SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITSAP COUNTY

CLARENCE MORIWAKI,
Petitioner/Appellee,

v.

RICHARD RYNEARSON aka RICHARD LEE,
Respondent/Appellant.

No. 17-2-01463-1

DECISION ON RALJ APPEAL

**** Clerk's Action Required ****

THIS MATTER comes before the Court on appeal of a final decision of a Kitsap County court of limited jurisdiction pursuant to RALJ 1.1. Respondent Rynearson appeals the trial court's entry of a final stalking protection order issued pursuant to RCW 7.92.100 on July 17, 2017.

SUMMARY

Freedom of speech is strongly protected from executive, legislative and judicial branch interference under the First Amendment to the United States Constitution.

In the stalking protection order context, the legislature recognizes that victims of stalking conduct deserve protection which can be accomplished "without infringing on constitutionally protected speech or activity." RCW 7.92.010.

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On the record before this Court, Respondent's actions are protected by the First Amendment. Accordingly, the trial court's decision to grant the stalking protection order is reversed, the stalking protection order is vacated, and the matter is remanded to the trial court for entry of dismissal.

ISSUE

RCW 7.92.020(3) provides that "stalking conduct" occurs in one of three alternative ways – (1) any act of stalking under RCW 9A.46.110; (2) any act of cyberstalking under RCW 9.61.260; and/or (3) any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that: (i) would cause a reasonable person to feel intimidated frightened, or threatened and that actually causes such a feeling; (ii) serves no lawful purpose; and (iii) that stalking knows or reasonably should know threatens, frightens, or intimidates the person, even if the stalker did not intend to intimidate, frighten, or threaten the person.

The issue before the Court is whether the trial court properly issued a stalking protective order under any one of these alternative means.

FACTUAL AND PROCEDURAL HISTORY

Petitioner Clarence Moriwaki ("Moriwaki") and Respondent Richard Lee Rynearson, III ("Rynearson") both reside on Bainbridge Island, Washington. They have homes near one another.

Moriwaki is a founding member and volunteer director of the Bainbridge Island Japanese American Exclusion Memorial Association ("Memorial Association"). The Memorial Association is a non-profit organization that oversees a National Historic Site relating to the internment of Japanese-American residents forcibly removed from Bainbridge Island. The Memorial Association also promotes education about Japanese-American internment during World War II. Moriwaki gives speeches and has appeared in various media outlets to discuss internment and its lessons. Moriwaki regularly posts on Facebook regarding internment and related topics.

Rynearson frequently opines online about the National Defense Authorization Act of 2012 ("NDAA") which includes specific legislation about Guantanamo Bay detainees. He also comments on proposed legislation in Washington State such as Senate Bill 5176 that relates to the detention of United States citizens and lawful resident aliens under the NDAA. He regularly posts about the Memorial Association.

A timeline of relevant events is as follows:

November 20, 2016

Moriwaki accepted a "friend" request on his personal Facebook page from Rynearson. Over time the two voluntarily interacted on Facebook regarding a variety of topics. They eventually exchanged phone numbers.

January 24, 2017

In response to a Facebook comment by Rynearson, Moriwaki posted that Rynearson was "hijacking" comment threads.

January 25, 2017

Rynearson commented on the Memorial Association Facebook page, criticizing Moriwaki's support of President Obama and Governor Inslee. Over the next several days the two engaged in banter regarding a variety of topics.

January 27, 2017

Moriwaki posted an article on his personal Facebook page regarding hate crimes against Muslims and stated:

> Moriwaki: "So it begins."

To which Rynearson responded:

> Rynearson: "So what begins? You're not suggesting that attacks on Muslims are just beginning, or that bigotry against Muslim Americans is just beginning, are you? Surely not."

Moriwaki told Rynearson that this response offended him.

January 28, 2017

Moriwaki shared a post that he authored on behalf of the Memorial Association that contained an editorial he wrote for the *Seattle Times* after September 11, 2001. Rynearson responded asking why Moriwaki was not supporting SB 5176, which aimed at preventing usage of the NDAA against Washington citizens. Moriwaki responded by deleting the comment from his Facebook page. Rynearson later posted another public message on Moriwaki's page regarding the deletion of the post, and asking why Moriwaki was not engaging in the discussion surrounding the NDAA.

