IN THE COURT OF APPEALS OF THE STATE OF GEORGIA

MATTHEW CHAN,	)	
Appellant,	)	Docket No.:
	)	A14A0014
-against-	)	
	)	Lower Court No.:
LINDA ELLIS,	)	SU13DM409
Appellee.		

BRIEF OF APPELLANT MATTHEW CHAN

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I. PRELIMINARY STATEMENT

A. Nature of Matter and Order Appealed

Appellant Matthew Chan ("Appellant") brings this appeal of an Order of the Honorable Frank J. Jordan of the Superior Court of Muscogee County entered March 6, 2013, which granted Appellee Linda Ellis ("Appellee") a final Stalking Permanent Protective Order pursuant to OCGA §16-5-94 (e) and 19-13-4 (c) (hereinafter referred to as "the Order").

B. Jurisdiction

This case raises Federal and State constitutional issues and while Appellant filed his initial notice of appeal pro se in this court, Appellant's counsel on September 23, 2013, filed a motion to transfer the matter to the Supreme Court of the State of Georgia. This subject matter is reserved to the Supreme Court of Georgia under Article VI, Section VI, Paragraphs II and III of the Constitution of the State Georgia. This argument was raised in the court below in Appellant's Memorandum of Law at pages 32-37. See Court Exhibit Packet at pages 92-97 (future references to this packet will be made as "Packet at pg ___").

C. Statement of Facts

Appellee brought a petition pursuant to OCGA § 16-5-90 et seq. seeking a stalking protective order against Appellant due to certain posts made on a website owned by Appellant known as "ExtortionLetterInfo.com." (hereinafter referred to

as “ELI”). See, Transcript of Motion Hearing, held on February 28, 2013 at pages 3 and 10. (Future references to this transcript will be made as “T-#”).

At the hearing, it was not disputed that Appellant (who appeared pro se) and Appellee have never met; have never had any form of personal relationship; have never corresponded with each other; and have never even so much as spoken over the phone with each other. T-62. The petition was brought solely because of Internet discussion forum posts on ELI which were critical of Appellee’s attempts and methods to enforce her copyright in a poem she wrote called “The Dash.” T-64 line 16. When Appellee’s lawyer began her presentation of evidence, the court admonished her to focus not on all the posts on the website, but on those that are the subject of the stalking complaint, especially because the court “had limited time.” T-19 lines 13-19.

Appellee began with a post written by Appellant eight months earlier, on June 23 2012, where he refers to a post made by a third party, April Brown, who posted a series of emails she exchanged with Appellee over her copyright enforcement methods. In the post, Appellant refers to Appellee wishing to be “right” and states “well she is ‘dead’ right now.” Packet at page 3.

When Appellant responded that this was a figure of speech and not a threat, Appellee then moved on to another Internet post by Appellant from June 11, 2012. Appellee carefully parsed out snippets from the lengthy post that, taken out of

context, sounded vaguely threatening – ("So maybe she will understand potential consequences to her personally" or "I will pull that trigger much quicker if need be"). When read in context of the entire post, however, the comments clearly referred to Appellant's intent to publicly expose Appellee's methods and not to inflict harm or physical injury upon her. T - 23-24; Packet at pg. 4. Appellee then moved on to engage in the same form of selective editing with respect to a third post made by Appellant on December 12, 2012, after Appellant was hired as a public relations consultant by a person threatened with being sued by Appellee for $100,000. T - 28-32; Packet at pages 5-6. In that post, Appellant posted the name of Appellee's husband and the subdivision in which she lived. T - 28-32. Appellant testified that while he was in some way communicating to Appellee through this post, it was also directed at the open forum to discuss again the business dispute between Appellant's public relations client and the Appellee. T - 30 line 13 to 32 line 15. Appellee then begins the first in a great number of questions throughout the examination of Appellant about whether Appellant had deleted any of the posts complained of. T- 32 line 24. Appellant repeatedly stated he did not delete any posts because he wanted all the evidence to be before the court. T – 32 line 21 to 33 line 5; 37 lines 8-16; 57 lines 18-24. Appellant also tried to explain to the court that the forum contains between 19,000- 20,000 posts and therefore all of these posts must be taken in the proper context. T-39 lines 13-22.

