

71045-1

710451

NO. 71045-1-I

IN THE COURT OF APPEALS, DIVISION ONE

SHARON FOSSUM,

Respondent,

v.

DAVID HECKMAN,

Appellant.

APPELLANT'S BRIEF

ORIGINAL

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COURT OF APPEALS DIV 1
COUNTY OF WASHINGTON

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I. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR #1:

The lower court failed to enter written findings of fact and conclusions of law as required by CR 52¹ and SCLCR 52², making review of this case impossible without vacating the anti-harassment order and remanding the case.

ASSIGNMENT OF ERROR #2:

The lower court wrongly considered Ms. Fossum's July 29, 2013, motion for reconsideration in that there was no basis in CR 59 for hearing Ms. Fossum's motion for reconsideration.

¹ CR 52 provides in part that "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."

² SCLCR 52. DECISIONS, FINDINGS AND CONCLUSIONS

(1) Findings and Conclusions; the substantially prevailing party shall prepare proposed findings and conclusions. Any party objecting to proposed Findings of Fact and/or Conclusions of Law shall comply with:

(A) Proposed Changes in Opposition. Provide the court and opposing counsel with a copy of such proposed documents, which indicate all changes the objecting party proposes. Deletions shall be shown by a strike out and additions shown by underlining; or

(B) Alternate Proposed Documents. Provide the court and opposing counsel with a complete set of alternate proposed documents which easily identifies proposed deletions and additions.

(C) Oral objections at the time of presentation, without documentation as provided in (A) or (B) above, will not be permitted.

ASSIGNMENT OF ERROR #3:

The lower court wrongly considered the evidence of the recorded conversations that were included in Ms. Fossum's July 29, 2013, motion for reconsideration. These recordings were not "newly discovered evidence" as contemplated by CR 59 (a)(4), and so the evidence was not submitted to the court in a timely manner and should not have been considered. Additionally, these recordings were irrelevant and prejudicial under ER 401, 402, and 403.

ASSIGNMENT OF ERROR #4:

Without knowing precisely the lower court's findings of facts and conclusions of law, it is unclear what evidence the lower court believed alleged constituted a "course of conduct" that was undertaken with "no legitimate or lawful purpose," such that merited an unlawful harassment order under RCW 10.14.020(2)³. It does not appear there is sufficient

³

RCW 10.14.020 (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.

evidence in the record to support the issuance of the anti-harassment order in this case.

ASSIGNMENT OF ERROR #5:

There are not findings and conclusions to support the issuance of a permanent no contact order, as opposed to a one year order pursuant to RCW 10.14.080(4).

II. STATEMENT OF THE CASE

ON June 13, 2013, Sharon Fossum filed a petition in Snohomish County Superior Court seeking an anti-harassment protection order against David Heckman. (CP 182). The petition asserted that an anti-harassment protection order was based on Ms. Fossum's allegations of the following contacts allegedly made by Mr. Heckman (CP 184):

- On June 11, 2013, at 2:32pm, Ms. Fossum alleged she had received a phone call from an unknown number which she did not answer; the call was immediately followed by a text message that said, "If you are slightly interested wear black stockings next time u get dressed up." She did not respond to the text message. She contacted the police in regard to this message, and Ms. Fossum claimed in her petition that Mr. Heckman had sent the text.

- On June 10, 2013, at around 5:20pm, a women allegedly called Ms. Fossum's place of work and asked to speak to Ms. Fossum's husband Ron, who also worked there. The unknown women was adamant that she speak with Ron, who was not available. The caller ID recorded the women's phone number as 425-344-0050. At 5:25pm, Ms. Fossum received a text message from the same phone number stating, "Sharon, do you want a call from you secret admirer? I can take u places u have never been and where u need to go badly. Please say yes." Ms. Fossum did not respond to the text.
- On June 9, 2013, she was at a church she attended and went to the restroom. When she came out of the restroom she saw Mr. Heckman, who attended the same church, standing in the corner with a hand-written sign that said "call me." Ms. Fossum did not call.
- Ms. Fossum's brother, Jared, who worked at the same office with Mr. and Ms. Fossum, allegedly saw Mr. Heckman's vehicle drive by the office 1-2 times per week.
- Ms. Fossum had not had a conversation with Mr. Heckman in the preceding year with the exception of a call Mr. Heckman had made to her regarding the delivery of some items belonging to Mr. Fossum's parents, and that call had been made on May 5, 2013.

- Mr. Heckman had been employed by Mr. Fossum's business as an independent contractor some years previous to these allegations, and the petition alleged that Mr. Heckman had been fired due to "sexual harassment" of another person (NOT Ms. Fossum).

In response to Ms. Fossum's petition, the Snohomish County Superior Court Commissioner entered a temporary anti-harassment order, and set the matter for a hearing. Mr. Heckman responded in due course with petitions supporting his position that Ms. Fossum's petition was inaccurate, her allegations incorrect, and concluding that there was no basis for an anti-harassment order (CP 142-169).