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Moriwaki: "Your post, re-post and this very comment are the definition of trolling, relentless contact that harasses. Along with being insulted and offended, you don't get to define when I feel harassed."

January 29, 2017

Moriwaki initiated a private Facebook message conversation with Rynearson addressing the exchanges of the past few days:

Moriwaki: "My patience is wearing thin. I waited to see what your response would be when I said that you had offended me." And:

Moriwaki: "you see it [(a post)] as an opportunity to promote your POV (of which I usually agree)," the comment was an "argumentative demand," and it reflected a "pious self-righteous audacity to write your bullying demand on My Timeline." He then said "You have crossed a line. You are not conversing but trolling."

Moriwaki continued, describing his Facebook page as hosting a party, where friends are:

Moriwaki: "welcome to comment," but "if someone at the party keeps butting in, trying to monopolize conversations, I as the host have the right to ask them please cease and desist." … "You are clearly a passionate person, but please promote your ideas and attract people to your own wall. Create your own party. Stop the bullying and attempts to hijack my party."

Rynearson responded to Moriwaki's message, saying that he would read it and respond. Moriwaki replied by objecting to Rynearson publicly commenting again about Moriwaki's lack of support for SB 5176. From that point Rynearson's wife then commented (using Rynearson's account) to explain why her husband was engaging with Moriwaki regarding the NDAA and state legislation. Moriwaki responded that he was waiting to see Rynearson's response to Moriwaki being offended as:

Moriwaki: "a test of [Rynearson's] character and sincerity," and objected that Rynearson had not acknowledged that he offended Moriwaki.

Moriwaki: "Your post, re-post and this very comment are the definition of trolling, relentless contact that harasses. Along with being insulted and offended, you don't get to define when I feel harassed." … "To be continued, I am late meeting a friend for breakfast ...."

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January 30 to February 4, 2017

Rynearson commented on four of Moriwaki's public posts. Moriwaki "liked" one of the comments and did not delete or object to any of the others.

February 3, 2017

Moriwaki posted a public comment supporting the Washington lawsuit challenging the federal travel ban, including tags and links to the official and personal Facebook pages of Governor Inslee. Rynearson posted a comment on this post regarding Inslee's vote for the NDAA while in Congress and replied to comments from several other people voicing support of Governor Inslee. Moriwaki responded to these comments, labelling them as trolling, and indicated he wanted to continue the private message conversation with Rynearson.

February 4, 2017

Rynearson posted a lengthy public comment on Moriwaki's page regarding President Obama and then U.S. Congressman Inslee's Support of the NDAA:

> Rynearson: "just because someone is different than you, Clarence Moriwaki, doesn't make them a "troll or someone who 'harasses' or a 'threat' or a 'subversive. Let's celebrate diversity, Clarence.'"

The following exchange took place via private Facebook message:

> Moriwaki: "you are doing real time trolling. Can't you control yourself? You are bullying … you are also a bit of a sociopath…"
>
> Rynearson: "Clarence I am not trolling or bullying … now you are about to cross my line I highly advise you to reconsider. my line is one of diversity and free speech. I promise to you with everything that I am, your efforts to stifle free speech will fail you massively."
>
> Moriwaki: "I'm going to do something that I gave [up] hoping that you would do. I am sorry. I didn't have my coffee and my phone lit up with multiple notifications from you. I'm sorry, and I didn't mean to hurt you. However, please reflect. I am going to be late. To be continued."

February 5, 2017

Moriwaki deleted several of Rynearson's comments from the thread regarding Governor Inslee and the travel ban lawsuit that was originally posted on February 3rd. Rynearson sent a private message to Moriwaki objecting to the deletions of the comments. Rynearson began reposting some of the deleted comments with screenshot photos and making commenting about deletion of the posts.

Moriwaki responded to Rynearson with a private Facebook message:

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Moriwaki: "Stop trolling. Stop it. You are harassing, bullying and relentless. Stop. Your self-righteous reposting is the definition of harassment... Dude, I am going to report you to Facebook. KNOCK IT OFF!"

The two then argued back and forth, with Moriwaki twice describing his "party" analogy for Facebook. This culminated in the following exchange:

Moriwaki: "[Rynearson is trying to] hijack [Moriwaki's] page with [his] single-issue obsession."

Rynearson: "[A] differing view is not trolling or harassing or bullying."

Moriwaki: "KNOCK IT OFF!" … "I have asked you to stop posting on MY PAGE!"… "We are done."