The next item discussed was a cartoon of five people in Revolutionary War dress (who are all engaged in sending out threatening letters in efforts to enforce copyright claims), with Appellee in the middle. The cartoon shows them with their pants down and their hands over their crotches and is captioned "Ready, Aim, Fire." T-37 line 22 to 38 line 22; Packet at page 10. No evidence was presented as to who created or posted this cartoon or when it was posted. The next post discussed at the hearing was a video where Appellant is having a conversation about Appellee with a third party, Robert Krausankas. The video was not offered into evidence on the record and no transcript was made of it.T-41 line 20 to 43 line 10. While the record shows that Appellee played only a small portion of the video, Appellant advised the court that the entire conversation was part of a thirty minute broadcast of an Internet TV show on the Vimeo website called "The ELI Factor."T-42 lines 4-23.

Finally, with respect to anything posted by Appellant, the last piece of evidence was a comment he made on ELI on February 9, 2013, about his having visited Marietta, Georgia, the Appellee's hometown, and having been near her sub-division. T-35 lines 16-21; Packet at pg 7. The post was written after Robert Krausankas had posted a Google Street View image of Appellee's house on December 14, 2012, and after Appellant had been to Marietta for a date. T-35 line 16 to 36 line 19; 37 lines 1-4. When asked if he thought it was "okay to post a

picture of her house on your website” Appellant responded that he was neutral about it as he did not post it and as it was a Google Street View image. T-36 lines 17-22. Again, he was asked whether he could have deleted the post and again he stated he was neutral about it. T-36 lines 23-25.

Appellee then testified on her own behalf and the only additional evidence presented was a post made by April Brown, dated December 4, 2012, which was under a forum topic labeled “Re: Ellis - Get ready - We are coming after you!”. The post was the seventh reply to the initial post and was a link to a YouTube video clip of a song called “The Hearse Song.” T-54, line 1 to 57, line 14; Packet at page 58. The original post did not contain the song’s lyrics as shown in the court exhibit; the lyrics were added to the exhibit by Appellee. Appellant again explained that he did not post it on ELI and again, Appellee raised that Appellant had not deleted this post after service of the temporary protective order. T- 57 lines1-14.Appellee, on cross-examination, conceded that Appellant and she had never met (T-62 line 4); had never emailed each other (T-62 line 8); that Appellant had never even tried to telephone her (T-62 lines 9-12); Appellant never texted her T-62 line 25); Appellee never saw Appellant come to her house (T-63 line 13); and that Appellant never followed her (T-63 line 15). Appellee also acknowledged that she was aware “The Hearse Song” video and the Google Street image of her home were posted by others and not Appellant. T-61 lines 10-24.

The final witness for Appellee was John Jolin, an employee of Appellee, who testified on rebuttal that on January 6, 2013, his girlfriend noticed she received a call from a number owned by Appellant. No conversation was had; no voicemail was left; no evidence was submitted as to who made the call. T-103 line 9 to104 line 1; Packet at page 59-60. Appellant denied making the call and stated it was likely a call made to his cell phone number using Google Voice and that he was very skeptical about it as he did not make the call. T-106 line 12 to 108 line 22. That ended Appellee's evidence of the conduct complained of.

All the "conduct" evidence presented by Appellee is summarized below:

Evidence Presented	**Date of Occurrence**	**Tr. Page**	**Packet Page**	**Additional Facts**
1.Post by Appellant "dead right"	June 23, 2012	22	3	
2. Post by Appellant "potential consequences"	June 11, 2012	23-24	4	
3. Post by Appellant "Husband's name"; "subdivision name"	December 12, 2012	28-32	5-6	All publicly available information
4. "Ready, Aim, Fire" cartoon	Unknown	37-38	10	No evidence of who created it or posted it
5. Video conversation between Appellant and R. Krausankas	Unknown	41-42	N/A	No transcript; no evidence of content; Part of 30 min. ELI Factor Web Show
6. Post by Appellant about visiting Marietta	February 9, 2013	35	7	Appellant was on a date at a social event
7. Post of Google Street View of Appellee's house	December 14, 2012	35-37	8	Posted by R. Krausankas
8. Post by April Brown of "The Hearse Song"	December 4, 2012	54-57	58	Posted by April Brown; YouTube video link
9. Appellant's number on Appellee's employee's girlfriend's phone	January 6, 2013	103	59-60	No conversation, no voicemail, no evidence of who made the call.

