No. 309240

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

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ELIZABETH A. M. GRAY,

Respondent,

v.

JAMES D. GRAY,

Appellant.

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# BRIEF OF APPELLANT

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**Issues Pertaining to Assignments of Error**

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2. Where the evidence indicated Appellant, in sending text messages to Respondent about the exchange of their child for residential time, was on

occasion telling Respondent where to meet him, instead of asking her, was there substantial evidence to support findings that Appellant did this so many times that a reasonable person would suffer substantial emotional distress, and that the Respondent in fact suffered substantial emotional distress from that conduct?

3. Do the oral findings by the trial court support a Conclusion of Law that unlawful harassment occurred?

## II. STATEMENT OF THE CASE

Elizabeth Gray filed a Petition for an Order of Protection – Harassment against James Gray, in the Superior Court of Whitman County, dated February 24th, 2012. CP 1-8. After a hearing, the Superior Court granted a final order to Ms. Gray. CP 66-67. James Gray appeals that order.

Ms. Gray's Petition included a "Personal Statement" of the facts she alleged supported her requests. It indicated she was filing for an order of protection "due to the Respondent's harassing/controlling text messages, his violation of our Decree of Dissolution to intimidate/harass, and his interference to intimidate/harass and stalking-like behavior during my residential time with our son at school pick-ups." CP 3.

Her statement indicated the parties had been divorced in 2008, and that an order had been entered on June 4th, 2010, that included the following language:

> Text messages or other communications from Respondent to Petitioner that do not relate to an emergency concerning the child or a problem with the timing of a drop off or pick up will be construed to be improper and unlawful harassment. CP 3.

Ms. Gray's statement then sets forth a list of eleven text messages from Mr. Gray, quoting each. The oldest cited was on June 29th, 2011, and the most recent, February 12th, 2012. CP 3-5.

Mr. Gray's texts on February 12th, 2012 were: "We will be at Chase Bank at 7 pm, do u understand?" "Then just meet me at chase till I tell you different do you understand that". "Chase bank forever do you understand that. good." CP 3.

Ms. Gray had texted back in in response to Mr. Gray, generally asking him not to speak to her like that, not to tell her what to do, and to not change the pickup spot. Her comments included: "Again, quit with the side comments and speaking like that to me. No more. Thank you. And quit changing the pickup/dropoff point. I don't want you texting every time." CP 3.

On February 20th, 2012, Mr. Gray had texted the following to Ms. Gray at 2:34 p.m. : "We will be at Chase bank 7pm do you understand?" Ms.

Gray replied: "Do not speak to me like that. And yes, I got the message for pick up." CP 3. Those were all the texts set forth by Ms. Gray for that date.

On February 18th, 2012, Mr. Gray sent the following text: "You pick up and drop off will be at chase bank today." No reply is set forth. CP 3.

On February 16th, 2012, Mr. Gray sent texts stating: "We will be at chase bank at 7 p.m." and "Do u understand chase bank?" To which Ms. Gray replied: "Yes". CP 4.

On February 3rd, 2012, Mr. Gray texted Ms. Gray about having exchanged the child's shoes for a pair that fit him, and asked her to stop texting the child about the shoes. CP 4.

The most recent text cited by Ms. Gray before the February 2012 texts is dated October 24th, 2011, and concerned the time and place of the drop off, to which Ms. Gray objected. Mr. Gray replied: "Whatever u need to make u feel better". CP 4.

In September of 2011, Mr. Gray had sent Ms. Gray texts about their son's football gear bag, and about someone wanting to buy her Volvo, which she indicated she was not interested in selling. CP 4.

On August 19th, 2011, Ms. Gray received what she called a "series" of texts that she described as "harassing." They were set forth by her as

follows: "Need jimmy's phone charger and man bag call us when you're a chase bank". Then seven minutes later: "We want that 2 day". And eleven minutes later: "We're waiting 2 day". No responses from Ms. Gray are set forth. CP 4.