Rynearson: "Oh, we're not done. What follows next is done with love. You need my help to celebrate diversity. Should you reflect upon your behavior and your fear of those who are different and should you come to celebrate free speech and discourse in the future, please let me know."

Moriwaki then blocked Rynearson on Facebook.

The same day (shortly after blocking Rynearson on Facebook) Moriwaki received a text message from Rynearson and the following exchange took place:

Rynearson: "Mr. Moriwaki, I'm doing an initial story for a new up and coming blog (ClarenceMoriwakiBainbridgelsland.com) about your role as president of the memorial and your support for multiple politicians who expressly voted to make internment happen again. Looking forward to your comment for the story if you are interested. Thanks."

Moriwaki: "Of course, but first would you please ID yourself?"

Rynearson identified himself and there was a short text exchange:

Moriwaki: "Yeah, and this isn't trolling or harassment. Richard, your obsession is getting disturbing"

Rynearson stated that he was obsessed with preventing internment from happening again. Moriwaki responded:

Moriwaki: "Then start respecting me by leaving me alone."

Rynearson: "I understand you do not want me to contact you at this number you gave me. If you change your mind about a comment you know how to reach me. Goodnight."

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Rynearson did not Facebook message, text message, email, telephone, or otherwise contact Moriwaki after February 5th. There is no evidence Rynearson has posted on Moriwaki's Facebook page after being blocked. There is no evidence Rynearson contacted Moriwaki telephonically or otherwise after Moriwaki texted him to leave him alone.

February 5, 2017

On February 5, 2017 Rynearson created a public Facebook page entitled "Clarence Moriwaki of Bainbridge Island." The first post, dated February 6, states:

> Facebook Page: "This page is meant to be a discussion concerning our view that public figure, Clarence Moriwaki, President of the Bainbridge Island Japanese American Exclusion Memorial, is unfit to be President or board member for our memorial."

The page title was later changed to "Not Clarence Moriwaki of Bainbridge Island" after receiving critical posts regarding the title of the page.

On the page, there are a variety of memes, many bearing Moriwaki's photo. One has his photo with barbed wire and a message that Moriwaki supports "politicians who made indefinite detention without charge or trial 'legal'." Rynearson posted on the "Not Clarence Moriwaki of Bainbridge Island" Facebook page almost daily from February 23 until Rynearson was served the Temporary Protection Order on March 15. The posts criticized Moriwaki's role at the Memorial Association and his perceived support of politicians who supported the NDAA and related legislation. Other posts shared information about the NDAA and various efforts to fight it through lawsuits and state legislation. Rynearson paid for advertising of the page, causing it to appear in news feeds of those who did not sign up, or follow, the page. He made the page private after receiving the Temporary Protection Order.

February 7, 2017

A friend of Moriwaki's, Bonnie McBryan, made a public post on her Facebook page, open to public comments, sharing an article about liberal intolerance. Rynearson made some comments on McBryan's post (on her personal Facebook page) and mentioned Moriwaki censoring him as an example of liberal intolerance. Moriwaki could not see Rynearson's comments due to his Facebook block.

Rynearson commented:

> Rynearson: "I'm outside on the street, in Clarence's analogy, after Clarence put his hand over my mouth and threw me out. So I'm out on the public street now in front

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of his house talking to some of his guests (our mutual neighbors) as they leave his house, some of which appreciated my comments."

McBryan: "I am really concerned about your statement that you are outside Clarence Moriwaki's house and talking to his guests and mutual neighbors. I assume that is rhetorical; if not it sounds a bit threatening."

Rynearson: "Bonnie McBryan Now that is just silly."

McBryan: "Thank you -- and you see how easy it is for one to misunderstand a reference or misinterpret your actual intentions."

At some point during this exchange, McBryan messaged Moriwaki.

McBryan: "Richard announced he is outside your house. You might unblock him to take a screen shot– and consider calling the police."

Moriwaki: "Breathtaking. I hope that he is speaking metaphorically."

McBryan: "He just confirmed that he is."

