SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING

SCARLETT, Appellee, v. GJOVIK, Appellant.	NO. 22-2-03849-7 SEA *Lower Court Case Number 22CIV01704KCX* ORDER

This appeal came on regularly pursuant to RALJ 2.2(a), before the undersigned Judge of the above-entitled court and after reviewing the record on appeal and considering the written submissions of the parties, the court reaches the following findings of fact and law.

LIMITATIONS UPON ITEMS CONSIDERED

Both parties are unrepresented in this matter. This Court must begin with a clarification regarding the guiding rules, the materials considered, and thus articulate what was not considered.

Appellant filed their opening brief more than 90 days after initiating the appeal, which is a violation of RALJ 7.2 and grounds for dismissal due to "abandonment," however this Court did not exercise its discretion to consider a dismissal. Appellant's brief is 76 pages long, with over 400 pages of attachments (which included additional legal briefing)[1],

[1] Including "Notice of Pendancy of Other Actions" (sub-16, 55 pages), "Appendix of Exhibits" (sub-17, 72 pages), and "Exhibit X/Legal Memo" (sub-23, 337 pages)

which is in violation of RALJ 7.3(b). Both Appellant and Appellee attempted to introduce additional "evidence" into the record throughout the entirety of their submissions, in terms of factual assertions not in the lower court record, along with Appellant's submission of an additional witness statement (Found in electronic record at sub-48).

Appellee raises multiple objections to the length and content of Appellant's submissions, but failed to note motions for consideration by this Court per local rules. Appellee submitted a brief of appropriate length.

Appellant requests at various times that this Court apply Rules of Appellate Procedure. However, the RAPs "govern proceedings in the Supreme Court and the Court of Appeals for review of a trial court decision and for direct review in the Court of Appeals of an administrative adjudicative order under RCW 34.05.518." (RAP 1.1). The rules which govern the proceedings before this Court (i.e. "review by the superior court of a final decision of a court of limited jurisdiction"), are found in the Rules of Appeal for Courts of Limited Procedure (RALJ), as well as the local RALJ rules.

Appellant requests that this Court vacate the lower court's order via "CR 60," which applies to a judgment or order of Superior Court, and does not apply to these proceedings.

Appellant has asked this Court to consider pending actions, investigations, proceedings and lawsuits in various other courts, jurisdictions, and proceedings. These matters are not before this Court, and this Court has no jurisdiction to rule in any fashion on those matters. The ruling in this matter in no way governs any determinations in any other court, jurisdiction, or proceeding involving the parties.

The Court provides this background to explain that many documents, arguments, and requests contained in the parties' submissions were ***neither reviewed nor considered*** by this Court, as they fell outside of the trial record or were unrelated to any issue this

Court has authority to determine. This Court's role is a very limited one, articulated by RALJ 9.1:

> **(a) Errors of Law.** The superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law. **(b) Factual Determinations**. The superior court shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction.

In other words, this Court can only consider facts which were before the lower court, and this Court will not consider new facts, assertions, or declarations provided on appeal. Briefs from each side contain factual assertions that were not contained in the lower court record, and/or were irrelevant to issues on appeal. This Court will not consider facts outside the record. Nor will this Court consider allegations that are irrelevant to the legal issues on appeal in this case. This Court can only consider whether the lower court's decision was in error.

Overall, this Court has an obligation to interpret and apply the RALJ rules "liberally" to "promote justice and facilitate the decision of cases on the merits." (RALJ 1.2(a)). As such, "cases and issues will not be determined on the basis of compliance or noncompliance with these rules," except in limited circumstances which do not apply to the matter before this Court. (see RALJ 1.2(b)). Thus, the failure of parties to adhere to briefing timelines or limitations, and the parties' introduction of additional facts, will not guide this Court's final determination. This Court will not dismiss for these procedural defects, but has elected to simply not review or consider those items which were inappropriately provided. This Court will only consider whether an error of law was committed by the lower court, based upon the record before the lower court only.

To the degree that Appellant/Respondent appears to be challenging personal jurisdiction (due to her residence location in California), this Court finds no merit, as RCW 10.14.155 provides for jurisdiction over nonresident individuals in anti-harassment proceedings in certain circumstances when the conduct giving rise to the petition occurred out of state. The conduct must represent an "ongoing pattern of harassment that has an adverse effect on the petitioner or a member of the petitioner's family or household and the petitioner resides in this state." RCW 10.14.155(d)(1). Petitioner/Appellee resides in Washington. The lower court properly exercised jurisdiction.