The sum total of direct conduct attributable to Appellant was therefore five (5) sporadic posts that he posted on ELI between June 11, 2012 and February 9, 2013 (counting the video conversation). The balance of the evidence wasthree (3) posts made by others and proof that a phone number belonging to Appellant showed up on the cell phone of a girlfriend of Appellee's employee.

Appellee, however, did present one other piece of evidence against the Appellant: a five-page ex-parte affidavit of Timothy McCormack, a Seattle, Washington attorney, containing approximately thirty-nine pages of exhibits mostly wholly unrelated to the case before the court, including petitions and orders for injunctions from cases in Washington State. Over Appellant's objection, Appellee read from the affidavit and Appellant was forced to answer questions about comments, opinions and statements of fact made by McCormack in the affidavit. T-44 line 19 to 48 line 6.The bulky affidavit contained McCormack's outlandish and unsupported opinion that he "believe[s] [Appellant] is a danger both to himself and to others" and that he "believe[s] Mr. Chan is likelyto follow through on his threats of physical retaliation against [Appellee]" Packet at pg.13 (emphasis in original).

When it was Appellant's turn to present his case, he submitted a lengthy Memorandum of Law which was admitted into evidence. Packet at page 61. Appellant made a motion to dismiss the petition based on the memorandum of law,

Georgia Law and the First Amendment of the United States Constitution, which the court reserved decision until the conclusion of evidence.T-76-80. He then testified in his own behalf. He testified he was forty-six years old; had no prior criminal record; and was a landlord in Georgia, having lived in Columbus for the past fourteen years. He explained that he is also a publisher, broadcaster and reporter writing about the phenomenon of "copyright trolling" on ELI. He stated that the Appellee and her family were never in any physical danger and he never threatened their physical safety; rather, the dispute between the parties arose out of a business dispute. T-81 line 25 to 83 line 3.

Appellant went onto explain that the subject petition was just the latest in a series of attempts by Appellee to stop ELI from discussing Appellee's methods of copyright enforcement. T-84 line 9 to 89 line 24. He put into evidence the infringement letter and complaint Appellee brought against his public relations client. Packet at pg. 103, 118. Interestingly, during Appellant's enumeration of the various ways that Appellee has tried to stifle the speech on ELI relating to Appellee's program, Appellee's counsel objected, stating that the business dispute bore no relation to the complaint. Appellee's counsel stated in open court:

> [W]e are not here to resolve the business dispute, we just want him to stay away and stop harassing her and making threats. We are not trying to do anything to his website or to stop his work in that fashion ....in other words, the stalking protective orders are very limited in their scope, in the sense of making him have to stay away, and making him stop making threats towards her and her family via any communications, Internet or otherwise. . . .We are not here to resolve the

business dispute, we just want him to stay away and stop harassing her and making threats. We are not trying to do anything to his website or to stop his work in that fashion . . .. and we're not trying to shut his website down.
T-86 line 6 to pg. 87 line 15.

The Appellant then moved on to try and put the posts complained of into context by explaining ELI to the court. T-90 line 5 to 93 line 5. He pointed out that ELI has various discussion forums on numerous topics where individuals are free to post comments on their own, including putting into evidence a chart showing the various parts of ELI. T-90 line 20; Packet at pg 119. He talked about the boisterous, sarcastic and humorous language used and which is sometimes accompanied with venting of emotion using military tactical language. T-91 line 16-25; 92 lines 1-17. He also noted to the court, that due to the number of different areas on ELI, a user has to voluntarily click on a particular forum, then a particular topic and then a particular post to find a post; you cannot accidentally come across a forum post as it requires several "mouse clicks." T-90 line 21 to 91 line 3. He described that the ELI Forums related to Appellee's business have over 1,900 posts on 180 different sub-topics and that ELI has over 14,200 posts other posts across 740 topic threads in total. T-96 line 18-24.