Oral argument was held in the matter on July 17, 2013 (Report of Proceedings, July 17, 2013). After considering the arguments and exhibits of the parties, the court found that the burden of proof had not been met, and dismissed the anti-harassment order (CP 140). The court did not submit written findings of fact and conclusions of law, as required by CR 52 and SCLCR 52. As the basis for dismissal, the order states that "The Court does not find sufficient evidence of unlawful harassment." (CP 140). The order dismisses the case "with prejudice." (CP 140).

On July 29, 2013, the Ms. Fossum submitted a motion for reconsideration of the dismissal order (CP 137). The basis of the motion

for the reconsideration request was for the court to consider the contents of a recorded interview conducted of Mr. Heckman done on February 4, 2011, related to the alleged sexual harassment of different person (NOT Ms. Fossum) more than two years earlier. Counsel for Ms. Fossum acknowledged in her motion for reconsideration that these recorded materials were not properly prepared in advance of the July 17th hearing, and that the recorded materials were thus inadmissible at the July 17th hearing (“At the hearing on July 17, 2013, Petitioner only had an uncertified copy of the transcribed pages available. Due to an objection from opposing counsel regarding authenticity of the materials, those transcripts were not submitted to the court.”). (CP 138).

Mr. Heckman briefed a response objecting to the materials and objecting to the motion to reconsider. (CP 65). Mr. Heckman argued that the “new” materials were not related to Ms. Fossum, and were not admissible under ER 401, ER 402, and ER 403. (CP 65). Mr. Heckman also asserted that, “There has been no explanation as to why [the materials] could not have been transcribed and certified previously,” noting that at all times the materials had been in the exclusive possession of the Ms. Fossum. (CP 66).

On August 19, 2013, the Snohomish County Superior Court Commissioner heard oral arguments on Ms. Fossum's motion to reconsider, and granted it over Mr. Heckman's objection (Record of Proceedings, August 19, 2013). A permanent no contact order was then entered on August 19, 2013. (CP 58). The court did not submit written findings of fact and conclusions of law, as required by CR 52 and SCLCR 52.

On August 29, 2013, Mr. Heckman filed a motion to reconsider the court's August 19th issuance of the permanent no contact order. (CP 54). On September 11, 2013, the court denied that motion by written order without oral argument (CP 6).

Mr. Heckman subsequently filed a motion for revision of the Commissioner's ruling. (CP 12). That motion was heard by the Superior Court and denied by written order dated October 1, 2013. (CP 2). Notably, no record was made of the oral arguments regarding the motion for revision (the hearing was neither court reported nor audio recorded).

This appeal follows.

III. ARGUMENT

The appeal presents questions of law regarding the statutory and procedural rule requirements for an anti-harassment order proceeding under RCW 10.14. Such questions are reviewed de novo.

1. The trial court failed to make the findings of fact and conclusions of law required by law and court rule in order to allow for competent review.

The somewhat convoluted procedural track of the lower court rulings makes the review of this case without benefit of the court's finding of fact and conclusions of law impossible. At the hearing on July 17th, the lower court dismissed the petition stating that the court "finds insufficient evidence of unlawful harassment." In dismissing the petition with prejudice, the court did not enter any findings resolving the factual disputes of the parties, nor proclaiming on what specific grounds the court had found insufficient evidence.

At the August 19th hearing, the court entered a permanent order on the same evidence without specifying any further findings and conclusions. The disconnect between the two rulings – each made without informing the record of findings and conclusions – invites only speculation and precludes meaningful review.

“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 consists of (1) a knowing and willful (2) course of conduct (3) directed at a specific person (4) which seriously alarm, annoys, harasses, or is detrimental to a person, and (5) serves no legitimate or lawful purpose.” RCW 10.14..020(2).

In entering an anti-harassment order, the court must make specific factual findings as to how Mr. Heckman’s alleged behavior fits within the elements of the statute. Without findings, appellate counsel and court are left to guess at what facts may or may not have been found, and how those ‘potential’ facts fit into the conclusions necessary for issuance of an anti-harassment order. This is an exercise in futility.

In addition to the findings required by the statute, Superior Court Civil Rule 52(a)(1) requires that in all actions tried upon the facts without a jury, the court shall find the facts specifically and state separately its conclusions of law. Snohomish County Superior Court Local Civil Rule 52 sets out a procedure contemplating the entry of such findings and conclusions into the record. Here again, these rules were not followed.

RAP 10.4(c) requires an appellant to include a challenged finding of fact as part of the brief. Such a requirement cannot be followed in the absence of findings.

This order of anti-harassment cannot be sustained on this record. The order should be vacated and the matter remanded back to the lower court.

2. Motions for reconsideration must be founded on specific causes cited in CR 59 that ‘materially affect the substantial rights of a party.’ Ms. Fossum’s motion for reconsideration was not rooted in a cause recognized by CR 59, and it should have been procedurally barred.

