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WASHINGTON STATE COURT OF APPEALS, DIVISION II

Jonathan J. Arras
Respondent

v.

Laura G. McCabe
Appellant

68454-0-I

King County Superior Court Cause Number 0-93-04793-0 SEA

The Hon. Joan E. Dubuque

APPELLANT'S BRIEF

Laura G. McCabe, Pro Se

8109 11th Ave. S.W., Seattle, WA 98106
lauragmccabe@gmail.com

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II. ASSIGNMENTS OF ERROR & ISSUES

A. Assignments of Error.

1. The evidence is insufficient to establish the elements of unlawful harassment.
2. The court abused its discretion and denied Appellant a fair hearing by assuming the existence of the dispositive disputed fact.
3. The Order is vague, overbroad, and violates the First Amendment.
4. The trial court violated the appearance of fairness doctrine.
5. The court abused its discretion by not deferring to the primary jurisdiction of the family court over relations between the parties.

B. Issues Pertaining to Assignments of Error.

1. Did the evidence fail to establish a “course of conduct” as defined in the statute?
2. Did the evidence fail to show any conduct directed at Petitioner as required by the statute?
3. Did the evidence fail to show any conduct that was not legitimate, lawful, or otherwise contrary to the statute?
4. Did the evidence fail to establish any degree of distress as required by the statute?
5. Did the evidence fail to establish the statutory requirement of conduct that would be distressing to a reasonable person?

6. Was Appellant denied a fair hearing by the court's accepting as given, before hearing any evidence, that she was in the habit of using her former married name?

7. Was the conduct prohibited by the trial court legitimate and lawful conduct that is protected by the First Amendment to the Constitution of the United States?

8. Was Appellant prejudiced by Petitioner's having shopped for a forum other than the family court?

III. STATEMENT OF THE CASE

Appellant Laura G. McCabe was the Respondent below. She and the Petitioner, Respondent Jonathan Arras, were divorced in 2009. They share custody of two children, ages 5 and 8. The relevant facts in the record are as follows:

Ms. McCabe's mother, Jordan McCabe ("Jordan"), has a secured life-interest in a mother-in-law apartment on the ground floor of Mr. Arras' home. For several years, Jordan paid Mr. Arras an agreed share of the monthly utility bills, based upon a monthly total he reported. Mr. Arras never showed Jordan copies of actual bills: he simply emailed her a monthly total, and she paid him.

In November 2011, Jordan attempted to enforce a rental provision in her agreement with Mr. Arras that would allow her to move away. He refused. Later that month, Ms. McCabe discovered that Mr. Arras had been systematically overcharging her for shared monthly childcare expenses, and initiated a proceeding in family court. *See* Order filed Jan 27, 2012.

Jordan became concerned that her ex-son-in-law had been overcharging her, too. Decl. of J. McCabe at 2. She asked Mr. Arras for copies of their shared bills, but he refused. *Id.* When Jordan refused to pay November's bill without some documentation, Mr. Arras told her to

“forget” the total he’d already demanded for that month. *Id.*

Jordan decided to request copies of the bills directly from the City of Bellevue (“City”), but was uncomfortable navigating the City’s automated telephone customer-service system. *Id.* Jordan asked her daughter (who has eight years’ experience as a phone agent), to call the City for her. *Id.* at 2-3; Decl. of L. McCabe at 3.

On Dec 29, 2011, at her mother’s request, Ms. McCabe called the City. RP 6; Decl. of L. McCabe at 3; Decl. of J. McCabe at 2; Decl. of Shortridge. The only disputed fact in this case is whether Ms. McCabe identified herself correctly during that call, as she maintains, or if she improperly claimed to be Mr. Arras’ current wife (and a current resident of the Bellevue property). *Id.* ; RP 10.

It is undisputed that Ms. McCabe made the call, described her mother’s predicament, requested that copies of future bills be sent to Jordan’s P.O. Box, and arranged to have electronic copies of old bills forwarded by email. *Id.* It is also undisputed that the City’s agent complied with Ms. McCabe’s requests. The agent informed Ms. McCabe that the name “Laura Arras” was still on the account, and removed that name during the same call. RP 7; Decl. of Shortridge. It is undisputed that Mr. Arras’ receipt of bills was not affected. RP 10.

On January 27, 2012, the family court granted Ms. McCabe a substantial money judgment against Mr. Arras, compensating her for systematic overcharges by Mr. Arras on monthly shared educational bills for their children. Order filed Jan 27, 2012.

