DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 32418-4

Spokane County Superior Court Case No. 14-2-00761-7
The Honorable Michael Price
Superior Court Judge

APPELLANT'S OPENING BRIEF

Marlo Coyle, o/b/o B.J.C.

Appellant

v.

Nimsha Asia Goins

Respondent

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Citations to Authority

I. Facts

In 2013 a CHINS Petition was filed on behalf of BJC, the then 15 year old son of Marla Coyle, who helped him with this Petition and appeal. RP 4 & 10. In that CHINS case the Respondent Mr. Goins, a CPS counselor, was assigned by the Superior Court to assist BJC with the issues presented in that Petition. RP 10. Mr. Goins had been a counselor working for CPS for approximately 15 years. RP 9. He also had his own private practice with associates working for him. RP 15.

After being assigned to BJC's case Mr. Goins had him come to his private counseling center for more counseling. RP 11, CP 1-7. This conflict of interest was disclosed to the State DSHS CPS Ombudsman and Mr. Goins was disciplined for this self-referral. RP 10. This conflict was not the subject of this particular case but was germane to the concerns the Petitioner and his mother had about Mr. Goins seemingly overwhelming personal interest in BJC. The more important and relevant facts relate to allegations by BJC about Mr. Goins' sexual advances toward BJC. RP 4, 7, 11, 15 & 23, CP 1-7.

After being assigned to BJC's CHINS case, Mr. Goins made sexual advances toward BJC. RP 8 & 34; CP 1-7. According to BJC's Petition, Mr. Goins, did such things as caress his neck and face in a sexual manner, and showed up randomly at places he was known to go, such as a particular Starbucks he frequented and a doctor's office visit for BJC. RP 15-16 & 33, CP 1-7. However, of most importance, BJC alleged that after the CHINS Petition was dismissed, Mr. Goins followed him into the men's bathroom at the courthouse, and while BJC was unzipping his pants, Mr. Goins lifted himself over the stall wall where BJC was, and ordered him to show him his genitals. PR 8-9, CP 1-7. BJC's Petition alleged the following:

"In August BJC [sic] was at the courthouse on 8/16/14 & Mr. Goins followed him into the restroom he popped his head over the stall & asked to see his penis"

In Summary, the Petition alleged the following "grooming" and/or sexual conduct by Mr. Goins, as follows: (See CP 1-7.)

1. *Mr. Goins placed BJC in his own treatment center for therapy/counseling without state permission;*
2. *Mr. Goins was released from the services of CPS after placing BJC in his own clinic;*
3. *BJC expressed concern that Mr. Goins was gay and this made him uncomfortable;*
4. *After being released from CPS services and in particular on BJC's CHINS case, Mr. Goins showed up at a medical urological appointment for BJC without permission. BJC asked him to leave three times but he did not until the doctor entered the room;*
5. *BJC was at the Gonzaga Campus cafeteria getting coffee and Mr. Goins showed up to talk with BJC. At that time Mr. Goins asked BJC if he would be interested in getting "into things w/ another man", and claimed it would not be homosexual, it would just be experimenting. BJC said no he "liked girls";*
6. *On one occasion Mr. Goins was caressing BJC's face & the back of his head while meeting with him;*
7. *On another occasion Mr. Goins kissed BJC's forehead during a meeting;*
8. *BJC's mother called the police because of this touching and reported this unwanted and sexual conduct, giving the police report number in BJC's Petition;*
9. *BJC feared that Mr. Goins was going to "kill him" or "kidnap him";*
10. *His Petition requested help from Mr. Goins and further indicated that now he feared even seeing a psychologist.*

These things all occurred at various times, both during the CHINS Petition process and after it was dismissed. *Id.*

At the hearing on the CHINS Petition, and although clearly irrelevant to the sexual conduct and advances by Mr. Goins, the Respondent's counsel focused on BJC's mother and a finding of contempt against her in the CHINS case for contacting the foster family about her son. RP 26-29. Additionally Mr. Goins argued that Ms. Coyle was also close to being ordered to not file anything in the CHINS case because she was so involved in the litigation. RP 43. Finally, he also indicated that BJC's mother was ordered to have a psychological evaluation completed in the CHINS case, and that this entire Petition was created because of her need to retaliate against Mr. Goins, as well as her propensity to litigate against other people. RP 39-45.

After the CHINS case was dismissed, Mr. Goins was still pursuing her son inappropriately, so she helped her son file this Petition for a Sexual Harassment order. RP 11-13, 50 & 57. CP 1-7. She obtained an exparte order, served Mr. Goins and a hearing was set for March 18, 2014. CP 12-14.