Appellant's testimony was uncontested by Appellee and rebutted only by the testimony of Appellee's employee, John Jolin, regarding the phone number on his girlfriend's phone, described above.

When the parties summed up, Appellant briefly summarized what he had just testified to. T-109 line 16. Appellee's counsel, in her summation, not only set forth the elements of O.C.G.A. 16-5-90 (a)(1), but also argued that the Appellant, by not removing the allegedly offending posts, violated the temporary protective order even though that issue was not before the court via the petition. T-111 line 14 to 112 line 20.

The court, without taking any recess to thoroughly read all of the exhibits and Appellant's memorandum of law,[1] granted the petition for a protective order but in doing so found that Appellant not only violated the elements of OCGA § 16-5-90 (a)(1) (T-120 line to 121 line 7) but also the elements of (a)(2) which only applies to persons who are already subject to an order of protection. This was not before the court via the petition and could not be before the court because when the petition was filed, no order was in effect against Appellant. T-121 lines 8-19. The court issued an expansive order, more far-reaching than Appellee had even requested as per her attorney's statements, which required Appellant to delete from ELI all posts referring to Appellee. It is from this order that Appellant appeals.

[1]The record shows that the court was very pressed for time and even took short breaks in the case to hear from other lawyers with cases pending for that date. See Tr. at pgs. 22 line18, 41 line 12, 52 line 6, 122 line 9.

II. Enumeration of Errors

A. Jurisdiction: The Court's jurisdiction is set forth in paragraph I(b) on p.1 infra

B. Errors Below:

1. The court below improperly found that the Appellee's evidence constituted "contact" by the Appellant with the Appellee and a "willful course of conduct" under OCGA § 16-5-90(A)(1) so as to amount to "stalking" under the statute. Appellant's Memorandum of Law, dated February 27, 2013raises this issue at p. 24-38; Packet at 64-98.

2. The court below improperly penalized Appellant for conduct that only constitutes stalking under (A)(2) when Appellant was never made aware that this section of the statute was at issue at the hearing and the issue was not covered by the petition. This issue was not preserved by Appellant as he was unaware it was being argued. The error constitutes plain error, see p.19 infra;

3. The court below improperly admitted into evidence an ex-parte affidavit. Preserved by Appellant's objection at T-48-49;

4. The application of this statute against the Appellant for this conduct violated the Appellant's First Amendment rights and the Communications Decency Act of 1996.Appellant raised this issue on the record at T-76-80; T- 96 lines 9-12. It was also raised in Appellant's Memorandum of Law at p.32-37; Packet at 92-97.

5. Were this Court to find that a protective order was proper under the statute, the order issued by the court below was overbroad, unduly burdensome and overly restrictive and even exceeded the relief demanded by Appellee below. This issue was not preserved by Appellant. The error constitutes plain error, see page 19 infra.

III. ARGUMENT AND CITATIONOF AUTHORITIES

A.

THE FEW INTERNET POSTS MADE BY APPELLANT DO NOT ESTABLISH THE ELEMENTS OF OCGA § 16-5-90(a)(1)

OCGA § 16-5-90(a)(1) prohibits very specific conduct only and does not reach conduct that is not listed in the statute. Under OCGA § 16-5-90(a)(1) A person commits the offense of stalking when:

"he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person."

Nearly every element of this statute was not met by the evidence below. It was undisputed below that the Appellant never followed or placed Appellee under surveillance. The only method of "contact" found by the court was the use of a computer to broadcast posts about Appellee. T-120 lines 12-22. Both OCGA § 16-5-90 and 16-5-91 require, in relevant part, that the proscribed act of making non-consensual contact with another person be 'for the purpose of harassing and

intimidating the other person.' "*Johnson v. State* 264 Ga. 590, 591(1994). There was no proof that this was the purpose behind the posts complained of; instead Appellant repeatedly testified and his posts revealed that his intent was to expose Appellee's business practices and to show the hypocrisy between her poem's message and how she conducted her business. The court below, in issuing its decision, highlighted a section of Appellant's Trial Memorandum that stated "This again establishes that Respondent and ELI are trying to get Petitioner to see the errors of her ways to stop extorting people for their use of The Dash."T-122 lines 18-22. The court found this was an admission that Appellant meant to intimidate Appellee. That is not supported by the record, as described above, and Appellee admitted she filed the petition in part because of her reputation and as ELI was now in second position on an Internet search of her product. T-72 lines 11-14.