On July 10th, 2011, Mr. Gray sent a series of text messages to Ms. Gray including "Please bring james phone" and then after she apparently did so, then asking her to also bring the charger for the phone. Mr. Gray then stated in texts that he would not agree to her proposals for changes to the Parenting Plan, due to his apparent belief that she was playing "games" over the charger. Ms. Gray later brought the phone charger for the child's phone. CP 5.

In the oldest series of texts, on June 29th, 2011, Mr. Gray had begun with "Please drop our son at chase bank please confirm." Ms. Gray had responded that no, it would be at McDonald's. Mr. Gray insisted he could not make it there by 7 p.m.. Ms. Gray stated that Chase Bank was not part of the Parenting Plan. Mr. Gray had replied: "Neither are your proposals but you need to work with me like I need to work with you or if we can't work together like the judge say we can go to mediation?" CP 5.

Ms. Gray's statement in support of her Petition went on to explain her belief that Mr. Gray was not adhering to the provisions of the Parenting

Plan for pickups and drop-offs. She stated that she had tried to get Mr. Gray to agree to a change in the location for the exchange of the child during a mediation in October of 2011. "He has violated the Order, will continue to do so and ignore the Court's decision." CP 5.

Ms. Gray's statement then further alleges that Mr. Gray had been "found to harass me" "by this Court" during the dissolution process and in 2010, when on each occasion he has sent over 240 "unwanted/unnecessary" text messages to "harass and bully me." No content of those alleged messages are provided in her statement. CP 6.

Ms. Gray alleged that on December 14th, 2011, Mr. Gray had followed her into their child's classroom when she was there to meet with a teacher, and forced himself into the conversation. She alleged this violated a provision of their Decree. CP 6.

Ms. Gray alleged that when she would go to the child's school to pick him up for her visits, that Mr. Gray would be there. At first, it appeared that he was there to pick up his girlfriend's child, but he was not observed to be doing this in recent months. Mr. Gray would stop their son as he left school to engage in conversation, and "drop items off to him that are of non-importance." CP 6.

Ms. Gray indicated in her statement that she requested the following

relief: 1) that Mr. Gray's texts be limited to emergencies with their son, and if Mr. Gray would be late for pickup or drop-off, 2) that Mr. Gray be restrained from being less than 100 feet from her, 3) that pickups and drop-offs be at the police department, with no changes, and 4) that Mr. Gray be restrained from her residence, place of work, and any place where she was engaged in exercising her residential time. CP 7.

In an additional Declaration by Ms. Gray filed March 6th, 2012, Ms. Gray stated that although the Parenting Plan provided for pickups and drop-offs to take place at a McDonald's, that since January of 2011, only two took place there. 30 of the exchanges took place at Chase Bank, 41 took place at the residence of Mr. Gray's girlfriend, three at school, 14 at football practice, and ten at Chevron-Sunset Mart. CP 39-40.

The Declaration indicates that Ms. Gray had asked during a mediation session in October 2011 for the exchanges to take place at the Chevron-Sunset Mart, and that although Mr. Gray had said no to this at the time, that the exchanges did take place there for a period of time into November of 2011. CP 40.

An e-mail from Madeline Martin, Ms. Gray's mother, was provided in which she stated that she began picking the child up at school for Ms. Gray's visitation time, due to Ms. Gray's complaints about Mr. Gray. Ms.

Martin's "report" states that Mr. Gray would be sitting in a vehicle at the school at 2:50 p.m., and at 2:55 p.m. he would walk up to the school and speak to "Jimmie." And that he had not been picking up his girlfriend's son, Zack, at school since January 23rd, 2011. (According to Ms. Gray, her mother did not start picking the child up for her until after sometime in December of 2011. CP 41). Ms. Martin indicated she had not shown up for a 7 p.m. exchange until 7:08 p.m. because "I was pre-occupied preparing this report!" CP 43-44.