Ms. Fossum’s motion for reconsideration contains a section (section 2) entitled “Grounds.” (CP 138). The “Grounds” section does not cite to a specific provision of CR 59 which might authorized the motion for reconsideration (CR 59(a) - (1) Irregularity in proceedings, (2) Misconduct of a party, (3) accident or surprise, (4) “Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at [the hearing],” (5) excessive damage award, (6) error in damage award, (7) decision contrary to law, (8) previous error objected to at trial, or (9) substantial justice has not been done.). Rather, the grounds section of Ms. Fossum’s brief simply

request “that the Court consider additional evidence which was not available on July 17, 2013, at the time of the hearing.”

However, Ms. Fossum explains later in the same section (line 18) that “At the hearing on July 17, 2013, Petition only had an uncertified copy of the transcribed tapes available. Due to objection from opposing counsel regarding authenticity of the materials, those transcripts were not submitted to the Court.”

Why the materials were not ready for the hearing is clearly the fault of Ms. Fossum, an error which cannot be rescued by CR 59. As Mr. Heckman asserted in his brief, “There has been no explanation as to why [the materials] could not have been transcribed and certified previously,” noting that at all times the materials had been in the exclusive possession of Ms. Fossum. (CP 66).

As there was no procedural mechanism in CR 59 to allow for a motion to reconsider, the motion for reconsideration should not have been allowed. The July 17th order of dismissal should stand unmolested. The anti-harassment order should be vacated.

3. The lower court should not have considered the transcribed recordings submitted as evidence as part of the motion to

reconsider as this evidence was not “new” evidence (as noted above) under CR 59(a)(4), and it was irrelevant and prejudicial.

The transcribed recording evidence submitted with Ms. Fossum’s motion for reconsideration was irrelevant and prejudicial. The recordings involved an employment controversy that was not between Mr. Heckman and Ms. Fossum. It was recording that was made two and half years prior to the hearing at which it was submitted. The evidence was offered only to improperly smear Mr. Heckman’s character and to argue improper propensity evidence.

This evidence should not have been considered by the court as part of a motion to reconsider or otherwise. As it was the only evidence underlying the motion to reconsider, the July 17th order of dismissal with prejudice should stand, and this order of anti-harassment now vacated.

4. There is insufficient evidence in the record, as currently constituted, to legally support the issuance of anti-harassment order.

To avoid infringing on constitutional rights, the anti-harassment statute, RCW 10.14, was drafted to prohibit only “serious, personal harassment.” RCW 10.14.010. “The statute is not designed to penalize people who are overbearing, obnoxious, or rude.” Burchell v. Thibault, 74

Wn.App. 517, 522 (1994). This brief has cited to the elements that must be found by the court in order to enter an anti-harassment order, the last of which is that a person had engaged in a course of conduct that “serves no legitimate or lawful purpose.”

In the case at bar, there is no assertion within the petition that Mr. Heckman had done anything unlawful; as such, to meet this prong of the analysis, the lower court must have found and concluded that Mr. Heckman engaged in a course of conduct that had “no legitimate purpose.”

But in City of Bellevue v. Lorang, 140 Wn.2d 19, 2000, the court struck down as unconstitutionally vague a Bellevue telephone harassment statute that forbade speech “without purpose of legitimate communication.” The court found that the phrase ‘legitimate communication’ did not give sufficient notice of what speech was prohibited.

The vagueness problem inherent in Lorang exists as well in anti-harassment order cases where, as here, the court makes no specific finding giving factual construct to “legitimate purpose” as it relates to alleged harassing behavior. Without these findings and conclusions, the entry of this order is constitutionally impermissible. The order should be vacated.

5. The anti-harassment order should not have been permanent.

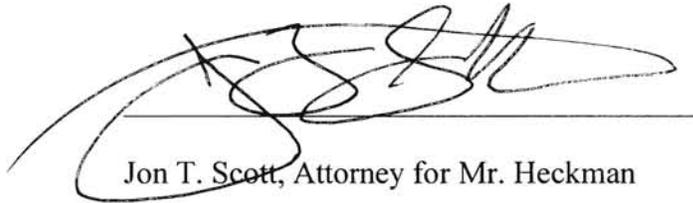
RCW 10.14.080 (4) commands that “[a]n order issued under this chapter shall be effective for not more than one year unless the court finds that the respondent is likely to resume unlawful harassment of the petitioner when the order expires. If so, the court may enter an order for a fixed time exceeding one year or may enter a permanent antiharassment protection order.”

On this issue, the court once again failed to issue any findings or conclusions to support its issuance of a permanent order as opposed to a one year or longer fixed duration order. There exists no evidence in the record to support this permanent order.

IV. CONCLUSION

For the reasons stated herein, Mr. Heckman respectfully asks that this court vacate the anti-harassment order issued by the lower court.

RESPECTFULLY SUBMITTED THIS 10th DAY OF JULY, 2014.

A handwritten signature in black ink, appearing to read 'Jon T. Scott', is written over a horizontal line. The signature is stylized and somewhat illegible.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on JULY 10, 2014, I arranged for service of the foregoing Appellant Brief to the Court and to the parties to this action as follows:

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Dated in Everett, WA., this 10th Day of JULY.



Jon T. Scott