The term "harassing and intimidating" is further defined in OCGA § 16-5-90 as a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves *no legitimate purpose.*" *Johnson v. State* 264 Ga. at pages 591-592. (emphasis in original) There is no proof that Appellant engaged in a willful course of conduct with no legitimate purpose with the intent to place Appellee in fear of physical harm to herself or her family.

"To 'contact' is readily understood by people of ordinary intelligence as meaning '[t]o get in touch with; communicate with.' American Heritage Dictionary (3d ed. 1992)." *Johnson v. State* 264 Ga. at page 591. In the case of *Marks v. State*, 306 Ga. App.824 (2010) the Georgia Court of Appeals specifically held that posting on the internet about someone does not constitute "contact" under the statute. In *Marks*, a defendant's conviction for stalking and violating an order of protection was reversed because the court found that his posting on the internet of several untrue statements about his ex-wife on several websites and his having emailed links to the postings to several people was not "contact" under the statute. *Id.* at 826.Here, the court below distinguished *Marks* only by stating that in *Marks* "the court specifically found that no evidence was presented suggesting that the boyfriend actually authored the web postings." T-119 line 20. But that is incorrect. In *Marks*, the court treated as undisputed that the boyfriend wrote the posts complained of. The court below also ignored that the two posts Appellee complained of the most vociferously -- "The Hearse Song" and the Google Street View image of her house -- were posted by others. The court also did not apparently take into account that no evidence was presented as to who posted the cartoon; or who, if anyone made the call to Appellee's employee's girlfriend. Similarly, the court ignored that in order to view the posts, Appellee had to make several mouse clicks into the discussion forum. T-90 line 21 to 91 line 3.

That Appellee had to access the posts voluntarily and repeatedly also means that the "place or places" element was not met. In *Pilcher v. Stribling*, 278 Ga. App. 889 (2006), the Georgia Court of Appeals held that the term "place or places" shall include any public or private property occupied by the victim other than the residence of the defendant. The law only applies therefore to contact made at a public or private piece of property occupied by the person – so while emails repetitively sent to someone's home would qualify, general posts about the person on the Internet would not meet the definition of "place or places."

There is similarly no proof that Appellant engaged in a willful course of conduct with no legitimate purpose, another statutory requirement. See, *Johnson v. State* 264 Ga. 590, 591-592 (1994). In *Daker v. Williams,* the Supreme Court of Georgia instructed that a "'course of conduct' refers to a series of successive actions, and, as such, is equivalent to a '*pattern of behavior.*' " 279 Ga. 782,785 (2005). Accordingly, in *State v. Burke*,267 Ga. 377 (2010)*,* where there was only a single act at issue, one violation of a protective order, the Georgia Supreme Court held that the evidence " simply [did] not establish 'a *pattern* of harassing and intimidating behavior.' " 267 Ga. at 379. Indeed, in *Burke,* the Court reiterated that the " 'harassing and intimidating' conduct must be established by, among other things, 'a *pattern* of harassing and intimidating behavior.' "*Id.*(internal citation omitted; emphasis in original). So that it is clear that not only must there

be a pattern, but it must be a pattern of harassing and intimidating behavior. *Id.* See also *Krepps v.* State, 301Ga.App. 328, 330(2), (2009) (noting that a conviction for stalking requires the state to prove, as part of establishing the element of "harassing and intimidating" behavior, a pattern or a course of conduct). Appellee complained of five posts over a period of eight months with no post occurring in four of those months; an insufficient number of acts to constitute a pattern of harassing behavior. In contrast to the Internet activities that Appellee complained of here, the serious nature and deep extent of the pattern necessary to reach the intent of the statute is shown by the Georgia Court of Appeals' decision in *Autry v. State*, 306 Ga.App. 125 (2010),(cert. denied February 28, 2011). In that case, a defendant was charged under OCGA §16-5-90(a)(1) and was convicted after a jury trial. In appealing his case to the Georgia Court of Appeals, he argued that the evidence presented against him did not amount to "a course of conduct." The appellate court agreed that a sufficient pattern was not shown even though there was evidence that the defendant had repeatedly followed the complainant at a series of destinations over the course of a day and the victim testified she was in fear for her safety. *See*, *Autry v. State*, 306 Ga. App at 125-128.

