional or knowing* touching or fondling by the petitioner or the respondent, either directly or through clothing, of the sex organs, anus, or breast of the petitioner or the respondent, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the respondent upon any part of the clothed or unclothed body of the petitioner, *for the*

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<sup>1</sup> Tela and Ruben both testified that Ruben did hug and tickle his granddaughters. RP 86, 91.

*purpose of sexual gratification or arousal of the petitioner or the respondent.*

IL ST CH 740 § 22/103 (Emphasis added). Thus, the intent or knowledge under Washington's statute must be to satisfy some sort of criminal impulse.

And, although the Respondents continue to assert that the record supports their claim that Torres "touched their breasts", that is an overstatement. Both were unclear how old they were when this touching happened. M.T. stated that it was when she was "little" and before she was wearing a bra. RP 23-24. L.T. said any touching occurred over her clothing. RP 57.

C. THE RESPONDENTS SEEK TO TRIVIALIZE THE STATUTE

This statute should not be used by disgruntled parents as leverage in family discord. Even Judge Hayden seemed trepidatious about entering the order. RP 108.

L.T. and M.T. argued in the trial court that their grandfather's tickling was "grooming behavior", although there is no support for this assertion. The brief compares Torres's behavior to rape, pornography and producing child pornography. BOR at 11. The Respondents claim that this Court should find an inference that Torres's behavior was "sexually motivated" even though there is nothing in the record to support that

inference. RP 18. They also claim that he was “an abuser” and “molesting them.” RP 24. They actually argue that there is evidence that “Torres is in fact sexually attracted to underage girls” because one of the twins alleges that he “looks at teenage girls’ chest and butts.” BOR at 19. How she could know this is not explained in the transcript.

The Respondents also argue that there is no requirement that any of Torres’s activities reach the level of conduct described in RCW 7.90’s preamble. Under their reading of the statute any non-consensual touching of the girl’s breasts to their grandfather’s chest at any age, no matter how trivial and without regard to knowledge or intention, is the basis for entry of a “sexual assault” protection order.

True victims of sexual assault deserve the full protection of the law. But in this case, this Court should see through the hyperbole and take into account all of the facts. There is evidence that the request for this order arose as part of the ongoing family disharmony. Christine Norton and Adrian Torres were embroiled in a visitation dispute. There was a disagreement about family religions. Visitation took place in a location remote from the teen’s current activities. Clearly, their mother did not support visitation with their father. The evidence is that L.T. and M.T. simply did not want to visit their father in Cowlitz County any longer. Norton originally alleged that Torres had repeatedly touched L.T. and

M.T. inappropriately for years. CP 7. A police investigation ensued and no criminal charges were brought. These facts support Ruben's assertion that it was the family discord that precipitated the request for this order.

D. RESPONDENTS ARE NOT ENTITLED TO ATTORNEYS FEES

Respondents seek to recover "attorneys fees" even though they paid no fee in this case. Respondents assert, without any citation to any record, that Ruben knew that they paid no fee to their lawyer and somehow thought that might mean he would prevail on appeal by default. How he would have known this is unclear. Certainly, undersigned counsel had no idea that Ms. Cordo's clients paid no fee.

The Respondents fail to cite to any authority that would support the payment of fees that were never actually incurred. Moreover, the "SVLC" is not a "party" to this litigation. Thus, it cannot recover its fees under RAP 18.9(a).

While the Respondents also argue that the appeal is "frivolous", they fail to cite to the cases defining what that term means. The cases say that an appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 151

P.3d 219, 222-23 (2007), *review denied*, 162 Wn.2d 1009, 175 P.3d 1092 (2008) (no award of fees where appeal was not devoid of merit); *Marquez v. Cascade Residential Design, Inc.*, 142 Wn. App. 187, 174 P.3d 151 (2007) (appeal was not frivolous); *Matheson v. Gregoire*, 139 Wn. App. 624, 161 P.3d 486 (2007), *review denied*, 163 Wn.2d 1020, 180 P.3d 1292, *cert. denied*, 555 U.S. 881, 129 S.Ct. 197, 172 L.Ed.2d 140 (2008) (appeal was not frivolous where reasonable minds could debate the merits). And, all doubts concerning whether an appeal is frivolous are resolved in favor of *the appellant*. *Lutz Tile, Inc. v. Krech*, *supra*; *Camer v. Seattle School Dist. No. 1*, 52 Wn. App. 531, 762 P.2d 356 (1988), *review denied*, 112 Wn.2d 1006, *cert. denied*, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989).