July 17, 2017

On July 17, 2017, the trial court held a hearing as to whether the temporary stalking protection order previously entered should continue. Following the hearing the trial court issued a stalking protection order. The trial court determined that stalking, cyberstalking, and unlawful harassment occurred based upon the following findings:

- Rynearson posting on Moriwaki's Facebook page after being asked to stop;
- Rynearson re-posting screen captures of posts that had been deleted by Moriwaki;
- Rynearson's public post referring to Moriwaki's "party" analogy in explaining that, metaphorically, he was not at Moriwaki's party but on the public street outside his house;
- Rynearson's text message to Moriwaki seeking comment on his blog about Moriwaki;
- Rynearson's creation of the "Not Clarence Moriwaki of Bainbridge Island" page using Moriwaki's name;
- Rynearson's public posting of memes that used Moriwaki's image; and
- Rynearson advertising some of the posts from the "Not Clarence Moriwaki of Bainbridge Island" on Facebook.

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STANDARD OF REVIEW

In appeals of final decisions by courts of limited jurisdiction, the Superior Court sits as an appellate court. This Court reviews the trial court's decision for errors of law and accepts the trial court's findings of fact as verities where they are supported by sufficient evidence in the record.[1]

ANALYSIS

The trial court issued a stalking protection order. RCW 7.92.020(3) provides that "stalking conduct" occurs in one of three alternative ways – (1) any act of stalking under RCW 9A.46.110; (2) any act of cyberstalking under RCW 9.61.260; and/or (3) any course of conduct involving repeated or continuing contacts, attempts to contact, monitoring, tracking, keeping under observation, or following of another that: (i) would cause a reasonable person to feel intimidated frightened, or threatened and that actually causes such a feeling; (ii) serves no lawful purpose; and (iii) that stalking knows or reasonably should know threatens, frightens, or intimidates the person, even if the stalker did not intend to intimidate, frighten, or threaten the person.

For the trial court to be affirmed, the Court must find that at least one of the above statutory definitions of "stalking conduct" is satisfied.

In addition to the applicable statutes listed below, the Court is guided by the Washington Court of Appeals decision *State v. Noah*[2], and the Federal District Court decision *United States v. Cassidy*[3].

Unlawful Harassment

RCW 7.92.020(3)(c) clearly relates to RCW 10.14's unlawful harassment conduct. Reference to that statute is helpful. RCW 10.14.020 defines "course of conduct" and "unlawful harassment":

> 1) "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, ***but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."***
>
> (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. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually

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[1] RALJ 9.1(a)–(b); *State v. Kessler*, 75 Wn. App. 634, 638–39, 879 P.2d 333 (1994).
[2] *State v. Noah*, 103 Wn. App. 29 (Div. I 2000).
[3] *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011).

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> cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.[4]

"Course of conduct" does not include constitutionally protected free speech, constitutionally protected activity and constitutionally protected rights, including but not limited to, freedom of speech and freedom of assembly. Like RCW 7.92.020(3)(c)(ii), the Unlawful Harassment statute requires the court to determine whether course of conduct in question "serves no legitimate or lawful purpose."

> In determining whether the course of conduct serves any legitimate or lawful purpose, the court should consider whether:
>
> (1) Any current contact between the parties was initiated by the respondent only or was initiated by both parties;
> (2) The respondent has been given clear notice that all further contact with the petitioner is unwanted;
> (3) The respondent's course of conduct appears designed to alarm, annoy, or harass the petitioner;
> (4) The respondent is acting pursuant to any statutory authority, including but not limited to acts which are reasonably necessary to:
>
> (a) Protect property or liberty interests;
> (b) Enforce the law; or
> (c) Meet specific statutory duties or requirements;
>
> (5) The respondent's course of conduct has the purpose or effect of unreasonably interfering with the petitioner's privacy or the purpose or effect of creating an intimidating, hostile, or offensive living environment for the petitioner;
> (6) Contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.[5]

State v. Noah provides persuasive guidance as to whether conduct "serves no legitimate or lawful purpose". In *Noah*, the respondent picketed outside on the sidewalk in front of a therapist's office. The respondent was protesting the legitimacy of recovered memory therapy. He carried signs that stated: "Voodoo Therapy Practiced Here," "David Calof, Mr. Windbag! Psychotherapist," "Big Bucks For Therapy Spreading Child Abuse Hysteria," and "David Calof Voice of Hatred And Revenge."[6] The Court of Appeals found that the picketing conduct could not serve as the basis of an anti-harassment order as it involved a legitimate and lawful purpose. The conduct was an exercise of the right of free speech, and therefore not unlawful.[7]

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[4] RCW 10.14.020.
[5] RCW 10.14.030.
[6] *State v. Noah*, 103 Wash. App. at 34–35.
[7] The anti-harassment order was upheld, however, because of other unprotected activity by the respondent.