The Georgia General Assembly in 1998 specifically added the requirement that the victim's emotional distress must be established by "a pattern of harassing and intimidating behavior." This requirement was added "to help avoid abuse of

the system by people who overreact or become vindictive." Review of Selected 1998 Georgia Legislation, 15 Ga. St. U. L. Rev. 62 (Fall 1998).Appellee has overreacted and the statute was explicitly amended to avoid this abuse of the system by requiring a significant pattern of harassing behavior not shown here.

At best, Appellant operated an Internet discussion forum where Appellee and her business practices were discussed by Appellant and others. The only post that comes close to resembling a threat is a post mentioning Appellee in a forum topic entitled "Re: Ellis – Get Ready -We are coming after you!" Appellant was not the person who posted this topic or the post in question. Also, when taken in context, it is clear that the poster is not threatening violence. What is meant is that the poster and others will scrutinize and alert the public to Appellee's doings regarding her copyright infringement scheme. That post was also made over seven months before the hearing date and is merely a link to a video on YouTube.

Because Georgia courts have specifically ruled that Internet posts do not constitute "contact" under this statute and because Appellant has not engaged in any other conduct governed by the statute as defined by the Georgia Supreme Court and because Appellee did not make out her burden that Appellant's conduct met each and every element of the statute, including engaging in a pattern of harassing and intimidating behavior, the order must be reversed.

B.

APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN COURT RULED ON EVIDENCE OF CONDUCT WHICH WOULD ONLY VIOLATE OCGA § 16-5-90(a)(2) WITH WHICH APPELLANT WAS NOT CHARGED

Throughout the hearing, Appellee's counsel repeatedly questioned Appellant about his leaving up the allegedly offending posts, including the Google Street View Image of her house despite his having been served with a temporary protective order as a result of the filing of the petition. See, e.g. T-36 lines 23-25;T-32, line 24. Appellant repeatedly told the court he left the posts up after service of the order to allow the court to see all the evidence and not appear to be hiding anything. T-32, 37 line 8-16; 57 line 18. Appellant did not realize that Appellee's counsel was baiting the Appellant into admitting conduct that would constitute a violation of OCGA §16-5-90(a)(2), which only governs conduct occurring after service of a temporary protective order and which was obviously not part of the petition the hearing was addressing as at the time of the filing of the petition as no protective order was then in place.

Unfortunately, the court below took the bait. In its ruling, the court specifically quoted from OCGA §16-5-90(a)(2)'s language by finding that the mere broadcasting of Appellee's home address constituted "stalking." T-121 lines 8-19.

Appellant had no notice that he would be judged and have to defend against section (a)(2)'s more stringent prohibition. '[R]easonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are "basic in our system of jurisprudence." *Ford v. Ford*, 270 Ga. 314 (1998) quoting *Taylor v. Hayes,* 418 U.S. 488, 498(1974). See also *Dowdy v. Palmour,* 251 Ga. 135(2), (1983). To comport with due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Ford*, *supra at 315.*The notice must be of such nature as reasonably to convey the required information. *Id.* In *Ford,* an action to collect sums due under a divorce decree, the appellee's lawyer had written the court that appellant had not met his financial obligations and asked that the court impose sanctions. The court responded that it would hold a telephone conference to discuss "this matter." After the conference, the court found appellant in contempt and appellant appealed. In reversing the contempt finding, the Georgia Supreme Court found that the notice received by appellant from the trial court was not reasonable because it failed to adequately inform appellant of the charge against him so that he would have the opportunity to defend himself against the charge at the specified time and place for the hearing. *Id.* at 315. The court stated that because appellant voluntarily appeared and defended at the hearing did not excuse the failure to comport with due process. *Id.* In a nearly

identical situation here, appellant had absolutely no notice that he would be facing a hearing on OCGA §16-5-90(a)(2), had no opportunity to prepare for a defense under this section and yet was found by the trial court to be in violation of its language. T-121 lines 8-19.