ASSIGNMENT OF ERROR

A review of the record before the lower court, along with the lower court's decision (both the written order and oral rulings in transcript of proceedings held on March 1, 2022) leads this Court to conclude that the order was entered in error.

RECORD AND DECISION OF LOWER COURT

The case presented to the lower court clearly showed a picture of two parties who posted and messaged regarding each other on their individual Twitter pages (and other social media accounts). While the parties initially spoke well of each other, their interactions changed. By December 2021, neither party thought well of the other. Both parties have strong, publicly posted opinions about the validity of each side's activism, public statements, and online activities. Petitioner filed a request for an order, describing Respondent's pattern of "posting defamatory content and other false statements about me on her Twitter account." Petitioner also speculated about posts made by anonymous accounts, which Petitioner attributed to Respondent. Specifically, Petitioner wrote and testified in court about Respondent "re-posting" items posted on Petitioner's own social

media platform starting in December 2021. Petitioner admitted to having published these facts to her own followers, which exceeded 55,000. Petitioner claimed that Respondent "filed an NLRB charge against Apple, Inc." Petitioner claimed that Respondent posted information related to a background check of Petitioner's spouse. Petitioner also claimed that Respondent expressed opinions about Petitioner's truthfulness in her public posts and her involvement in ongoing litigation with Apple, Inc.

Respondent and Petitioner both provided many many pages of communications, arguments, screenshots, postings, and other items, to show the postings and communications of Petitioner and Respondent in the months preceding the filing of the AHO petition. At one point, both parties relied on a third party to act as an informal intermediary, to attempt to reach an agreement regarding what topics should be commented upon in each other's Twitter pages and other social media platforms. Both parties blocked each other, unblocked each other, messaged each other, posted accusations of harassment against each other, reporting each other to various governmental agencies, and made statements about various ongoing litigation between Respondent and Apple, Inc. Parties at first expressed engagement and support for each other, which was ultimately replaced with vitriol and public attacks of each other, commencing in December 2021.

The lower court denied a temporary order, finding no emergency. After a full hearing, the lower court granted the order, for a length of five years. In doing so, the court found that the "course of conduct" by Respondent involved primarily the "re-posting" of various items. The court expressed its greatest concern about posts related to records of criminal history as well as details about Petitioner's health.

The court ultimately asks a key question of the Petitioner/Appellee:

> THE COURT: I'm sorry; so are you saying that the information about your medical -- various medical conditions, your mother's whereabouts and those sorts of things that she's reposting things that you have already posted on Twitter?
>
> (Transcript of proceedings, sub-6, page 18)

Petitioner confirmed that this was true, explaining to the court that Respondent had re-posted items that Petitioner intended only for her "own" Twitter followers (approximately 55,000+), and/or were items that Respondent found through other sources, commenting that "she actually did delete a lot of the Tweets that had personal information about it except for two of them." Petitioner then adds that Respondent conducted a background check on both herself and her husband and provided this information to a representative for Wikipedia.

When counsel for Respondent objects and points out that postings by Respondent were true and accessible publicly, the lower court states:

> THE COURT: That's not the standard. That's not the standard in an antiharassment order. Whether it's true or not doesn't matter in an antiharassment order.
>
> . . . So what we're trying to figure out is whether there's a pattern of activity over time directed at Ms. Scarlett that serves no lawful purpose. And if you want to address -- maybe address your questions toward how any of these postings serves a lawful purpose, that might serve your client well.
> (Transcript of proceedings, sub-6, page 21)

When questioned by Respondent's counsel, Petitioner is asked:

> Q. . . . The communications that you're referencing, are those messages sent directly to you or are they something that she posts to the public at large?
>
> A. They are what she is posting to the public, as I have stated.
>
> (Transcript, sub-6, page 22)

Petitioner verifies that these messages were not sent directly to her, as in the form of a text message, an email, a letter, or a physical verbal exchange. When asked about the source of information posted by Respondent, the following exchange occurs:

> Q. . . . So let me recap. You put in the public sphere information about yourself that other people could see and then copy, and she took that information and she put into another format. Do I understand that correctly?
>
> A. That is correct.
>
> Q. All right. And that information that you shared, how many people did you share that with?
>
> A. My entire Twitter feed.
>
> Q. 45,000?
>
> A. 55,000. (Transcript, sub-6, page 25)

The lower court made its findings on the record (not in writing). The court described the various online postings of Respondent/Appellant which the Court relied upon in entering an order in favor of Petitioner/Appellee:

