

CASE NO. A07-2175

State of Minnesota
In Court of Appeals

BRYAN JOHNSON,

Appellant,

vs.

BRENT WILLIAM PETERSON, et al.,

Respondents.

APPELLANT BRYAN JOHNSON'S BRIEF AND APPENDIX

BILL L. THOMPSON, ESQ.
Attorney Reg. No. 317627
306 West Superior Street
1200 Alworth Building
Duluth, Minnesota 55802
(218) 723-1990

*Attorney for Appellant
Bryan Johnson*

DENTON LAW OFFICE
Brenda Denton, Esq.
Attorney Reg. No. 028516X
326 Central Avenue North #2
Duluth, Minnesota 55807
(218) 628-4022

*Attorney for Respondents
Brent William Peterson, et al*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

APPELLANT'S TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
LEGAL ISSUES	iii
APPELLANT'S STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
STANDARD OF REVIEW	6
ARGUMENT	6
CONCLUSION	14

TABLE OF AUTHORITIES

Judicial Decisions, Minnesota:

<u>Beach v. Jeschke</u> , 649 N.W.2d, 502 (Minn. App. 2002).....	12
<u>Bjergum v. Bjergum</u> , 392 N.W.2d 604 (Minn. App. 1986)	6
<u>Davidson v. Webb</u> , 535 N.W.2d 822 (Minn. App. 1995)	12
<u>Sefkow v. Sefkow</u> , 427 N.W.2d 203 (Minn. 1988).....	6
<u>Witchell v. Witchell</u> , 606 N.W.2d 730 (Minn. App. 2000).....	6

Statutory Provisions:

Minn. Stat. § 609.748	1, 8
Minn. Stat. § 609.748, Subd. 1(a)(1).....	6
Minn. R. Civ. P. 52.01	6

LEGAL ISSUES

- I. Did the trial court abuse its discretion when it issued a harassment restraining order against the Appellant?

The trial court granted the harassment restraining order on behalf of Respondent Peterson, but dismissed the petition of Respondent E.S.

- A. Did the trial court abuse its discretion when it found Appellant “assaulted” Respondent Peterson on June 3, 2007?

The trial court held that a June 3, 2007 altercation outside a Holiday gas station constituted assault despite there being no physical contact.

- B. Did the trial court abuse its discretion when it found Appellant’s acts constituted “repeated incidents of intrusive or unwanted acts?”

While not making a specific finding, the trial court seems to hold that the Holiday gas station incident and two reports to the authorities constituted “repeated incidents of intrusive or unwanted acts.”

- C. Did the trial court abuse its discretion in failing to make a finding that Appellant’s acts had a substantial adverse effect on Respondent Peterson?

The trial court did not make any findings on the substantial adverse effect of Appellant’s actions, except for a cursory reference to how Respondent Peterson felt following the Holiday gas station incident.

STATEMENT OF THE CASE

On September 17, 2007, Brent William Peterson (hereinafter "Respondent Peterson") and E.S. (hereinafter "Respondent E.S.") petitioned the Court for a Harassment Restraining Order (hereinafter "restraining order") pursuant to Minn. Stat. § 609.748. The Petition was brought against Bryan Craig Johnson (hereinafter Appellant). An evidentiary hearing was held on September 25 and September 26, 2007, in front of the Honorable Sally L. Tarnowski. At that point in time, both parties were allowed to present witnesses, testimony, and evidence concerning the issues at hand. Following the close of testimony, both parties were allowed to submit written closing arguments.

On October 1, 2007, the District Court issued an order granting the Petition of Respondent Peterson and dismissing the claims of Respondent E.S.

STATEMENT OF FACTS

Appellant and Respondent E.S. were previously married (A22, T.6). This marriage was dissolved in approximately July of 2006 (A23, T.7). As part of the terms of the divorce decree, Appellant was allowed parenting time with the parties' minor child. The exchange point for parenting time was the Duluth Visitation Center.

Following the divorce, Respondent E.S. and Respondent Peterson entered into a relationship and are currently significant others who are living together (A23, T.7). On September 17, 2007, Respondents joined together in petitioning the Court for a restraining order against the Appellant (A1-A4).