Mr. Goins' counsel appeared in this case over the weekend before the March 18th hearing, and served Ms. Coyle with a 63 page declaration the Saturday before the Tuesday hearing date. CP 17-98, 121-124 & RP 3. Ms. Coyle asked for a continuance but that was denied summarily. RP 4-5. She also brought BJC to the hearing to testify but the judge sent BJC out of the courtroom. RP 1-5. This seemed quite strange since even Mr. Goins counsel thought BJC would testify. RP 6.

The Judge first entertained a motion to dismiss but denied that motion. RP 9. At one point the Judge went through the statute one by one and indicated that some of the factors

did not "seem" to fit BJC's allegations about Mr. Goins (RP 7-8), however, he denied Mr. Goins initial request to dismiss the case outright. RP 8-9. He then went on to question Ms. Coyle about her son's Petition and about her involvement in the CHINS case. RP 1-60. More particularly he redirected her several times back to the statutory criteria for this Petition, and many times she asked him to talk with her son to get his side of the story. *Id.* An example of this redirection was as follows:

> THE COURT: *Ma'am, I've got to stop you, ma'am because you're getting way off in left field. Because the issue - - maybe that's my fault because I asked the question.*
> MS. COYLE: *That's okay.*
> THE COURT: *The issue is whether there should be a sexual assault no contact order, so that's what I have to focus on today.* (RP 11).

On another occasion Ms. Coyle went on to talk about Mr. Goins attempts to sexually groom her son and an attempted rebuttal to Mr. Goins attempts to paint her as the one creating this story, but the Judge again told her that such argument was irrelevant and reminded her that this was about the factors in the statute. RP 11-14. In spite of the fact that the Judge often redirected her back to the factors at RCW 7.90 to pin point what Mr. Goins did, he seemed to focus on other things as well, such as whether she obeyed the orders requiring her to get a mental health evaluation, her CHINS contempt order, and what she did or did not do in that other case. See RP 9-39.

When Ms. Coyle tried to rebut the allegations by Mr. Goins' that she was somehow a bad faith litigant and was mentally ill, she was always abruptly stopped and the Judge redirected her again and again. *Id.* She then became somewhat frustrated and asked why the court would not let her rebut Mr. Goins allegations if the court was not going to strike Mr. Goins irrelevant material as well. See e.g. RP 15 line 6-24. The judge denied her

request to strike his irrelevant exhibits and information about the CHINS. RP 15-16. The Judge also asked about the order for her to obtain a psychological evaluation and whether she complied with the order and she indicated that she was unable to follow through with the evaluation because she did not have the money to pay for it, and at the advice of her counsel she was told that there was no longer any valid orders left in the CHINS case, and that order was moot. RP 11-13, 50 & 57.

When it came time for Mr. Goins counsel to argue the case, he was allowed to argue Ms. Coyle's reputation and past actions, stating over and over that there were no allegations that fit the statute. RP 39 – 45. This substantially irrelevant evidence about the CHINS case, the orders therein (that were moot after the dismissal), and evidence about Ms. Coyle's alleged history of filing for many other protection orders, was allowed into the hearing. *Id.* Not once did the judge redirect Mr. Goins counsel to stick to the statutory factors. *Id generally.*

As indicated, several times Ms. Coyle invited the Judge to meet with BJC, to talk to him in chambers or on the stand, but the judge refused. See e.g. RP 64. Eventually the judge made his ruling on the Petition without ever talking to or allowing BJC to testify. RP 65-71. He found that the Petition was not brought in good faith, that her claim was non-meritorious and that there were no facts that were close enough to form a basis for the Petition, and summarily denied the same. RP 71-75. In addition to this the judge fined her for a frivolous case (RP 80) in the amount of $1,200.00 and also found her to be a "vexatious litigant" and that the clerk should not accept any filings from her without a court order from himself for a period of 24 months from March 18, 2014. RP 71-81. All of those orders have been appealed. CP 104-120.

II. Error

1. The judge committed error by allowing prejudicial and irrelevant evidence to come in about the Petitioner's mother and not striking that evidence;
2. The judge committed error by not allowing the Petitioner, who was a 16 year old boy, to testify about the sexual conduct of the Respondent;
3. The judge committed error by not applying RCW 7.90.010(4)(d) to the facts presented by the Petitioner, i.e. that the Respondent in the capacity of a state appointed counselor demanded to see the Petitioner's genitals in a courtroom bathroom stall, after a clear history of sexual grooming (which corroborated that this was likely done for sexual gratification);
4. The judge committed error by concluding that the Petitioner's mother was a vexatious litigant and by controlling her filings for two years.

III. Law and argument

A. The judge should have stricken the irrelevant testimony and exhibits that the Respondent's declaration provided since they served no purpose under the statute and simply prejudiced the court against BJC to the point it distracted the court from an objective analysis of what happened to this boy and this 16 year old petitioner should have been allowed to testify.

