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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 48367-0-II

David K. Bowers and Kathryn E. Bowers, husband and wife;
Robert Cobb and Debra A. Cobb, husband and wife; and
Anthony L. Beltrame and Maggie Beltrame, husband and wife,

Respondents,

v.

James W. Dunn, dealing with his separate property
and "Jane Doe" Dunn,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF APPELLANT JAMES W. DUNN

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Assignments of Error

1. The trial court committed error by granting a no-contact order dated October 16, 2015. CP 113-114.
2. The trial court committed error by entering a no-contact order that was overbroad and vague. CP 113-114.

Issues Pertaining to Assignments of Error

1. Did the trial court lack authority to enter a no-contact order in an easement case a year and a half post-trial where no petition for such an order was filed, and the party against whom the order was entered was not in contempt of court?
2. If the court did have authority to enter the no-contact order, is it too overbroad and vague where it restricts all verbal, non-verbal and third party contact for an unspecified amount of time with neighbors who must drive over Mr. Dunn's property to access their homes, and former neighbors who did not join in the motion?

Statement of the Case

James Dunn installed speed bumps on his property in an attempt to reduce his neighbors' speeding over a gravel easement road. CP 1-17. David and Katherine Bowers challenged Mr. Dunn's action by filing a lawsuit against him. CP 1-17. Shortly after the Bowers filed suit, Robert and Debra Cobb, and Anthony and Debbie Beltrame joined the Bowers as plaintiffs. CP 27-47. The Bowers', Cobbs', and Beltrames' suit asked the court to establish an express or prescriptive easement, and for trespass. CP 27-47. Mr. Dunn answered the complaint asserting there

was already an express road easement. CP 18-26. After plaintiffs' request for a temporary injunction to remove the speed bumps was denied, plaintiffs removed the speed bumps themselves without Mr. Dunn's permission. CP 23, 53-54, 66 (Finding of Fact 1.15).

Mr. Dunn is a single man and owns property at the corner of Ridge West Drive and 47th Street Court East in Lake Tapps, Washington. CP 44. A 1977 short plat created the original lots owned by the parties. CP 42. The short plat created four lots and a private roadway (47th Street East) across the north part of what is now Mr. Dunn's property. *Id.* The property was further subdivided in 1984. CP 44, 45. The Bowers, Cobbs, and Beltrames access their property over 47th Street East. CP 44-45, 47, 64-65.

On March 19, 2014, following trial, the court entered findings of fact and conclusions of law. CP 63-68. The court found an express roadway easement existed, and speeding on the easement could be controlled by Mr. Dunn installing a speed bump upon notice to plaintiffs. CP 68. An order to this effect was entered the same day. CP 61-62.

About five months after trial, on August 1, 2014, the court entered a second order directing Mr. Dunn to fix potholes in the road. CP 69. This order also said, "Defendant [Mr. Dunn] shall provide notice pursuant to the existing court order, such notice shall not violate this court's order that defendant shall not have contact with the plaintiffs."

Id. However, there was no court order preventing Mr. Dunn from having contact with plaintiffs. CP 61-62; *see also* CP 72, lines 1-7.

In May 2015 (nine months after the court's order to fix the potholes), the Bowers and Beltrames filed a motion asking the court to find Mr. Dunn in contempt for failing to comply with the court's order of August 1, 2014, and asking for clarification of the court's reference to a no-contact order. CP 70. Ms. Bowers admitted a no-contact order did not exist, but asked that the court "clarify" this reference. CP 72. The Bowers and Beltrames made several other allegations against Mr. Dunn. CP 71-92. The Cobbs did not join in the motion, and in fact, sold their property prior to the motion being heard. CP 73, 96. Mr. Dunn denied the allegations, asserted the motion was part of a continued pattern of harassment by the Bowers, and pointed out he completed road repairs 9 ½ months before the motion was brought (back at the time of the court's original order). CP 94-98.

An order on the motion for contempt and clarification was entered five months later on October 16, 2015. CP 113-114. At that time the court did not find Mr. Dunn in contempt. *Id.* Nevertheless, the court ordered:

James Dunn is hereby ordered not to have verbal or non-verbal contact with the Plaintiffs either directly or through third parties. James Dunn is authorized by this court to have written contact with the Plaintiffs only for the express purpose of giving notice of road repairs.