In their Petition, and at trial, Respondents made both joint and individual allegations against the Appellant. Respondent Peterson referred specifically to three incidents that he alleged met the grounds for a restraining order to be issued. For the sake of this appeal, there is no need to refer to the allegations of Respondent E.S., as her request for a restraining order was dismissed.

First, chronologically, Respondent Peterson cited to a May 13, 2007 incident where Appellant reported the Respondents to local law enforcement for failing to utilize a car seat when transporting the minor child. This issue was really broken down into two components. First, Respondent Peterson alleged the call to law enforcement itself was harassing (A28-A29, T.25-T.26). Second, the Appellant "searched" Respondent Peterson's vehicle to discover that there was no car seat (A28-A29, T.25-T.26).

Respondent Peterson learned of the call to law enforcement being made from Phil Beadle of the Duluth Visitation Center (A29, T.26). He then called the police to verify no laws had been broken (A29, T.26). This was the end of this incident other than the alleged reference made by Appellant on June 3, 2007 to Respondent Peterson still not having a car seat (A29, T.26). However, Respondent Peterson acknowledged that because of Appellant's actions they now use a booster seat at all times (A29, T.26).

As for the "search" of the vehicle, Respondent Peterson clearly testified he never saw Appellant search his vehicle (A32-A34, T.40-T.42). There were no signs of forced entry (A32, T.40), no items missing (A32, T.40), and no vandalism

(A32, T.40). Respondent Peterson acknowledged that the information concerning the lack of car seat could have been obtained by simply looking through the windows of his vehicle while it was parked on a public street (A32-A33, T.40-T.41).

Chronologically, the next allegation made by Respondent Peterson concerned a confrontation at a gas station on June 3, 2007 (A24-A28, T.21-T.25). Respondent Peterson acknowledged that this is the one and only time he had any direct contact with Appellant (A24, T.21). Respondent Peterson testified that this incident lasted about three to four minutes (A27, T.24). Appellant said his piece and left (A27, T.24). Respondent Peterson alleged that Appellant blocked his path, but that no physical contact occurred and Appellant didn't lay a hand on him (A26, T.23). In addition, Respondent Peterson alleged that Appellant made two, what he considered to be, verbal threats at that time: "I'll tear your ass to shreds" and "I know where you live, and you'd be surprised what kind of bad luck a guy can have" (A26, T.23).

The final allegation of harassment was that Appellant had reported Respondent Peterson for hitting the minor child with a belt (A30, T.27). He learned of the report from Respondent E.S. on September 16, 2007, and the following day he made his way to the courthouse and requested the restraining order (A31, T.28). Respondent Peterson, following his trip to the courthouse, then went next door and spoke with social services, and the police, and apparently that was the end of the incident (A31, T.28).

At the time of trial, Appellant acknowledged that he had reported the incident concerning the car seat to the police (A39, T.150), and had also reported the allegation of abuse against his daughter to the authorities (A37, T.143). Appellant testified that this was done over concern for his daughter's safety and well being (A8). There was no intent to harass the Respondents. He reported to authorities that his daughter indicated that she had been struck with a belt by Respondent Peterson (A37, T.143). As for the car seat, he testified that he now knows it is not against the law but it doesn't mean it's right given her small stature she is in danger of being harmed if there is no car seat (A39, T.150).

In addition, Appellant testified that he was not in the Duluth area at the time of the June 3, 2007 incident at the Holiday gas station (A38, T.145). Appellant indicated that he was out of town visiting his family and he did not return until approximately 10 p.m. on Sunday evening (A43, T.167). As he was not there, Appellant indicated he could not have made the threats, nor could this confrontation have occurred.

Following the conclusion of the evidentiary hearing and the written closing arguments of both parties, the trial court issued an order on October 1, 2007. The trial court indicated that the allegations made by Respondent E.S. were not proven and that her claims would be dismissed (A16-A17). However, the Court did issue a Restraining Order on behalf of Respondent Peterson. The findings by the Court included the following grounds:

1. Appellant physically or sexually assaulted the Petitioner.

2. Appellant made uninvited visits to the Petitioner.
3. Appellant made threats to the Petitioner.
4. Appellant frightened Petitioner with threatening behaviors.

These findings were explained in an attached Memorandum (A16).