The statute dealing with sexual harassment is very specific about what evidence can come in at the hearing, and unusually states that "[i]n proceedings for a sexual assault protection order and prosecutions for violating a sexual assault protection order, the prior sexual activity or the reputation of the petitioner is inadmissible," unless it is to be used to show consent, or if it is to be used for impeachment, it also should have been reviewed by the judge in camera to see whether it was relevant and appropriate in this case, or would be too prejudicial. (Emphasis added) RCW 7.90.080. It seems that it is the clear

policy in this statute to not allow distracting and prejudicial information about the Petitioner to come into the hearing without proper safe guards, since irrelevant reputation issues can strongly prejudice a victim's recitation of the facts, especially if there is a denial by the alleged perpetrator.

In this case the judge allowed the Respondent and his counsel to place into evidence the Petitioner's mother's history of litigation against other people, not relevant to the case, to somehow discredit her and lead to a complete disregard of BJC's story. What BJC's mother did in other cases was and is substantially irrelevant to the entire notion that the Respondent was inappropriately sexually grooming him, and these allegations seemed to dovetail with at least one factor to support a restraining order. However, by considering all of this irrelevant evidence, the judge basically disregarded anything the boy had to say about this matter, which did not serve the statute's purpose in any way. BJC was unfairly denied a fair hearing on his request for a protection order and is clearly a violation of the statutes intent, which is to focus on what the boy experienced at the hands of the Respondent.

The statute seems to focus on getting to the facts, which is especially true in the case of an older teenager. For example, RCW 7.90.040(2) indicates that a 16 year old may file these kind of Petitions themselves without the help of an adult. Therefore, the legislature must have intended that a 16 year old should be in the hearing and at least allowed to testify to see if his or her story rings true. As it turned out, his story was completely overshadowed by the Judge's focus on the mother and her activities, which completely distracted from the real issue of whether BJC experienced these things with the Respondent. At the very least the judge could have and should have interviewed the child,

either in open court or in chambers to verify his story. At a minimum he could have appointed a GAL pursuant to RCW 7.90.040 and RCW 26.44.053.

It is understood that a denial of a request to strike irrelevant evidence is within the trial court's discretion. See *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Burmeister v. State Farm Ins. Co.*, 92 Wn.App. 359, 365, 966 P.2d 921 (1998). However, a trial court may abuse its discretion if it denies a motion to strike if it applies the wrong legal standard and considers evidence for a purpose for which the evidence is not admissible. See *Orion Corp. v. State*, 109 Wn.2d 621, 638, 747 P.2d 1062 (1987). In this case the judge considered evidence as to the mother's reputation for litigation and avoided focusing on the evidence provided by the boy through his mother. The statute on sexual protection orders for children that are 16 years old and older appears to clearly instruct the court to be careful what they consider, and they are specifically prohibited from considering inappropriate or irrelevant evidence, which seems to muddy the allegations, or distract from what is alleged. See RCW 7.90.080.

In this case the Judge allowed too much irrelevant information into the hearing. This ended up doing just what the legislature seemed to want to avoid, and that is distract the issues from the statutory factors and testimony of the child.

B. The Petitioner enumerated at least one of the statutory bases for his Petition and that was the bathroom demand to see the boy's genitals while peering over the stall at the boy while he was relieving himself, which should have been explored further.

The Judge in this case said at page 71 of the record,

> *"As best I can tell from the pleadings that were filed, and that's what I have to base my conclusions on, there's really been no inappropriate touching at all, except a suggestion that perhaps Mr. Goins caressed the child or an allegation which he vehemently denies that he kissed the child in some fashion. Frankly, the request for a sexual assault protection order is*

completely non-meritorious [sic], and it does not comply with the statute in anyway. So that's the action that's before me. It's just absolutely non-meritorious [sic], and I would deny that today with prejudice." (Emphasis added)

The Judge specifically and solely focused on whether there was an "assault" or "touching" and not whether there was other "sexual conduct" as the statute requires. RCW 7.90.010 (4) specifically indicates that it is "sexual conduct" that the legislature wants the judiciary to look at, not just sexual assault. This is obvious because not all of the factors in the definition section of this statute involve touching. Specifically, section (4) (d) involves any inappropriate actions by the perpetrator when they use any kind of "force" to cause a child to display their genitals. Such a factor could easily be inferred where you have a boy who was under court orders to participate with a State recognized counselor and that previous counselor seeks, peeks and requests that the boy show him his genitals while he has them out of his clothing. BJC saw Mr. Goins as a person who was in a position of authority when this happened, in a place of authority, the courthouse. If this was further explored by the court, as it should have been, the boy could have corroborated this story with more details that would have certainly supported whether the incident really did happen or not. As it was, the court completely ignored this factor and instead focused on whether there was a "touching" or not. It is clear that in matters dealing with children that it is error for the Judge to fail to follow the statutory requirements in its decisions. See e.g. *In re CMF* at 179 Wn.2d 411, 314 P.3d 1109 (2013).