The next business day, Mr. Arras filed a police report charging Ms. McCabe with unlawful harassment. Four days later, Mr. Arras filed a petition for a protection order in a different court department. Petition.

At the hearing on Feb 28, 2012, Ms. McCabe testified that she believed it was entirely lawful for her to make the call on her mother's behalf, and that her mother had a lawful right to receive copies of the bills. RP 7-8. She denied using, or answering to, the name "Mrs. Arras" since her divorce two-and-a-half years prior. RP 7, 10. The court stated that Ms. McCabe was not permitted to dispute the agent's claim that she had improperly identified herself as "Mrs. Arras." RP at 10.

The Petitioner made no claim that Ms. McCabe sought private information he had not already disclosed to Jordan. RP 8-9. Mr. Arras did not allege any ulterior motive for his ex-wife's call, nor did he suggest how accessing old utility bills was harmful or distressing. See id. When asked by the court how he had even learned about Ms. McCabe's call to the City, Mr. Arras testified that a "shut-off notice" had mysteriously appeared on his front door but offered no details or documentation for this

documented call to the City. RP 5. But at the close of the hearing, when Ms. McCabe requested clarification of the court's finding or the required "pattern of unlawful conduct," the court declared it was also relying on the Mr. Arras' new, undocumented claims. RP 17.

The court granted Mr. Arras an order protecting him from being kept "under surveillance" by Ms. McCabe,¹ based solely on its finding that she exercised poor judgment by making the call for her mother. "I suggest that it's not something for you to intervene in. ... So I'm going to grant [the] anti-harassment order." RP 14; RP 16.

Ms. McCabe filed this timely appeal.

IV. STANDARD OF REVIEW

This Court reviews a challenge to an anti-harassment order for abuse of discretion. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). The Court will uphold an order only if the trial judge's findings are supported by substantial evidence in the record, and if those findings support the conclusion that unlawful harassment occurred. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 707–08, 64 P.3d 1 (2003). A challenge to the court's conclusions of law is reviewed de novo. *State v.*

¹ Mr. Arras also sought to prevent Ms. McCabe from visiting her mother on the disputed property, but the court ruled that Mr. Arras could not prevent Ms. McCabe from visiting her mother's home. RP 14.

Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

At the hearing, Ms. McCabe asserted that the court's ruling was contrary to the evidence and asked the court to make a record of the evidentiary basis for its rulings. RP 14, 15, 16. This was sufficient to preserve the issue for review.

V. ARGUMENTS

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE ELEMENTS OF UNLAWFUL HARASSMENT.

The Legislature enacted anti-harassment laws to prevent "serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate." RCW 10.14.010. A court may enter a civil anti-harassment order only if it finds by a preponderance of the evidence that unlawful harassment exists. RCW 10.14.080(3).

'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...

RCW 10.14.020(2) (emphasis added).

The Petitioner did not introduce any evidence to establish or support the elements of harassment:

(a) There was no “course of conduct.” The only conduct alleged in Mr. Arras’ Petition was the single phone call placed by Ms. McCabe to the City.

It is undisputed that Ms. McCabe made this call, at her mother’s request, for the sole purpose of verifying amounts paid for services to her mother’s residence. Additional unsupported, unchallenged accusations made by Mr. Arras for the first time at the hearing alleging *other* calls were not properly before the court.

Even if this Court accepts that the Petitioner’s new accusations were admissible and credible, the purpose of the new alleged calls cannot be presumed to be any less “lawful or legitimate” than the conduct alleged in the original Petition. *See* Sec. (c), *infra*.

(b) The conduct alleged was not “directed at” the Petitioner. Mr. Arras presented no evidence that Ms. McCabe’s conduct was directed at him; nor did he allege any personal, or ignoble motive for his ex-wife’s actions. Ms. McCabe requested copies of shared utility bills for her mother’s home; Mr. Arras could have been *any* housemate, tenant, co-owner, or landlord who was billing Jordan McCabe for shared utilities.

Ms. McCabe had no contact with Mr. Arras, nor could her actions have foreseeably impacted him.

(c) The conduct alleged was legitimate and not unlawful. Ms. McCabe's conduct served both a legitimate and lawful purpose.

(i) Legitimate: Substantial evidence in the record shows that Mr. Arras is embroiled in a six-figure lawsuit with Ms. McCabe's mother. Attachment to Decl. of Jordan McCabe, 'Attorney Letter.' Ms. McCabe's mother is a senior citizen and a recent transplant to the region, who has no family or social support, other than her daughter. Decl. of J. McCabe at 1.