In the Court's Memorandum, the Court found that Respondent Peterson testified more credibly concerning the June 3, 2007 incident (A18). The Court found that this June 3, 2007 incident constituted "assault." The Court based this decision on the *Blacks Law Dictionary's* definition of assault (A19).

The Court went on to explain that it also considered the May 13, 2007 incident over the car seat in making its decision. The Court explained that it did not find the Appellant's testimony credible on how he discovered that there was no car seat in the vehicle, and moreover, found that reporting this alleged violation of the car seat law to the police was inappropriate, given the knowledge that Respondent should have had concerning the law (A19-A20).

The Court concluded by explaining why it dismissed the Petition concerning Respondent E.S. The Court believed that while it did not condone the Appellant's behavior, it did not believe these actions met the threshold for a Harassment Restraining Order. Instead, the Court thought these matters would be more appropriately addressed in Family Court (A20-A21).

It is from this Court Order that the appeal arises.

I. Did the trial court abuse its discretion when it issued a harassment restraining order against the Appellant? Yes.

The trial court granted the harassment restraining order on behalf of Respondent Peterson, but dismissed the petition of Respondent E.S.

STANDARD OF REVIEW

An appellate court reviews Harassment Restraining Orders under an abuse of discretion standard. Witchell v. Witchell, 606 N.W.2d 730, 731 (Minn. App. 2000). A district court's findings of fact will not be set aside unless clearly erroneous, and due regard is given to the District Court's opportunity to judge the credibility of witnesses. Minn. R. Civ. P. 52.01. See also Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988). The appellate court will reverse a protective order issued under the act if it is not supported by sufficient evidence. See Bjergum v. Bjergum, 392 N.W.2d 604, 606 (Minn. App. 1986).

ARGUMENT

A. Did the trial court abuse its discretion when it found Appellant assaulted Respondent Peterson on June 3, 2007?

The trial court held that a June 3, 2007 altercation outside a Holiday gas station constituted assault despite there being no physical contact.

Harassment is defined as follows:

A single incident of physical or sexual assault or repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of relationship between the actor and the intended target[.] Minn. Stat. 609.748, Subd. 1(a)(1) (emphasis added).

There is no dispute that the clear language of the statute specifically states that a "single incident of physical or sexual assault" constitutes harassment. In this

case, neither Respondent alleged sexual abuse. Thus, this particular portion of the statute does not apply.

The next stage in the analysis is whether or not physical assault occurred. Based on the testimony of Respondent Peterson, it is 100% clear that no physical contact occurred between the Appellant and Respondent Peterson at the June 3, 2007 confrontation (A26, T.23). The Court specifically found, concerning this incident, the Appellant did the following:

1. Stood in a confrontational way with his chest sticking out (A19).
2. Threatened to “tear [Respondent Peterson] to pieces,” and told Respondent Peterson “you never know what kind of bad luck a guy can have,” and “I know where you live” (A19).

The Court made specific findings that this single incident was sufficient to constitute harassment as defined under the law. The Court indicated that “that provision allows for a single incident of assault to constitute harassment” (A19). The Court’s interpretation of the statute is correct, but how the Court applied it to this case and situation is erroneous.

The Court ignored the plain language of the statute. The Court in this situation juxtaposed the *Black’s* law definition of assault to make its determination:

Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force, such as would give the victim reason to fear or expect immediate bodily harm...an assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another.

The definition employed by the trial court in this matter is clearly more lax than that intended by the statute. The statute specifically states that it must be one incident of physical or sexual abuse. In this case the Court ruled that despite there being no physical contact it still constituted physical assault (A19). The statute clearly indicates physical contact must occur.

B. Did the trial court abuse its discretion when it found Appellant's acts constituted "repeated incidents of intrusive or unwanted acts"?

While not making a specific finding, the trial court seems to hold that the Holiday gas station incident, a report to the police, and another report to social services would constitute "repeated incidents of intrusive or unwanted acts."

The next argument in this matter concerns whether or not the Appellant's actions would meet the definition of "repeated incidents." This argument is complicated because of the Court's decision concerning the assault. Because the Court ruled the Holiday gas station incident was an assault, it did not make any further findings.