Here, Ruben Torres is a loving grandfather who, up until this order was entered, had been very involved in his granddaughter's lives. He has been branded a sexual *offender* when the trial court did not find any knowing or intentional sexual conduct on his part. There is clearly a meritorious debate about whether or not his action in hugging and tickling his granddaughters at some unspecified time in the past justifies the entry of this order.

## II. CONCLUSION

The law requires that a sexual assault protection order issue only when an unconsented intentional or knowing touching has occurred. There was no such knowing or intentional touching in this case. The trial court made no finding of knowing or intentional actions. Thus, the trial court erred in entering an order against Torres.

DATED this 10th day of April, 2013.

Respectfully submitted,

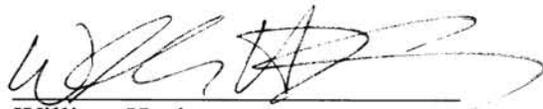
  
Suzanne Lee Elliott, WSBA #12634  
Attorney for Ruben Torres

### CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

Ms. Emily Cordo  
Sexual Violence Law Center  
1420 Fifth Avenue, Suite 2200  
Seattle, WA 98101-1346

10 Apr 2013  
Date

  
William Hackney

HOUSE BILL REPORT  
HB 1555

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

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As Reported by House Committee On:  
Judiciary

Title: An act relating to sexual assault protection orders.

Brief Description: Addressing sexual assault protection orders.

Sponsors: Representatives Williams, Rodne, Lantz, Chase and Ericks.

Brief History:

Judiciary: 1/30/07, 1/31/07 [DPS].

Brief Summary of Substitute Bill

- Provides that a sexual assault protection order is a remedy for victims who do not qualify for a domestic violence protection order.

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HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member;

Warnick, Assistant Ranking Minority Member; Ahern, Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Staff: Trudes Tango (786-7384).

Background:

Last year, the Legislature established a new civil protection order called the sexual assault protection order. Any person who is a victim of nonconsensual sexual conduct or penetration that gives rise to a reasonable fear of future dangerous acts may file a petition for a sexual assault protection order.

A domestic violence protection order is a civil remedy when there has been domestic violence between family or household members. Family or household members include current and former spouses, persons who have a child in common, adults who have in the past or are currently residing together, persons 16 years of age or older who have in the past or currently have a dating relationship with a person 16 years of age or older, persons who have a biological or legal parent/child relationship, including stepparents, stepchildren, grandparents, and grandchildren.

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Summary of Substitute Bill:

Language is added to explicitly state that a sexual assault protection order is a remedy for victims who do not qualify for a domestic violence protection order.

Substitute Bill Compared to Original Bill:

The original bill: (a) deleted language in current law providing that if a respondent appeared at a hearing for an ex parte temporary order the respondent may file an appearance and testify; (b) removed the requirement that an ex parte temporary contain a specific statement regarding a respondent reopening the order; and (c) prohibited a public agency from charging filing or service of process fees to a petitioner.

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Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) This is a housekeeping bill. Survivors of domestic violence are better served by the domestic violence protection orders. Sexual assault protection orders are for a narrow category of victims. The language that the bill deletes does not affect how a respondent can access the court system. There was no intention for the deletions to be substantive. The language in last year's bill that created sexual assault protection orders was based on Illinois' statute. Washington does not use the term "reopen an order."

(Concerns) Cities have fiscal concerns about the bill. It should be discretionary for municipal courts to issue these orders due to the fiscal impact on cities.

(Opposed) This is not just a housekeeping bill. Even if a respondent does not receive notice of an ex parte hearing, the respondent could still appear in court. The respondent should be able to file an appearance and testify. A respondent should be able to reopen the ex parte order if the respondent has a meritorious defense.

Persons Testifying: (In support) Christiane Hurt, Washington Coalition of Sexual Assault Programs.

(Concerns) Tammy Fellin, Association of Washington Cities.

(Opposed) Amy Muth, Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: Marcia Magee.