Mr. Gray filed a Declaration in response to the Petition. CP 45-48. According to Mr. Gray, the Parenting Plan entered December 10th, 2008, para. 3.11, provided for exchanges of the child "at the McDonald's on Stadium Way unless otherwise mutually agreed upon by the parents." CP 45, para. 2.

Under the Parenting Plan, there are approximately 20 exchanges per month. CP 45, para. 3. At a mediation in October of 2011, the parents agreed to the exchanges being at the Chevron, because they both lived close by, and about ten exchanges did take place there, as listed by Ms. Gray. Then, according to Mr. Gray, they both agreed to have the pickups and exchanges at Tami Mohr's house, and that is why Ms. Gray lists 41 pickups or drop-offs at that location. CP 46, paras. 4-10.

Mr. Gray also alleged the parties agreed to make the exchanges at their son's football practice, and that is why Ms. Gray lists 14 exchanges during the months of football practice. CP 46, paras. 11-12.

According to Mr. Gray, the parties then agreed to use Chase Bank as an exchange point, beginning in January of 2011, because Ms. Gray used to work there and it was convenient for her, and for him, and they continued to do so "until the present." He noted Ms. Gray listed 31 uses of Chase Bank for the exchanges. CP 46-47, paras. 13-16.

Mr. Gray indicated that he entered his son's classroom on December 14th, 2011, as his son told him there was an issue over a book report. He had already been at the school, with his son, when Ms. Gray had walked past him. Mr. Gray then went into the classroom of Mrs. Cartwright, his son's teacher, with his son to discuss the book report issue. Mr. Gray stated that he was unaware that is where Ms. Gray had been going. When he entered the classroom, Ms. Gray was not speaking to Mrs. Cartwright. Mr. Gray then had a conversation with Mrs Cartwright for no more than a minute. Mr. Gray did not speak to Ms. Gray during this time. He then left with his son. CP 47. Paras. 17-27.

According to Mr. Gray, he goes to the school on days that he is not picking up his son, merely to see his son for no more than a minute or two,

to ask him how his day has gone. He does not say anything to Ms. Gray, or acknowledge her, during these times, and stays away from her. CP 47. Paras. 28-30.

At a hearing on March 30th, 2012, the parties made their respective arguments based on the written declarations filed with the Court. No documents from the Dissolution matter were in the record.

The Court asked Ms. Gray, as to exchanges of the child: "The times that you have agreed to have a change in place other than at McDonald's you have agreed to that quite a few times right?" Ms. Gray: "Yes." RP 18, lines 13-24.

Among other comments, the Superior Court Judge said "All right you know on its face this is a close case." ... RP 19, lines 18-19.

> The text messages relate to parenting issues and he's shaking his head yes, they relate to parenting issues they are baloney will you be at Chase Bank - um - you do this you do that - um - you know we've got to put this in context we have to consider everything that has happened I feel.
>
> If this was the first time - hum - maybe I could understand it Mr. Gray but over and over and over and over. These are good faith communications concerning your child. They're just exactly as she says they are controlling, bad faith harassing communications. Now if this was the first time something like this had happened I'd say come on Mrs. Gray come on don't read them ignore them but it's never going to end is it?
>
> RP 20, lines 4-16.
>
> It's never going to end Mr. Gray you are a chronic harasser and

> you're doing it on purpose not because you're worried about your children and you might argue that you phrase these things so you can make that argument but I can read and I can put everything in context here. Your motivations are not pure your motivations aren't aimed toward your child the way that the text messages are worded yeah it relates to your child it's telling her what to do. You're divorced you've got a place to have an exchange you don't have a choice you cannot agree otherwise because he'll take advantage of it just meet at McDonald's. ...
>
> RP 20, lines 18-25, RP 21, lines 1-3.