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In the present case, it is difficult to reconcile how posting politically themed messages on a Facebook account about Moriwaki's role with the Memorial Association can be deemed unlawful harassment while the act of picketing directly outside a therapist's office in protest of the use of recovered memory therapy was considered constitutionally protected speech by the Washington State Court of Appeals in *Noah*. Both the posting on Moriwaki's personal Facebook page (until Moriwaki blocked Rynearson from his page), as well as the subsequent creation of the "Clarence Moriwaki of Bainbridge Island" Facebook page are an analogous extension of protected political speech or "picketing" on the internet.

Rynearson commented on the personal Facebook page of Moriwaki, voicing his opinions on topics that were relevant to posts initiated by Moriwaki. Moriwaki characterized this as "trolling," while Rynearson saw it as engagement of political discourse of public concern. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community," ..., or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public ....'"[8]

The United States Supreme Court has "long recognized that not all speech is of equal First Amendment importance. It is speech on " 'matters of public concern' " that is 'at the heart of the First Amendment's protection.'"[9] Rynearson criticized Moriwaki's role at the Memorial Association. This is not a purely private concern. The Memorial Association's work is a public issue (the forcible removal of Japanese-Americans and internment). Where Rynearson made statements against Moriwaki's role at the Memorial Association and generated images and memes using Moriwaki's likeness to post on the "Clarence Moriwaki of Bainbridge Island" Facebook page, this conduct is not substantially different than the statements on placards used to picket in *Noah*.

Rynearson asserts Moriwaki is a limited public figure regarding the issue of internment. Limited public figure status, in this context, requires that an affected party demonstrate by clear and convincing evidence that statements are uttered "with actual malice, that is, with knowledge of

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[8] *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011)(internal citations omitted).

[9] *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59, 105 S. Ct. 2939, 2944–45, 86 L. Ed. 2d 593 (1985).

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falsity or reckless disregard of the truth or falsity of the statement."[10] This is relevant because, as discussed below, "defamatory speech does not enjoy the protections of the First Amendment."[11]

> To be considered a public figure, courts usually require the plaintiff to voluntarily seek to influence the resolution of public issues. ...
>
> > [The] designation [as a public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues....[12]

Moriwaki is not a "public figure". Moriwaki is a "limited public figure", specific to the issue of internment and the Memorial Association. Moriwaki is a volunteer board member of the Memorial Association. He has given speeches and appeared in the media discussing internment and the lessons we should learn from incarceration without due process. Moriwaki has commented frequently in public regarding internment and its relevance to the present political climate on both his private Facebook page[13], as well as writing Facebook posts in the name of the Memorial Association. He has also had letters to the editor published in the *Seattle Times* discussing internment.

In *Camer v. Seattle Post-Intelligencer*, the Court of Appeals found that the petitioner had become a "limited public figure" because he voluntarily sought to influence the resolution of public issues via "press release, 'letters to the editor,' frequent participation in public meetings and hearings."[14] Moriwaki's involvement with the Memorial Association, his public actions, and related public political discourse on issues related to internment and incarceration without due process meet the criteria of a limited public figure based on the factors set out in *Camer*.

Even if Moriwaki is not a limited public figure, Rynearson's postings are still protected under *Noah*. In *Noah*, the respondent was picketing a private individual and the court nevertheless found that the picketing was a permissible exercise of free speech since the speech was uttered on public property. Whether Moriwaki is a "limited public figure," or simply a private individual,

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[10] *Alpine Indus. Computers, Inc. v. Cowles Pub. Co.*, 114 Wash. App. 371, 388, 57 P.3d 1178, 1188 (2002), amended, 64 P.3d 49 (Wash. Ct. App. 2003).
[11] *Thomson v. Doe*, 189 Wash. App. 45, 50, 356 P.3d 727, 730 (2015).
[12] *Camer v. Seattle Post-Intelligencer*, 45 Wash. App. 29, 42, 723 P.2d 1195, 1203 (1986)(internal citations omitted).
[13] At least once "tagging" Governor Inslee's official and private Facebook pages.
[14] *Camer v. Seattle Post-Intelligencer*, 45 Wash. App. at 43.