However, I would expect that the Court of Appeals is going to review this matter and look at it from this perspective as well, so this argument follows. The question boils down to whether the three incidents listed in the Court's Memorandum would constitute "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another." Minn. Stat. § 609.748. After reviewing the allegations, it will become clear that they do not meet the threshold required to issue a restraining order. Because of its decision

on the “assault,” the Court did not make specific findings on the other two occurrences, which prevents the Appellate Court from making a meaningful review on this issue.

The facts where the Appellant reported the lack of a car seat to law enforcement and reported the alleged abuse of the child to the authorities are really quite similar events. First, the Court needs to make a decision as to whether these types of incidents would be considered intrusive or unwanted. Moreover, this matter is complicated by the fact that the trial court did not make any specific findings as to how these two incidents would have been considered intrusive or unwanted.

Looking specifically at the incident of the car seat, Respondent Peterson testified that the Appellant “searched” his vehicle. However, Respondent Peterson’s definition of search was extremely broad. Respondent indicated that he had no firsthand knowledge that the Appellant entered his vehicle, nor did he witness this “search” (A32-A34, T.40-T.42). His vehicle was parked on a public street for a visitation exchange (A32-A33, T.40-T.41). There was no testimony to refute the Appellant’s testimony that he was told by his daughter that this was Respondent Peterson’s vehicle, he noticed there was no car seat in the vehicle as he walked past, remembered the license plate, and then reported it to law enforcement (A40-A42, T.163-T.165).

At the time of trial, Phillip Beadle from the Duluth Visitation Center testified on what occurred on May 13 concerning the car seat. When Appellant

came into the Center, he informed Mr. Beadle that as he was walking by Respondent Peterson's truck he noticed that there was no car seat inside and that the Visitation Center needed to call the police. (A35, T.60). Mr. Beadle then indicated that he couldn't call 911, but if he felt there was something putting his daughter in danger that he certainly had the right to call 911 himself. (A35, T.60).

Mr. Beadle's testimony clearly indicates the inherent problem with considering this type of action harassment. As a parent, Appellant clearly has the right to make reports when he considers something to be a danger to his child. In this instance, Appellant had concern over the car seat. There was no testimony heard, other than the Appellant himself, that indicated that this was meant, or intended, to harass the Petitioner. Appellant clearly testified that his intent was to protect his daughter, and to ensure that her interests were met (A8).

It should also be noted, and this Court should take judicial notice of the fact, that while the law specifically states that car seats are only required for children under the age of four and under 40 pounds, it is not common course and practice. The generally held belief of the community is that children should be in booster seats until they are eight years old, or over 80 pounds, for safety reasons. This common practice is for the same reason that the Appellant stated at trial, which is smaller children do not fit into the shoulder harness of most vehicles until they are older and more full grown (A39, T.150). Under these circumstances, it is hard to fathom a parent asserting their rights over a concern for their child, is

somehow harassing another party. Moreover, Respondent Peterson acknowledges that they now have their child in a booster seat (A29, T.26).

The same can be said for the report to Social Services Initial Intervention Unit. There was no testimony on record refuting the Appellant's statement that his child informed him that she had been disciplined with a belt by Respondent Peterson (A37, T.143). Appellant then contacted law enforcement to make a report that his child informed him she had received corporal punishment at the hands of Respondent Peterson (A37, T.143). This matter then went through proper channels. There is no indication that Appellant did anything but report it to proper authorities.

There is no indication that the Appellant meant, or intended, this act to be harassing towards Respondent Peterson. This was a father who was concerned with the safety and well being of his child, and acted in a manner that he deemed appropriate. It is a parent's right and obligation to act when they believe their child is being harmed. Appellant did nothing wrong by making this report.

It is clear from the record that both the car seat incident and the allegation of abuse were reported to proper channels. Appellant did not contact, confront, or otherwise harass Respondent Peterson about them. He did not go to his place of business. He did not call Respondent Peterson repeatedly to interrogate him over the incident. He did not go to his residence. He went through proper channels and these entities did their job.

To consider these two incidents as a harassment opens a door that I am not sure this Court or any court wants to open. It potentially sends a chilling effect to any parent in raising concerns over the safety and welfare of their children through proper channels, if it can in turn lead to a restraining order. The trial court in this matter was correct on one matter, which is that many of these issues are better resolved in Family Court. If Respondent E.S. believes that this was having a negative impact on the child, her remedy was to get this addressed in Family Court.