The Superior Court entered an Order for Protection - Harassment. CP 66-67. In explaining exactly what relief was being ordered, the Judge stated:

> ... child's school or extracurricular activity respondent's restrained from being in no less than 30 feet of the petitioner and I'm not worried if she's meeting with the – if he's meeting with the teacher you're walking into the room isn't going to get him in trouble so don't –
>
> RP 22, lines 11-16.

The Order provided that Mr. Gray was restrained from making any attempts to keep under surveillance Ms. Gray or their child. He was restrained from making any contact with Ms. Gray except for text message in case of emergency during his time with the child, or in case of being late for a pickup or drop-off during his residential time. CP 67.

The Order also restrains Mr. Gray from being within 100 feet of Ms. Gray's residence or place of employment, or within 30 feet of her during

the child's extracurricular activities or during pickups and drop-offs of the child for residential times. He is also restrained from getting out of his vehicle during the pickups or drop-offs. The Order also states Mr. Gray is restrained from interfering with Ms. Gray's picking up of the child from school. CP 67. The Order restrains Mr. Gray from changing the place of pickup or drop-off of the child, and provides that the exchanges will take place at the designated McDonald's. CP 67.

Apparently no written Findings of Fact were entered in support of the order.

## III. SUMMARY OF ARGUMENT

The trial court rejected contentions by Ms. Gray, the Petitioner in the Superior Court and the Respondent on appeal, that changes in the location of the exchanges of their child for residential time was unlawful harassment. The trial court also rejected the argument that Mr. Gray's entry into a school classroom while Ms. Gray was present was a basis to find harassment. The trial court based its decision to grant an Order of Protection – Harassment was based on finding that Mr. Gray was telling Ms. Gray what to do, and controlling her, in texts stating where the next drop off of the child would take place.

It is submitted that such conduct by Mr. Gray, the Appellant does not

constitute unlawful harassment as a reasonable person would not be caused substantial emotional distress by such conduct, and the record did not indicate that Ms. Gray suffered substantial emotional distress from that conduct which the Superior Court found was harassment. The Order should be reversed, and the Petition dismissed.

IV. ARGUMENT

1. The trial court erred in failing to enter written Findings of Fact

CR 52(a)(1) provides in full:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to rule 58 and may be entered at the same time as the entry of the findings of fact and the conclusions of law.

> We have previously held that a trial court's failure to enter findings of fact and conclusions of law requires remand to the trial court for formal entry of written findings and conclusions unless the record is adequate for review. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 416, 157 P.3d 431 (2007) (holding that "[a]bsent an adequate record" to review the attorney fee award, an appellate court "must remand for further proceedings"); *Shelden v. Dep't of Licensing*, 68 Wn. App. 681, 685, 845 P.2d 341 (1993) (citing *Peoples Nat'l Bank of Washington v. Birney's Enterprises. Inc.*, 54 Wn. App. 668, 775 P.2d 466 (1989)).
>
> *Morcos Bros, Inc. v. Meridian Place LLC*, 158 Wn. App. 1033 (2010) *review denied*, 171 Wn. 2d 1007, 249 P.3d 182 (2011)

If the record is not adequate for this Court to provide review for Mr.

Gray, then the case should be remanded to Superior Court for formal entry of written findings.

What can be gleaned from the Judge's oral ruling as far as findings, and not conclusions, includes: That the texts were "over and over and over and over", "you're doing it on purpose not because you're worried about your children", "they are controlling, bad faith", and "it's telling her what to do." RP 20, lines 4-25. Appellant submits that those were the only "findings of fact" expressly made here.

The Judge implicitly made two other findings. One was that the mere fact of changing the locations was not harassment, because he asked Ms. Gray if she had agreed to the changes in location and she said yes. RP 18, lines 13-24. The Judge did not include changes of locations per se in his oral comments, as constituting harassment.

And the Judge said Mr. Gray would not be in trouble for being in the same classroom as Ms. Gray, RP 22, lines 11-16, so implicitly he did not find the December 14th, 2011 incident to be a basis for granting the order.