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Rynearson's public internet postings opining about Moriwaki's involvement with the Memorial Association are subject to First Amendment protections.

Camer cites two cases relevant to the analysis of protected speech like that in *Noah*. In *Spelson v. CBS*, the court found that in the context of a series of news broadcasts entitled "Cashing in on Cancer", statements such as "Spelson had overstepped the bounds of his training", Spelson's practices were "unethical, unprofessional, inhuman and totally worthless", Spelson's behavior "really borders on the criminal", and other statements regarding "cancer con-artists" and "cancer quacks" were permissible statements of opinion.[15]

Camer also cites *Information Control Corp. v. Genesis One Computer Corp.*, where the court held that even apparent statements of fact may assume the character of opinions, and are therefore protected, when made in "public debate…or other circumstances in which an audience may anticipate efforts by the parties to persuade others to their position by use of epithets, fiery rhetoric or hyperbole."[16]

Other case law supports fundamental principles that uphold robust First Amendment protections in the field of public debate.[17,18]

Rynearson's internet postings qualify as public debate and therefore his criticisms of Moriwaki regarding his position with the Memorial Association and challenges to stated political opinions are permissible under the First Amendment.

The trial court held that the "true purpose of [Rynearson's] course of conduct is to harass, intimidate, torment and embarrass Moriwaki and to cause harm to his community reputation … began as retaliation after being limited, rejected and eventually blocked from Moriwaki's personal site."[19] In *Noah*, the respondent may not have had any genuine interest in "recovered memory therapy," just as Rynearson may not have any genuine interest in the issue of internment and

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[15] *Spelson v. CBS, Inc.*, 581 F. Supp. 1195 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985).
[16] *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980)(quoting *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601, 552 P.2d 425, 428, 131 Cal. Rptr. 641, 644 (1976)).
[17] See *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (holding the First Amendment protected the right to distribute leaflets "critical of [a realtor's] real estate practices" that accused him of being a "panic peddler," requested calls to his home phone number, and were distributed among his neighbors, passed out at a local shopping center, and handed out to people on their way to or from the realtor's church).
[18] See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (criticism of African-American residents who did not participate in a boycott of white-owned stores, whose names were listed in leaflets and mentioned in church speeches, was protected speech).
[19] See trial court's Conclusions of Law, paragraph 7.

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Moriwaki's role with the Memorial Association. Nevertheless, the speech is protected even if it is not based on any firmly held belief so long as it does not fall within any of the categories of unprotected speech as enumerated in the *Cassidy* case analyzed below.

Moriwaki asserts that Rynearson's speech towards and about him is trolling, bullying and harassing. However, as the Court of Appeals noted over 20 years ago, Washington's unlawful harassment statute is "not designed to penalize people who are overbearing, obnoxious or rude."[20] Indeed, as stated in *Snyder v. Phelps*, in "public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to freedoms protects by the First Amendment."[21] United States Supreme Court precedent firmly establishes a 'longstanding refusal' to allow civil remedies 'because the speech in question may have an emotional impact on the audience.'"[22]

Stalking and Cyberstalking

RCW 7.92.020(3)(a) provides that "stalking conduct" includes any act of stalking as defined by RCW 9A.46.110. Stalking under that statute occurs in one of three ways:

> (1) RCW 9A.46.110:
>
> > (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
> >
> > (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
> >
> > (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
> >
> > (c) The stalker either:
> >
> > (i) Intends to frighten, intimidate, or harass the person; or
> >
> > (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person. ...[23]

Similarly, RCW 7.92.020(3)(b) provides that "stalking conduct" includes any act of cyberstalking as defined by RCW 9.61.260, which reads:

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[20] *Burchell v. Thibault*, 74 Wn. App. 517, 522 (1994).

[21] *Snyder v. Phelps*, 562 U.S. at 458 (quoting *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)).

[22] See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S. Ct. 876, 882, 99 L. Ed. 2d 41 (1988).

[23] RCW 9A.46.110.