If the Court dismisses, or agrees, that the two above instances do not constitute harassment, then there is no possibility under the law that the June 3, 2007 incident could be considered harassment. Respondents' attorney in her written closing argument, cited the case of Davidson v. Webb indicating that several acts of harassment during one incident may constitute harassment. Davidson v. Webb, 535 N.W.2d 822 (Minn. App. 1995). As the Court is aware, Davidson was effectively overruled when the statute was changed in 2000. The current law is that a restraining order specifically excludes "conduct occurring within a single confrontation, on one occasion, unless the conduct involves physical or sexual assault." See Beach v. Jeschke, 649 N.W.2d, 502, 503 (Minn. App. 2002). Beach also stands for the proposition that inappropriate and argumentative statements cannot be considered harassment. *Id.*

Despite the argument of Respondents' counsel, it is 100% clear that even though there were multiple statements made during the June 3, 2007

confrontation, this one confrontation cannot be construed as enough to meet the threshold required by law. As Respondent Peterson testified, this is the only time that he has had contact with the Appellant outside of the court proceeding (A24, T.21). All other contact would have been with the Visitation Center contacting Respondent Peterson to inform him that the Appellant had made a report to the police about the car seat (A29, T.26). The same would be true for the Visitation Center informing Respondent E.S. that the Appellant reported the allegation of abuse to law enforcement and social services (A30, T.27). Appellant himself never had any contact with Respondent Peterson on these issues.

Thus, even if the Appellant Court takes the trial court's interpretation of the June 3, 2007 event as true, under Minnesota law this is not sufficient to issue a restraining order. If Appellant had another confrontation, called the Respondent, showed up at his work, or done some other type of act that intruded upon Respondent Peterson, then a restraining order would be appropriate. Under these circumstances, there is only one incident and thus, this matter is not ripe. Clearly if Appellant has any future contact that is unwanted or intrusive, Respondent Peterson would be able to file a restraining order. However, at this time he does not meet the requirements of the statute.

C. Did the trial court abuse its discretion in failing to make a finding that Appellant's acts had a substantial adverse effect on Respondent Peterson?

The trial court did not make any findings on the substantial adverse effect of Appellant's actions.

Another issue with the trial court's decision is there was no finding on how these events had a substantial adverse effect upon Respondent Peterson. The trial court did make findings concerning the June 3, 2007 incident at the Holiday Station concerning the substantial adverse effect, indicating that Respondent Peterson "testified that he felt threatened and ashamed and he could not respond to the threats because of the child in the vehicle" (A19). However, the Court did not make any findings concerning how making a police report concerning the allegations of abuse or the car seat had a substantial adverse effect on Respondent Peterson. Moreover, the Court's reference to the June 3, 2007 incident is not a specific finding, it just reiterating as to what Respondent Peterson testified to at the time of trial.

Given the Court's lack of findings on this particular element of the statute, this clearly has to be reversed, or remanded to the trial court for further findings.

CONCLUSION

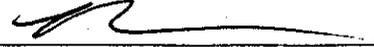
Based on the arguments above, Appellant respectfully requests the Court to reverse, or at minimum, remand this matter for further findings. It is clear from the record that the trial court abused its discretion on a number of levels. First, the trial court improperly used a definition of assault that was not intended by the clear language of the statute. In addition, the trial court abused its discretion in not properly addressing whether the acts of the Appellant constituted repeated incidents of an unwanted or intrusive nature. The trial court failed to make findings that it was the Appellant's intent to harass Respondent Peterson when he

made police reports concerning the car seat and an allegation of abuse made by his daughter. Finally, the trial court failed to make any findings as to how these acts had a substantial adverse effect on Respondent Peterson.

Respectfully submitted.

Dated: 4/6/08

FALSANI, BALMER, PETERSON,
QUINN & BEYER

By: 

Bill L. Thompson
Attorney Registration No. 317627
Attorney for Appellant
1200 Alworth Bldg.,
306 W. Superior St.
Duluth, MN 55802
(218) 723-1990