If that is a correct assessment of all the findings that the Judge made, or did not make, then the record is adequate for review. But if the Respondent should argue that the Judge made other findings, expressly or implicitly, then the record is not adequate for review, and there should be a

remand for entry of formal Findings of Fact to permit review.

2. The findings are not supported by substantial evidence

By statute, the findings are governed by a " preponderance of the evidence" standard. RCW § 10.14.080 (3). "Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." *State v. Askham*, 120 Wn. App. 872, 883-84, 86 P.3d 1224, 1230 (2004).

It is not disputed that two of the eleven texts about the location of the exchange complained of could be construed as Mr. Gray "telling" Ms. Gray what to do, using on two occasions words of command, instead of inquiring with Ms. Gray as to whether Chase Bank was an acceptable meeting place. On February 12th, 2012, Mr. Gray used words of command in stating the exchange would be at Chase Bank. And he did so as well on February 18th, 2012. CP 3. His language on February 20th, 2012, was more ambiguous. It stated that "we" would be at Chase Bank at 7 p.m., and asked Ms. Gray if she understood. CP 3. This is not necessarily telling her what to do, it could be construed as a reminder. A similar text was sent on February 16th, 2012, and Ms. Gray had simply replied "Yes."

CP 4.

Many months earlier, Mr. Gray had sent texts about Ms. Gray bringing the child's phone charger and bag, and had said "We want that 2 day" and "We're waiting 2 day." CP 4.

When Mr. Gray did in fact "tell" Ms. Gray what to do, there is no doubt this could be rude and annoying. But the entire context indicates that the parties changed location by agreement multiple times, and the most common meeting place was Chase Bank, with some 30 exchanges taking place there.

Ms. Gray did not object to the location itself at the time of the two texts that told her to be there for the exchange. Therefore it was only the way the text message were worded, that was the issue. Had the texts insisted she meet him at some brand new location, without explanation, or instructed her they would take place at a location Mr. Gray knew Ms. Gray objected to, and he did so repeatedly, we would have a different case.

The finding that the texts were "over and over and over and over" is not supported because there were only a couple of texts that were "telling her what to do" in the month of February, and two on the same date in August of the prior year, about the cell phone. The pattern was broken by a gap of many months duration.

There is no express Finding of Fact as to the conduct causing a reasonable person, and in fact causing Ms. Gray, substantial emotional distress, which, as discussed below, is one of the elements for "unlawful harassment."

But Ms. Gray's argument boils down to, yes, I am fine with exchanges at Chase Bank, but Mr. Gray is not going to talk to me that way (telling me what to do.) That would not cause a reasonable person substantial emotional distress, and did not likely cause Ms. Gray substantial emotional distress.

"The statute is not designed to penalize people who are overbearing, obnoxious or rude." *Burchell v. Thibault*, 74 Wn. App. 517, 522, 874 P.2d 196, 199 (1994). That is what has been shown here, and not more. In *Burchell*, there was also the additional issue that Burchell was not the victim of most of the alleged acts, another person was, and was part of the reason for the reversal of the Order in that case, but the Court's statement is indicative that conduct there is merely hard to put up with, or objectionable, is not sufficient to support the findings needed to support an Order for Protection.

3. The findings do not support the Conclusions of Law of " unlawful harassment"

The "unlawful harassment" required to support an Order of Protection under RCW Chap. 10.14 is defined as follows:

> (2) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.
>
> RCW 10.14.020
>
> ... the elements of a cause of action appear clearly from the face of the statute and require "[1] a knowing and wilful [2] course of conduct [3] directed at a specific person [4] which seriously alarms, annoys, or harasses such person, and [5] which serves no legitimate or lawful purpose." RCW 10.14.020(1). The course of conduct may be brief, but must evidence "continuity of purpose." RCW 10.14.020(2). In an effort to accommodate the vagueness problem which has plagued antiharassment legislation in the past, conduct is tested both subjectively and objectively in that it must be "such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner." RCW 10.14.020(1). *Cf., Everett v. Moore,* 37 Wn. App. 862, 866-67, 683 P.2d 617 (1984).
>
> *Burchell v. Thibault*, 74 Wn. App. 517, 521, 874 P.2d 196 (1994).