Id. Mr. Dunn appeals this part of the court's ruling. CP 115-117.

Argument

- 1. The no-contact order issued by the court should be vacated because it was not issued as part of a contempt finding, it did not comply with the anti-harassment order statute, it was not petitioned for, and it was not issued under any other authority.**

The trial court's no-contact order should be vacated because it was not properly before the court and the court did not have statutory authority to enter such an order. This issue should be reviewed de novo because it involves a legal issue (the court's authority) and the legal effect of the court's action. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 145 P.3d 1196 (2006); *Meadow Valley Owners Ass'n. v. St. Paul Fire & Marine Ins. Co.*, 137 Wn. App. 810, 156 P.3d 240 (2007).

The motion that led to entry of the no-contact order was a motion for contempt and clarification. CP 70. Had the court found Mr. Dunn in contempt of court, it could have imposed some sort of remedial sanction. RCW 7.21.030. But, the court specifically found Mr. Dunn was not in contempt of court. CP 113-114. Because there was no finding of contempt, the court's no-contact order can't be supported as an exercise of its contempt remedies under RCW 7.21.

As for the "clarification" part of the motion, there was no pre-existing no-contact order in place the court was clarifying. CP 61-62; *see also* CP 72, lines 1-7. Respondents conceded there was no prior no-contact order, and even they were perplexed by the language in the court's August 1, 2014, order that Mr. Dunn not have contact with them. *Id.*

So if Mr. Dunn was not in contempt of court, and the court did not previously enter a no-contact order, what was the basis for the court's no-contact order of October 16, 2015?

The injunction statute authorizes trial courts to grant injunctive relief. RCW 7.40. In their complaint, respondents asked the court to enjoin Mr. Dunn from obstructing their use of the roadway. CP 27-35. But no such injunction was entered after trial. CP 61-62, 66 (Finding of Fact 1.16). Instead, the trial court authorized Mr. Dunn's installation of a speed bump. *Id.* And there was no request in the complaint for a no-contact order against Mr. Dunn. CP 27-35.

Trial courts also have authority to issue anti-harassment orders. RCW 10.14. But such orders require filing a petition, an affidavit outlining the harassment committed, notice that an order could issue, and admissible evidence of harassment. RCW 10.14.020, RCW 10.14.030, RCW 10.14.040, RCW 10.14.080. If the court finds unlawful harassment by a preponderance of the evidence, the court can enter an order prohibiting that harassment. RCW 10.14.080(3). Absent exceptional circumstances, such an order is only valid for one year. RCW 10.14.080(4).

In the present case there was no petition for an anti-harassment protection order. RCW 10.14.040(1). There was no notice to Mr. Dunn that such an order might be entered. There was just notice respondents were asking the court to clarify its reference to an order everyone agreed did not exist. There were no specific findings of harassment in

the court's order. CP 113-114. All the court found was Mr. Dunn was not in contempt of court. *Id.* Further, the order entered by the court has no termination date as required by RCW 10.14.080(2) and RCW 10.14.080(11).

None of the other statutes authorizing the entry of no-contact orders apply in this case. This is not a Sexual Assault Protection Order case (RCW 7.90), stalking case (RCW 7.92), domestic violence case (RCW 10.99), or family law case (RCW 26.50). It is not clear on what authority the court entered the no-contact order.

Because Mr. Dunn was not in contempt of court and because the court did not enter an order under any of the statutes authorizing a no-contact order, the court's no-contact order should be vacated.

2. The trial court's no-contact order is overbroad and vague because it restricts Mr. Dunn's contact with non-parties and restricts virtually every kind of contact with his neighbors, whether intentional or not.

Even if the court had authority to enter a no-contact order, the order is overbroad and vague because it lasts for an undefined term, it restrains Mr. Dunn's contact with non-parties, and it restricts virtually every kind of contact with his neighbors. For these reasons, the court's no-contact order should be vacated.