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(1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party: …

(b) Anonymously or repeatedly whether or not conversation occurs; …[24]

As applied to the stalking and cyberstalking statutes, the *Cassidy* case is particularly persuasive. The defendant in *Cassidy* developed a personal relationship of a leader of a Buddhist sect, claiming to be follower of that sect. The leader declined his romantic advances, but confided intimate details of her personal life to defendant. Followers of the sect noticed inconsistencies in defendant's actions in line with their religious beliefs and they confronted him about that. The defendant left sect and began using Twitter and blog posts to comment on the sect and leader personally. The Federal Court found that all but a few hundred of nearly 8,000 Twitter posts were directed at or related to the sect or sect leader. The Federal Court, analyzed the First Amendment in conjunction with internet postings:

> Blogs are of unlimited size in terms of content, but must be accessed one at a time. Twitter is limited to 140 characters, but allows unlimited voluntary connectivity with other users. That connectivity, however, is subject to change at the whim of a user who has the ability to "turn off" ("block" or "unfollow") communications from another user. …
>
> … One does not have to walk over and look at another person's bulletin board; nor does one Blog or Twitter user have to see what is posted on another person's Blog or Twitter account. This is in sharp contrast to a telephone call, letter or e-mail specifically addressed to and directed at another person, and that difference, as will be seen, is fundamental to the First Amendment analysis in this case.[25]

The court in *Cassidy* further held:

> [T]he First Amendment protects speech even when the subject or manner of expression is uncomfortable and challenges conventional religious beliefs, political attitudes or standards of good taste. … In *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 Sect. 900, 84 L.Ed. 1213 (1940), the Supreme Court overturned the conviction of three individuals for passing out religious leaflets in violation of a Connecticut statute that made it a crime to solicit and breach the peace and observed:
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> > In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false

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[24] RCW 9.61.260.

[25] *United States v. Cassidy*, 814 F. Supp. 2d at 577-78.

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> statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

> ***Indeed, the Supreme Court has consistently classified emotionally distressing or outrageous speech as protected, especially where that speech touches on matters of political, religious or public concern.*** This is because "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate 'breathing space' to the freedoms protected by the First Amendment.' [26]

In other words, *Cassidy* holds that where speech has a legitimate purpose it remains protected even if it causes distress to the individual being criticized. Rynearson's speech is entitled to "special protection" under the First Amendment because it was uttered at a public place (public postings on the internet) on matters of public concern (the Memorial Association, the forcible removal of Japanese-Americans and internment). Such speech, while causing emotional distress to Moriwaki, cannot be restricted solely because it is upsetting or arouses contempt.

The court in *Cassidy* enumerated the categories of speech specifically determined to not be protected under the First Amendment:

> Even though numerous court decisions have made a point to protect anonymous, uncomfortable speech and extend that protection to the Internet, not all speech is protected speech. There are certain "well-defined and narrowly limited classes of speech" that remain unprotected by the First Amendment. … This type of unprotected speech is limited to, (a) obscenity, ... (b) defamation, ... (c) fraud, ... (d) incitement, ... (e) true threats, ... and (f) speech integral to criminal conduct ... ***Speech that does not fall into these exceptions remains protected.***[27]

There was never any demonstrated intent to injure, nor any physical threat by Rynearson toward Moriwaki or his property.[28] The closest instance of a "true threat" is the February 7, 2017, comment where Rynearson used Moriwaki's repeated party metaphor to say he was "out on the public street now in front of [Moriwaki's] house talking to some of his guests…." The subsequent relay of this message from the reader of the post to Moriwaki constituted a misinterpretation and misunderstanding of the metaphor introduced by Moriwaki, and was not a true threat. The record demonstrates multiple incidents where Moriwaki felt insulted, offended, bullied and harassed based on Rynearson's postings. Nevertheless, Moriwaki continued to both initiate and engage in private

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[26] *Id.* at 581–829 (emphasis added).
[27] *Id.* at 582–83 (internal citations omitted).
[28] The trial court reflected this fact in its decision to deny Moriwaki's petition for an order to surrender weapons.

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Facebook messaging with Rynearson. Moriwaki ended several conversations with "to be continued," as late as February 4, 2017, and "liked" at least one post by Rynearson between January 28 and February 3, 2017. These acts suggest a desire to continue engagement up until Moriwaki blocked Rynearson from his Facebook page.

There is no evidence that Rynearson surveilled, monitored, tracked or otherwise intentionally placed himself in proximity to Moriwaki for the purpose of stalking him, contacting him or interacting with him.

There was no obscenity by words or conduct.

There is no evidence incitement or speech integral to criminal conduct.