The Superior Court Judge indicated there were two items that he was

not finding were unlawful harassment, by implication. One of the main bases of Ms. Gray's argument was that the exchanges of the child had been taking place at various locations other than the McDonald's on Stadium way that had been specific in the Parenting Plan. The Court asked a question of Ms. Gray to clarify that she had agreed to changes of that location, and her answer was "Yes." The Judge then did not at any point indicate that changing the location per se was unlawful harassment.

The other action that the Judge rejected as unlawful harassment, by inference from his ruling, was that the December 14th, 2011 incident, where Mr. Gray had entered the same classroom in which Ms. Gray was present, was not an act of harassment. Otherwise he would not have specified that if Mr. Gray did so again, he would not be in trouble for that.

That leaves the remaining oral "findings of fact" to be gleaned from the Judge's oral comments at the time of ruling. Clearly the Judge's concern about Mr. Gray's texts were that "they are controlling, bad faith harassing communications" and that "it's telling her what to do."

That's what the findings boil down to, Mr. Gray, in his texts was "controlling" and "telling her what to do."

Do those findings adequately support a conclusion of law that "unlawful harassment" occurred? The answer should be "no."

It is conceded that some of Mr. Gray's texts could be construed as instructing Ms. Gray that she would be at the Chase Bank at the time for the exchange. This could be viewed as rude, irritating, or annoying. But that does not entitled the offended party to an Order from a Superior Court.

The conduct must be that "which seriously alarms, annoys, harasses, or is detrimental to" the person seeking the order. RCW 10.14.020(2).

It is submitted that when two parties are communicating about an exchange, and the two parties have agreed to changes in location in the past, a text about the current location and time of the exchange is not seriously alarming, annoying, harassing, or detrimental merely because it may rudely be worded as "telling" the other parent what will occur. It would not "seriously" concern the other person, though it could do so to a minor degree.

Further, the statute requires:

> The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.
>
> RCW 10.14.020(2).

The Superior Court did not make any finding that the conduct would

cause substantial emotional distress to a reasonable person, or that it in fact did so to Ms. Gray.

If two parties are in fact going to meet to exchange a child, with various locations being used from time to time by agreement, then if the father of the child does in fact uses words "telling" the mother where to be, instead of asking, when the location is one they have been frequently using, would a reasonable person "suffer substantial emotional distress"? Did Ms. Gray in fact suffer substantial emotional distress? If not, she did not establish grounds for the petition.

An example of a case more closely resembling what the Legislature had in mind in enacting RCW Chap. 10.14 can be found in *State v. Askham*, 120 Wn. App. 872, 875-76, 86 P.3d 1224, 1226 (2004). Askham was was convicted of the crime of stalking, which imports the definition of "harassment" from RCW 10.14.020, the civil unlawful harassment statute.

The facts found sufficient there to cause substantial emotional distress to a reasonable person and to the victim involved Mr. Askham's relationship with a female ending. She began dating Mr. Schlatter. Askham sent anonymous emails to Askham's work superiors alleging Askham inappropriately used work computers to access pornographic and racist sites, which was unfounded. Askham further had signed up Schlatter on

such sites, and posted altered photos to make it appear Askam had posted photos of himself in sexual activities with another male. Askam also sent the victim e-mails threatening to ruin his life, and to turn him into the FBI. *Askam*, at 120 Wn. App. at 875-76. "The State established a course of conduct designed to destroy Mr. Schlatter's life, both personally and professionally. This is sufficient to meet the reasonable person standard." *State v. Askham*, 120 Wn. App. at 882-83. And, Schlatter testified he felt "threatened" by the conduct. Id., at 883-84.