Under Washington law and the due process clause of the 14th Amendment to the U.S. Constitution, no-contact orders must be sufficiently specific to put a person on notice as to what type of conduct is prohibited, and to protect the public from arbitrary enforcement.

State v. Moultrie, 143 Wn. App. 387, 177 P.3d 776 (2008). Other limitations on no-contact orders under Washington law include requirements that the order have a specified duration, that it not interfere with a person's use or enjoyment of his or her real property, and not be extended to protect non-parties. RCW 10.14.080(4) (duration); RCW 10.14.080 (8) (property rights); *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006) (non-parties); *Price v. Price*, 174 Wn. App. 894, 301 P.3d 486 (2013) (property rights); *City of Seattle v. Edwards*, 87 Wn. App. 305, 941 P.2d 697 (1997) (duration).

The court's order of October 16, 2015, states,

James Dunn is hereby ordered not to have verbal or non-verbal contact with the Plaintiffs either directly or through third parties. James Dunn is authorized by this court to have written contact with the Plaintiffs only for the express purpose of giving notice of road repairs.

CP 113-114.

This order has no duration. On its face it may be perpetual. If this is an anti-harassment order, it must have a duration (usually no more than one year). RCW 10.14.080(4); *City of Seattle v. Edwards*, 87 Wn. App. 305, 941 P.2d 697 (1997).

The no-contact order does not specifically identify who is protected. It simply applies to all "plaintiffs." CP 113-114. This includes the Cobbs who no longer live in the neighborhood, are no longer benefitted by the easement, and did not join in the motion. CP 70, 73, 96. Because the Cobbs were not asking for a no-contact order, this part

of the order should be vacated. *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006).

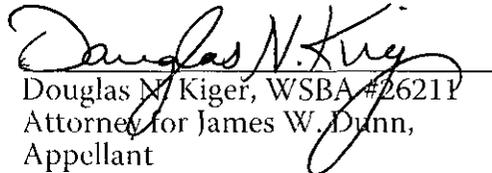
The no-contact order states that Mr. Dunn shall have no contact whatsoever, including verbal and non-verbal contact, or contact through third parties. CP 113-114. The only exception is written notice for road repairs. *Id.* The Bowers and Beltrames are Mr. Dunn's neighbors. The Bowers and Beltrames have to drive over Mr. Dunn's property to get to their homes. What if Mr. Dunn happens to be in his yard and looks at the Bowers or Beltrames when they are driving down the road? What if Mr. Dunn runs into the Bowers or Beltrames at the grocery store? Are these violations of the no-contact order? There are so many possible ways Mr. Dunn could have innocent verbal, non-verbal, or third party contact with the Bowers and Beltrames simply by virtue of the fact he is their neighbor and they drive over his property to access theirs. The present order unnecessarily interferes with Mr. Dunn's rights to be present on and enjoy his own property. RCW 10.14.080(8); *Price v. Price*, 174 Wn. App. 894, 301 P.3d 486 (2013). Similarly, the order is so overbroad and vague that it is virtually impossible to know what conduct is prohibited, or whether the restraint will be arbitrarily enforced. *State v. Moultrie*, 143 Wn. App. 387, 177 P.3d 776 (2008). Consequently, the order is invalid and should be vacated.

Conclusion

Mr. Dunn asks this court to vacate the no contact order. Mr. Dunn was not in contempt of court when the order was entered. There was no petition or findings to support such an order. The order has no stated duration, applies to non-parties, and is so overbroad and vague it interferes with his property rights and could subject him to penalty for otherwise innocent contact with his neighbors.

Respectfully submitted this 15th day of January, 2016.

BLADO KIGER BOLAN, P.S.


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Certificate of Service

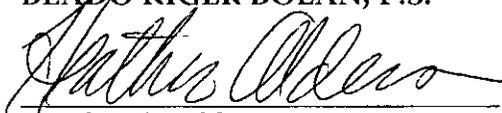
The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 15th day of January, 2016, she placed with ABC Legal Messengers, Inc. an original Brief of Respondent and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

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via U.S. Mail, first class, postage pre-paid, and email to
Carolyn@kraftlawgroup.com and Shannon@kraftlawgroup.com.

Dated this 15th day of January, 2016, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.


Heather D. Alderson
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