> The only purpose in posting information about Ms. Scarlett's mother, Ms. Scarlett's mother's whereabouts, home and pet, Ms. Scarlett's husband and his criminal record is clearly designed to upset Ms. Scarlett. There's no lawful purpose. There is no absolute right to free speech. Free speech can be curtailed in many ways, one of which is a protection order. The protection orders are clear that the course of conduct cannot be designed to alarm, annoy or harass. There's no other purpose for posting these things, none.
>
> The antiharassment statute does not require that Ms. Gjovik direct this specifically by directly speaking to her, it's designed -- it prohibits directing this at her. So it can be directed at other people knowing that Ms. Scarlett is going to see it and be aware of it. It can be communicated to others. It doesn't have to be communicated directly to Ms. Scarlett to be prohibited under our antiharassment statute.
>
> Posting this kind of information about somebody's medical condition, about someone's spouse's criminal history -- particularly when it's sealed, but even if it

weren't sealed -- about someone's parents, about someone's name change, none of that serves any lawful purpose to disseminate. The only purpose for doing that is to harass, annoy and alarm. Clearly, Ms. Gjovik has more than a bit of animosity toward Ms. Scarlett. Clearly, she was directing this at her and was hoping to harm her, to upset her. There's no other purpose for this. I am going to issue the order, and I'm going to make it a five-year order.

(Transcript, sub-6, page 47-48)

To sum up the stated areas mentioned by the lower court:

1) The reference to "medical conditions" referred to a reposting of Petitioner/appellee's own Tweets about her own medical conditions.[2]

2) The reference to Petitioner's family was related to Respondent's post opining about the strength of Petitioner's claims about her poverty in childhood in light of a posted photo. (Despite the reference to "location" this court sees no evidence that Petitioner's private home address was posted, and the reference to "home" appears from the record to be a comment about Petitioner's publicly posted childhood photo.)

3) The reference to criminal history was related to law enforcement or court documents obtained by Respondent showing that Respondent's spouse had a prior criminal conviction and was ordered to register as a sex offender.[3]

[2] Tweets and messages from Petitioner were apparently public at one point but were later restricted in audience reach to approximately 55,000 persons who were followers of Petitioner. It is unclear from the record when some items were "public" tweets, versus "limited audience" tweets.

[3] It was unclear from the record, but at some point either shortly before or shortly after Respondent posted this information, King County Superior Court sealed the juvenile record for Petitioner's spouse (in late December), a detail apparently unknown to Respondent when Respondent posted this background information, according to sworn testimony.

Despite the lack of "direct" communication to Petitioner, as conceded under oath, the court imposed distance restrictions, prohibitions against surveillance, and prohibitions against direct/third person communications to Petitioner. The court made no specific findings to support the extra length of the order (five years). Most important to Petitioner (and to the issues before this Court), the lower court also added the following language to the order:

> **"Respondent shall not make any statements or posts or other publications about Petitioner, including, but not limited to, petitioner's medical information, petitioner's family, petitioner's names, on any social media or internet or other medium. Nothing about this Order prohibits Respondent from testifying in administrative or judicial proceedings."**

The court referenced re-posting of items in its findings of "course of conduct." The court did not specifically reference in its findings the other category of items complained of by Petitioner, namely Respondent's opinions about Petitioner's role in ongoing litigation. Whether the lower court gave no weight or consideration to the claims by Petitioner is unclear. However, as the above language from the final order was not limited to "re-posting" public information, and was a full prohibition on "posts … *about* Petitioner," those "opinion" posts may very well have been intended to be referenced in the course of conduct that the court describes. Both categories will be analyzed by this Court.

A. THE LOWER COURT'S ORDER EXCEEDED STATUTORY LENGTH WITHOUT ADDITIONAL REQUIRED FINDINGS

RCW 10.14.080(4) provides that an anti-harassment order may not exceed one year in duration "unless the court finds that the respondent is likely to resume unlawful harassment of the petitioner when the order expires." No such finding was specifically made on the record by the lower court, which renders the length of five years to be improper.

B. THE LOWER COURT'S ORDER IS AN UNCONSTITUTIONAL PROHIBITION ON FREE SPEECH

Unlawful harassment is defined in RCW 10.14.020[4] as follows:

> (1) "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 is contact by a person over age eighteen that would cause a reasonable parent to fear for the well-being of their child.
>
> (2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."

Determination of the purpose of a course of conduct was governed by RCW 10.14.030, requiring the lower court to determine if the conduct serves any legitimate or lawful purpose. However, RCW 10.14.020 protects from consideration "constitutionally protected free speech." And a protection order that is based solely on protected free speech is invalid. Catlett v. Teel, 15 Wn.App.2d 689 (2020). Defamatory language is generally not protected, but defamatory speech must be certain and apparent from the words themselves. *Id.* at 705.