What occurred to Ms. Gray is not akin to the type of emotional distress that would be suffered in *Askham*.

As far as first meeting a "reasonable person" test, if Ms. Gray suffered emotional distress, that does not mean a reasonable person would have from anything here otherwise qualifying as "harassment." Ms. Gray was complaining of two actions that the Judge did not find to be harassment. One of those was the mere change in location of the exchanges of which she complained, yet she admitted to the Judge she agreed to those changes. And the December 14th, 2011 incident, in which Mr. Gray walked in to talk to his son's teacher, but the Judge ruled Mr. Gray would not be in trouble for doing that. So Ms. Gray's overall reaction was in part to things the Judge did not find to be harassing.

So Ms. Gray's own reaction is not necessarily that of a reasonable person. And if she suffered "emotional distress" it was in part due to other actions that were not harassment.

The facts here do not support that a reasonable person would suffer substantial emotional distress, from those acts specified to be harassment, nor that Ms. Gray in fact did suffer from substantial emotional distress from just those acts found to be unlawful harassment.

Ms. Gray is someone who agreed to multiple changes in the location of the exchange of the child, then came into Court citing the fact of the exchange as part of the allegation of "harassment." She was not exhibiting the feelings of a reasonable person in that regard.

Ms. Gray could have objected to the changes in the location by simply saying "no" to any requests for changes, and showing up at the McDonald's on Stadium way, and if Mr. Gray did not cooperate, she could have moved for a finding of contempt under the Dissolution of Marriage case, for a finding of contempt, or for modification of the parenting plan.

As to Mr. Gray "telling" her what to do in the way he worded his texts, if he was violating the Parenting Plan by texting her for more than just changes in time, then she had a remedy under that Plan. The parties had apparently gone to mediation as recently as October of 2011 over proposed

changes in the Parenting Plan. If Ms. Gray found the way Mr. Gray spoke in texts to be offensive, then she could have requested changes in the Parenting Plan to address that. If the parties could not agree, then she may have convinced a Judge ruling on a Parenting Plan to prohibit any texting at all by Mr. Gray in relation to exchanges, that he would either show up at a certain time at a certain location, or he would not receive the child back, or if Ms. Gray was the receiving parent, then he would be in contempt if the original time and place were not strictly met.

These other options go to whether this type of activity rises to the level of causing a reasonable person substantial emotional distress, and whether in fact Ms. Gray suffered substantial emotional distress from being "told" what to do, when the change of location and problems with timing alone were not objectionable.

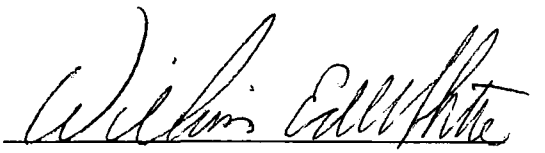
This Court should hold that the Superior Court's Conclusion of Law that "unlawful harassment" was established by texts that were worded to sound like they were telling Ms. Gray what to do were not supported by the oral Findings of Fact, and the Order should be reversed and vacated, and the Petition dismissed.

## V. CONCLUSION

This Court should remand for entry of formal Findings of Fact unless this Court finds the oral findings permit adequate review. The Superior Court's ruling granting an Order for Protection – Harassment should be reversed, the Order vacated, and the Petition dismissed.

Respectfully submitted,

Dated October 22nd, 2012



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Bolliger Law Offices

Certificate of Mailing

I hereby certify that on October 22nd, 2012, I placed a true and accurate copy of the foregoing Brief of Appellant to the Respondent, Elizabeth Gray, in US Mail, postage prepaid, at 525 SE Quail Dr. #2, Pullman WA 99163.

William Edelblute

Attorney for Appellant