After their interactions on February 5th, Moriwaki properly exercised the remedy discussed in *Cassidy* by blocking Rynearson from his personal Facebook page. Moriwaki also had the ability to protect his "own sensibilities simply by averting" his eyes from Rynearson's subsequent internet postings on other pages after he blocked Rynearson.[29]

Following Rynearson's contact of Moriwaki via text message on February 5th, Rynearson did not have any telephonic contact with Moriwaki after Moriwaki told him to leave him alone.

Rynearson's creation of the "Clarence Moriwaki of Bainbridge Island" Facebook page is neither defamatory or fraudulent. The Facebook page does not purport to be run by Moriwaki, nor attempt to convince anyone that it is.

The elements a plaintiff must establish for defamation are "falsity, an unprivileged communication, fault, and damages."[30] The Facebook posts are protected speech and not defamatory. The posts largely relate to Rynearson's objections to NDAA and related proposed state legislation as well as his opinions about Moriwaki's involvement with the Memorial Association and challenges to Moriwaki's stated opinions. The trial court did not make any findings that Rynearson posted false

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[29] The decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) underscores the fact that Moriwaki's interest limiting Rynearson's political speech is not a compelling one:

> Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities simply by averting [our] eyes.

"Here, A.Z. had the ability to protect her 'own sensibilities simply by averting' her eyes from the Defendant's Blog and not looking at, or blocking his Tweets." *United States v. Cassidy*, 814 F. Supp. 2d at 585.

[30] *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768, 773 (2005).

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statements. At oral argument on appeal, Moriwaki argued that two statements in the February 6th post describing the Facebook page's purpose were false: (1) that Moriwaki was a public figure and (2) that Moriwaki was president of the Memorial Association. Whether one believes Moriwaki is a public figure regarding the issue of the forcible removal of Japanese-Americans and internment is a matter of opinion. If Moriwaki is incorrectly named as president of the Memorial Association and that statement is false, it is not actionable because it is not damaging to his reputation.

The Facebook page Rynearson created was a public communication, like the blogs and Twitter accounts at issue in *Cassidy*. Rynearson's challenges to Moriwaki's personal role with the Memorial Association on the Facebook page is analogous to the defendant in *Cassidy* challenging the leader's role in the Buddhist sect. While the Court understands Rynearson's conduct caused Moriwaki emotional distress, as stated in *Cassidy* "the Supreme Court has consistently classified emotionally distressing or outrageous speech as protected, especially where that speech touches on matters of political, religious or public concern."[31]

As to the subsequent "sponsored posts" that promoted the page on to public Facebook newsfeeds, while perhaps closer to more directed contacts like an email or a text message, the speech is still an amplification of the same public messages available on the page directed to the public. This conduct is the equivalent of picketing in a public place, which has been held to be protected speech in both *Noah* and *Snyder v. Phelps*[32].

Rynearson's internet postings critical of Moriwaki's role with the Memorial Association is permissible and protected speech. Rynearson's conduct undoubtedly and understandably caused significant and real annoyance and distress to Moriwaki, particularly with his persistence in posting. But Rynearson ceased contact with Moriwaki once there was an unequivocal request to do so. By blocking Rynearson, Moriwaki was able to prevent any further contacts from Rynearson via Facebook. Rynearson has likewise not contacted Moriwaki once Moriwaki texted him to leave him alone.

Rynearson did not commit "stalking conduct" as that term is defined by RCW 7.92.020(3). Accordingly, issuance of the stalking protection order below was an error of law. RALJ 9.1(a).

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[31] *United States v. Cassidy*, 814 F. Supp. 2d at 581.

[32] *Snyder v. Phelps*, 562 U.S. 443 (2011)(The Supreme Court held that protests at a soldier's funeral were of a public concern and thus entitled to First Amendment protections.).

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CONCLUSION

A stalking protection order is not an available remedy if the speech and conduct complained of is protected under the First Amendment. The communication and conduct in this case falls under the umbrella of constitutionally protected speech. The trial court erred by granting Moriwaki's petition for a stalking protection order.

It is hereby **ORDERED,** pursuant to RALJ 9.1(e), that (1) the trial court's decision to grant the stalking protection order herein is **REVERSED**, (2) the stalking protection order entered on July 17, 2017 is **VACATED**, and (3) the matter is remanded to the trial court for entry of an **ORDER OF DISMISSAL**.

DATED this 10th day of January, 2018.

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