1) Appellant/Respondent's "Republishing" or "Re-posting" Publicly Available Records

[4] This statute (along with various other forms of orders prohibiting contact) have now been replaced entirely with a combined statutory scheme in RCW 7.105, which took effect in July 2022

While the publication of truthful information is not protected in all instances, the U.S. Supreme Court has shown how even the publication of a rape victim's name from a publicly-released police report is protected by the 1st Amendment.[5]

The Washington Constitution provides even greater protection than the U.S. Constitution's 1st Amendment to the publication of public records. Via Const. art I, § 5, Washington provides an absolute right to publish and broadcast accurate, lawfully obtained information that is a matter of public record.[6] These protections are not limited to information admitted into evidence and presented in open court.

While there is a compelling state interest in protecting citizens from harassment, a specific protection order must be narrowly tailored to further a compelling state interest. In a very similar case to the matter before this court, Division One[7] recently determined that restrictions such as the ones imposed by the lower court (related to online posts) were not narrowly tailored to further a compelling state interest.

The lower court in this matter seemed to require a "lawful purpose" behind the Respondent's postings of public records. But our state constitution does not allow for that consideration or restriction on free speech, and provides that "[e]very person may freely

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[5] *Florida Star v. BLF*, 491 U.S. 524 (1989)

[6] *State v. Coe*, 101 Wn.2d 364 (1984)

[7] *Catlett v. Teel*, 15 Wn.App.2d 689 (2020). This case involved a finding of improper "course of conduct" by Teel, an ex-boyfriend of Catlett, who appealed the entry of an antiharassment order which restrained his behavior. Teel caused public records to be published, namely requests for criminal records and other publicly available documents. He did so in a manner which resulted in an online posting of those documents via a site called "MuckRock". These documents included various police investigations of Catlett for harassing behavior, mental health checks of Catlett by law enforcement, arrests for domestic assault, etc. The documents obtained by Heel also included links to criminal records for another individual which (Teel) believed related Catlett's behaviors. Division One found that all of this was protected speech, that the lower court's order was an unconstitutional content-based restriction, and that its provisions imposed an unconstitutional prior restraint on future protected speech.

speak, write, and publish on all subjects, being responsible for the abuse of that right." Const. art 1, § 5. There is no categorical "harassment exception to the First Amendment's free speech clause."[8]

While many of the postings by Respondent which were complained of appeared to be offensive, rude, or harsh, the case law is clear: Civil antiharassment statute is not designed to penalize people who are overbearing, obnoxious, or rude.[9]

The lower court's determination **should have** exempted from a finding of "course of conduct" the "re-posting" of publicly available records, content and statements, as the actions constituted constitutionally protected free speech.

Further, the lower court's order for protection restricts future speech in a manner which constitutes an unconstitutional content-based restriction. The court cannot restrict expression because of its message, its ideas, its subject matter, or its content, unless it is narrowly tailored to promote a compelling governmental interest. Here, there is no privacy interest in public records and public postings. Re-posting of these public records falls within constitutionally protected activity. No applicable exceptions apply to allow a prior restraint on speech (e.g. incitement to violence, publication of obscenity, direct threat to military security, restrictions during times of war[10]). This Court need not look further than the

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[8] *Rodriguez v. Maricopa County Cmty Coll. Dist.,* 605 F.3d 703 (2010). In fact, in *City of Everett v. Moore*, 37 Wn.App. 862 (1984), a section of the crime of harassment was found to be overbroad which did not have a "precision of regulation" required by the 1st Amendment. Speech which harasses does not lose its constitutional protection by virtue of that fact alone.

[9] *Burchell v. Thibault*, 74 Wash. App. 517, 874 (1994). Again, nothing in the record suggested that the lower court found the Respondent's posts to be defamatory, which was appropriate as the posts could not meet the four elements articulated by *Herron v King Broad Co*., 112 Wn.2d 762 (1989)

[10] *See Near v. Minnesota ex rel Olson*, 283 U.S. 697 (1931).

decisions of Coe and Catlett to find that posts such as those at issue are related to law enforcement or court records and are protected speech.