Again, failure by the court to further investigate this allegation, and to not evaluate whether this statute could apply to older children, regardless of Mr. Goins denials, and Ms. Coyle's reputation, by interviewing the child, allowing him to testify, or appointing

a GAL to investigate the allegation would have been the proper course rather than simply saying there was no meritorious claims in the Petition. Surely that allegation in and of itself was not "non-meritorious" as suggested by the judge.

C. The Petitioner's mother was not a vexatious litigant given the fact that BJC had a viable claim that fit the statute and she should not have been fined nor restricted as to her access to the courts.

In order to be classified as a vexatious litigant the mother had to be found to have proceeded with numerous frivolous actions against the same party or had a reputation for serial litigation. In the old case of *Burdick v. Burdick*, 267 P. 767, 148 Wash. 15 (1928), the court described its authority to find a litigant vexatious. They said,

> *[W]hile there is some authority to the contrary, it is generally held that equity has jurisdiction to enjoin vexatious suits, not brought in good faith and instituted for annoyance or oppression or to cause unnecessary litigation. And this is so whether the litigation complained of is numerous actions between the same parties or numerous actions brought by many against one. Nevertheless actions are not necessarily vexatious because they are numerous. A very clear case must be made out to authorize a court of equity to enjoin suits on the grounds that they are vexatious and oppressive. One may not be enjoined from protecting and enforcing his rights by lawful means, unless his acts to that effect are done or threatened unnecessarily, not really for the purpose of protecting his rights, but maliciously to vex, annoy, and injure another.*

The action complained of must not be done to protect a person's rights and be unnecessary. *Id.* In this case Ms. Coyle's son asked her to bring this Petition because he was scared and feared Mr. Goins; had her son not asked her this and/or told her what Mr. Goins did she likely would not have filed this case. CP 1-7. Even so, Ms. Coyle asked time and again to have the Judge talk to her son to see if what he was saying was credible, and not focus on her alleged reputation. The judge failed to even consider that this was done to protect her son and rather concluded, again, because of the irrelevant material

about her, that she did this to harm Mr. Goins somehow. Instead, and again the judge ignored whether this suit was brought to protect her son, as well as the fact that the statute does not limit its focus just on sexual touching, and found her vexatious. This was wrong because there was in fact some corroboration for the mother's story in that Mr. Goins, after 15 years of service with CPS was specifically asked to resign from his position. Why would a career counselor with a nice state job simply quit over allegations about what he had been doing inappropriately with a boy he was to counsel. It makes little sense that he admitted that he was no longer working for the State, yet claims it was "ridiculous" that he did the things BJC said he did to him sexually.

Ms. Coyle helped her son file this Petition for Protection from Mr. Goins. It was his allegations and not Ms. Coyle's allegations. How could they be non-meritorious if at least one of the incidents seemed to meet the criterion of one of the factors for such a Petition? The Petition was not frivolous and this 16 year old boy should have been allowed to testify. It was inappropriate to take away his mother's right to protect him based on the irrelevant history of her previous cases. She requests that the order limiting her court involvement be vacated, and that the matter be remanded to another Judge, not already prejudiced to hear the boy's testimony of why he is afraid of Mr. Goins.

IV. Conclusion

In this case the court was asked to grant a 16 year old boy's request for a Sexual Harassment RCW 7.90 restraining order against a former state CPS worker who seemed inordinately interested in having a sexual relationship with this young man. Unfortunately, at the hearing although denying the Respondent's motion to dismiss the case, the Judge failed to exclude irrelevant evidence about the boy's mother that was

highly prejudicial and inappropriate, and denied the request for restraints. This denial was premature since the Judge should have allowed the boy to testify as contemplated by the statute, and even the Respondent, he should have not considered the Respondent's irrelevant evidence about the mother's past history of litigation on unrelated matters, and should not have found her to be a vexatious litigant. At a minimum there clearly seemed to be merit to BJC's Petition, given the sexual grooming history of the Respondent and his attempt to force the young man to show him his genitals in a courtroom bathroom, and the petitioner should not have been dismissed without further investigation.

Respectfully submitted this 17th day of November 2014 by,

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Declaration of Mailing

I, Robert Hervatine, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on November 17, 2014, affiant enclosed in an envelope a copy of this Statement of Arrangements addressed to: Robert Cossey attorney at law, 902 N Monroe St, Spokane WA 99223.

Said address being the last known address of the above-named individual, and on said date deposited the same so addressed by regular mail with postage prepaid in the United States Post Office in the City and County of Spokane, State of Washington.

Robert Hervatine, WSBA # 41833
STENZEL LAW OFFICE