(ii) Lawful: Conduct may be unlawful if it had the purpose or effect of unreasonably interfering with petitioner's privacy. RCW 10.14.030(5)(a). Here, Ms. McCabe did not interfere with Mr. Arras' privacy, nor did she attempt to do so. Mr. Arras made no claim that Ms. McCabe sought private or personal information he had not already disclosed to her mother. RP 8. Because Jordan is a resident of the property and pays a percentage of all shared utilities, she was entitled to receive documentation directly from the service providers. *See e.g.*, Decl. of C. Shortridge. Ms. McCabe requested from the City *only* information Mr. Arras had purportedly disclosed to Jordan, and in which he thus had no reasonable expectation of privacy.

(d) There was no claim of distress -- substantial or otherwise.

Before granting an anti-harassment order, the court must test alleged conduct “both subjectively and objectively” and find that it “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); *see also Burchell v. Thibault*, 74 Wn. App. 517, 521, 874 P.2d 196 (1994). Mr. Arras introduced no evidence that Ms. McCabe’s actions caused him alarm, annoyance, harassment, detriment, or emotional distress. By assisting her elderly mother during her legal dispute with Mr. Arras, Ms. McCabe may have irritated her ex-husband, but this does not merit a judicial remedy.

(e) Conduct could not have resulted in distress to a “reasonable person.” Whether or not he had anything to hide, the Petitioner has a protected right to privacy. See Sec. (c)(ii), *supra*. However, the City’s records should have only verified the information Mr. Arras had *already disclosed*, to his *immediate benefit*, because Jordan was refusing to pay without verification. Decl. of J. McCabe, at 1. Any distress caused by Ms. McCabe’s conduct would be “reasonable” only if Mr. Arras knew he had presented false information.

For the above reasons, the Petitioner failed to meet the prerequisites of RCW 10.14.020(2).

2. THE COURT ASSUMED AN ULTIMATE
DISPUTED FACT.

Ms. McCabe has not used the name “Arras” since her divorce on May 6, 2010. RP 2, 3. Her name change was noted in the court’s Decree of Dissolution, and she has been properly identified in all court documents and proceedings since. At this hearing, however, the bailiff announced the case as “Jonathan Arras versus Laura Arras, also known as McCabe.”

In addition, the court addressed her as “Ms. Arras.” RP 2.

This was erroneous and accepted as an established fact Mr. Arras’ disparaging allegation that Ms. McCabe was in the habit of using her former married name as an alias. This was highly prejudicial, because the term “also known as” gratuitously diminished Ms. McCabe’s reputation and credibility. More importantly, the sole basis for Mr. Arras’ claim of unlawful conduct was his assertion that Ms. McCabe represented herself as “Mrs. Arras.” This was an essential fact he was required to prove by a preponderance of the evidence. See, *State v. Green*, 157 Wn. App. 833, 846, 239 P.3d 1130 (2010). It was reversible error for the court to erroneously assume the ultimate disputed fact from the outset.

3. THE ORDER INFRINGES UPON MS.
McCABE'S FIRST AMENDMENT RIGHTS.

A petitioner seeking a civil anti-harassment protection order may not prohibit the respondent from exercising constitutionally protected free speech. RCW 10.14.080(7). Where the First Amendment is implicated, judicial intervention may not be overbroad. *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963).

Here, the court forbids “surveillance,” but because Ms. McCabe was never accused of conduct that could be described as “surveillance,” the orders present a vague, overbroad warning not to assist her mother during the complex, eminent litigation she is preparing against Mr. Arras. “I suggest that it’s not something for you to intervene in. ... So I’m going to grant your anti-harassment order.” RP 14; RP 16.

Conduct is not harassment where the respondent’s action was reasonably necessary to protect property or liberty interests or enforcing the law. RCW 10.14.030(4)(a), (b). Here, it is undisputed that Ms. McCabe called the City with the legitimate and protected purpose of safeguarding her mother’s property interests. Ms. McCabe acted as her mother’s agent in response to her mother’s legitimate concern that Mr. Arras had broken civil and criminal laws by engaging in a pattern of deceptive practices.

Because the Order is vague, overbroad and prohibits constitutionally protected conduct, this Court should vacate it.