2) Appellant/Respondent's "Opinion" Posts

A slightly different analysis applies to posts featuring the opinions of Respondent about the strength and veracity of various legal claims made by Petitioner, as well as opinions about Petitioner's involvement as a witness for Apple, Inc. It is important to note that these posts were featured on Respondent's own blog/site/social media pages, and were not directed to Petitioner. The lower court appeared to have heard and seen no evidence that the posts encouraged or incited violence. Petitioner asserts that the speculation and opinions expressed by Respondent about Petitioner's involvement in litigation were false and reckless. Thus, this Court will address this specific category of online posting via a separate test of whether this constitutes defamation, which may not be protected by the First Amendment.[11]

A defamation plaintiff must establish four essential elements to recover: (1) falsity; (2) an unprivileged communication; (3) fault; and (4) damages. [12]

The truth or falsity of the "opinions" was not explored in the court below. However, a great deal of evidence was before the court regarding the limited public figure

[11] Again, the lower court never specifically ruled that the opinions of Respondent about Petitioner's role in the ongoing litigation was part of the "course of conduct," but as mentioned above, due to the fact that the court ultimately ruled that "Respondent shall not make **any statements or posts or other publications about Petitioner,**" it can be assumed that the "opinion" posts were considered along with the republication of public data and information, and thus this topic must be addressed.

[12] *Mark v. Seattle Times,* 96 Wash.2d 473, 486, 635 P.2d 1081 (1981); *Sims v. KIRO, Inc.,* 20 Wash.App. 229, 233, 580 P.2d 642 (1978); Restatement (Second) of Torts § 558 (1977), *Bender v. City of Seattle*, 99 Wash. 2d 582, 599, 664 P.2d 492, 503 (1983).

status of Petitioner/Appellee. This status is important as there is a clear decrease in the protections against invasions of privacy and defamation of character provided by law, if someone is a "public figure" for a "limited range of issues." This applies when a party "voluntarily injects [them]self or is drawn into a particular public controversy." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Washington follows a five-part balancing test for identifying limited public figures. The test considers whether:

> (1) the plaintiff had access to channels of effective communication;
> (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy;
> (3) the plaintiff sought to influence the resolution or outcome of the controversy;
> (4) the controversy existed prior to the publication of the defamatory statement; and
> (5) the plaintiff retained public-figure status at the time of the alleged defamation."[13]

Page 155 of the 222 page lower court record includes a post of a "businessinsider.com" article, featuring Petitioner/Appellee, who provided public interviews and engaged in ongoing activism related to Apple Inc., after alleging harassment in what is described as a whistleblower filing. Petitioner/Appellee herself described in her own sworn testimony that she utilized her public followers to heighten awareness and engage in public activism, designed to reach a wide audience. In fact, Petitioner described using her public presence to initially increase Respondent's public reach, as they both were involved in activism and litigation, well before the alleged defamation.

There is more than sufficient proof of all five parts of the test above. Petitioner/Appellee is and was a limited public figure as it related to ongoing employment

[13] *Clardy v. Cowles Publ'g Co.*, 81 Wn. App. 53, 60, 62 (1996).

issues at Apple, Inc. As such, Petitioner must prove that Respondent had actual malice in making posts which were not truthful, before it would meet the legal definition of "defamation," [14] which could then exempt that content from free speech protections.

However, there was no evidence of actual malice before the lower court behind Respondent's posts. There was more than sufficient evidence of Respondent/Appellant's intentions and aim in addressing or magnifying or responding to an ongoing dispute and legal challenge. Respondent's expression of opinion in that context was not proved to be motivated by malice, but rather by activism.

Even if Respondent's speculation as to Petitioner's role as a witness or agent of Apple, Inc was not entirely accurate, Petitioner did not show sufficient basis for this to be qualified as "defamatory" content. As such, there is no proof that the "opinion" posts of Respondent could be exempted from free speech protections. And thus, those posts cannot provide an alternate means to support a finding of "course of conduct" to justify the lower court's restrictions on speech.

Overall, the Respondent's "re-posting" of public records and the "opinion" posts constituted free speech which must be protected per case law and constitutional protections. Accordingly, the lower court's ruling amounted to an unconstitutional prior restraint on Respondent's speech.

IT IS HEREBY ORDERED that the above cause is: [x] REVERSED.

The matter is REMANDED to King County District Court for further proceedings to be set for consideration related to the previously imposed order, in accordance with the above decision.

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[14] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), *Clardy v. Cowles Pub. Co.*, 81 Wash. App. 53, 55–56 (1996)

The Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

DATED:_September 26, 2022

_*Electronic signature to follow*_____
JUDGE ANDREA K. ROBERTSON

King County Superior Court
Judicial Electronic Signature Page

Case Number:	22-2-03849-7
Case Title:	SCARLETT vs GJOVIK (APPELLANT/KCD)
Document Title:	ORDER
Signed By:	Andrea Robertson
Date:	September 26, 2022

Judge: Andrea Robertson

This document is signed in accordance with the provisions in GR 30.

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