4. THE HEARING LACKED THE APPEARANCE OF FAIRNESS.

This Court will address an appearance of fairness claim where there is evidence of apparent bias. *In re Marriage of Wallace*, 111 Wn. App. 697, 706, 45 P.3d 1131 (2002). Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

Here, the court repeatedly refused to allow Ms. McCabe's witness to testify and rejected Ms. McCabe's arguments as inadmissible. RP 6, 10, 12, 14. Meanwhile, the court accepted Mr. Arras' undocumented testimony of conduct he had not mentioned in his Petition or Reply. Ms. McCabe was not allowed to object, question the witness, or reply to the new accusations. RP 17.

A court's findings cannot be said to rest on "substantial evidence" where the court rejects relevant documentary evidence from one party and in favor of speculation and undocumented allegations from the other. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009)(a ruling is

inherently unreasonable when the court relies on unsupported facts or takes an erroneous view of the law). The remedy is to vacate the order.

5. THE PETITIONER ENGAGED IN FORUM SHOPPING BY AVOIDING THE PRIMARY JURISDICTION OF THE FAMILY COURT.

Where another court has previously considered the case, its continued jurisdiction is favored, absent a change in the parties' proximity to that court. *In re Marriage of Susan C. and Sam. E.*, 114 Wn. App. 766, 776, 60 P.3d 644 (2002). This avoids conflicting decrees. *In re Marriage of Dunkley*, 89 Wn.2d 777, 780, 575 P.2d 1071 (1978). Here, the Family Court had issued an order adverse to Mr. Arras only days before his petition for protection. See Order filed Jan 27, 2012. In Mr. Arras' petition, he described only conduct that preceded the parties' last family court appearance. *Id.*; Decl. of Laura McCabe at 1-2.

Further, the Superior Court here was required to consider whether contact between these parties had been limited in any manner by any previous court order. RCW 10.14.030(6). A stringent no-contact provision of the Parenting Plan already restricted all communication between the parties to written form, and relating to their children only. Parenting Plan. When Ms. McCabe asked the court to consider this provision before ordering new restrictions, the court refused. RP 14-15.

Mr. Arras had no legitimate reason to bring this action in a different forum, other than to deny Ms. McCabe the benefit of continuity of jurisdiction in the family court, where the judge would have been alert to the retaliatory implications of his filing an action immediately after suffering an adverse judgment.

At minimum, this Court should vacate the order and remand for rehearing in the family court.

6. THE ERRONEOUS PROTECTION ORDER IS NOT HARMLESS.

Ms. McCabe has pursued her right to appeal in this case because *any* Protection Order against her is harmful.

Even though the Order forbids only conduct she has never engaged in (i.e., keeping Mr. Arras “under surveillance”), and has effectively *increased* her freedoms (by expressly allowing her to visit her mother’s home), the Order is nevertheless prejudicial and damaging to Ms. McCabe’s credibility, her standing in her community (particularly as a school volunteer), and her career.

The Order’s restrictions are vague, so Ms. McCabe has been afraid to help her mother prepare for her impending litigation with Mr. Arras.

Mr. Arras has informed the children’s teachers, doctors, guidance counselors, their friend’s parents, and their school principal about this

Order, which, unless overturned by this Court, is embarrassing and irrefutable. Ms. McCabe is also concerned that the Order might damage her credibility with the family court in the future.

The Court should vacate the order and dismiss the action.

V. **CONCLUSION**

The record does not support the court's finding of unlawful harassment, or its conclusion that a protection order was permitted by the statute.

The Order wrongly prevents the Appellant from engaging in lawful conduct pursuant to her constitutionally protected rights. The court below failed to provide the appearance of fairness, did not afford the matter due diligence, ignored the requirements of the relevant statute, and abused its discretion in granting the petition.

Therefore, this Court should vacate the order and dismiss the action.

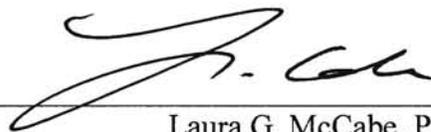
Respectfully submitted, this 31st day of May, 2012,


Laura G. McCabe, Pro Se

CERTIFICATE OF SERVICE

Laura G. McCabe certifies that deposited this day in the U.S. Mail, first class postage prepaid, a copy of this Appellant's Brief and the verbatim report of proceedings addressed to:

Jonathan J. Arras
1026 151st Avenue S.E.
Bellevue, WA 98007



Laura G. McCabe, Pro Se
King County, Washington, May 31, 2012