Because appellant had no notice and did not understand what he was being charged with, he did not raise this issue below. Both Georgia courts and the United States Supreme Court allow appellate courts to review unpreserved errors if the errors are "plain errors." *Puckett v. U.S.*, 556 U.S. 129, 135 (2009); *Culver v. State*, 314 Ga. App. 492 (2012). This court set a four-prong test to determine if an issue amounts to plain error, all of which are applicable here:

First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error - discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Kelly, 290 Ga. 29 (2011).

The order must be reversed as Appellant did not intentionally waive this issue; the error is clear; the error affected his substantial rights to due process; and failing to correct it would be fundamentally unfair and would affect the integrity and public reputation of judicial proceedings.

C.

THE COURT IMPROPERLY ADMITTED AN EX-PARTE AFFIDAVIT INTO EVIDENCE

The court below admitted into evidence a lengthy affidavit of Timothy McCormack, a Seattle-based attorney. The affidavit contained inflammatory, unsupported allegations and theories against Appellant and offered McCormack's opinion on the alleged "dangerousness" of Appellant. Packet at pg.12.

This Court has long held that it is reversible error to allow ex-parte affidavits into the record as they deprive the adversary of an opportunity to cross-examine the affiant. *Young v. Young*, 209 Ga. 711 (1953) citing *Adkins v. Hutchings*, 79 Ga. 260 (1888). In *Young*, a divorce action, the affidavits stated matters that were highly detrimental to the plaintiff, and most of them related to matters based upon pure rumor or conjecture similar to the statements in McCormack's affidavit. This error alone warrants reversal. *Hartley v.Caldwell*, 223 Ga. 333(1967)(admission of ex-parte affidavit on material issues in case was material rendering further proceedings nugatory);*Tamiami Trail Tours, Inc. v. Georgia Public Service Commission,* 213Ga. 418 (1957).

Georgia courts have also held that admission of ex-parte affidavits constitutes reversible error even if there was otherwise sufficient evidence to meet the burden of proof. *Lanthripp v. Lang*, 103 Ga. App. 602 (1961).

D.

THE FIRST AMENDMENT PROTECTS APPELLANT'SSPEECH AND THE COMMUNICATIONS DECENCY ACT OF 1996 PROTECTS A PERSON FROM BEING HELD RESPONSIBLE FOR OTHER'S POSTS

OCGA § 16-5-92 of the statute ("Applicability") states:

The provisions of Code Sections 16-5-90 and 16-5-91 shall not apply to persons engaged in activities protected by the Constitution of the United States or of this state or to persons or employees of such persons lawfully engaged in bona fide business activity or lawfully engaged in the practice of a profession.

a. Federal Constitutional Analysis

A brief analysis of the balancing done by courts, including the US Supreme Court, in deciding between (a) speech that incites persons to commit crimes or which involves criminal activity and (b) speech that is protected by the First Amendment establishes that Appellant was engaging in protected speech.

There can be no greater protected activity than speaking in a public forum. When a government places restrictions on the content that may be placed on the Internet, it acts as a regulator of private activity and its restrictions are subject to strict scrutiny. *Reno v. ACLU,* 521 U.S. 844 (1997). The Supreme Court's understanding of the Internet in *Reno* proved prescient when it observed that the internet constituted a:

dynamic, multifaceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it

could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

Reno v. ACLU, 521 U.S. 844, 870 (1997). The Supreme Court in *Reno*, also noted that the District Court below specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' *Id.* at869. [2] Other Supreme Court precedent likewise requires that illegal *action* be almost contemporaneous with the inciting speech if the speech is to be excluded from First Amendment protection. *See e.g. Brandenburg v, Ohio,* 395 U.S. 444, 447 (1969). The reason for an imminence requirement derives from the notion that the means to deter unlawful conduct is to punish the *actor* rather than the *advocate*. *Bartnicki v. Vopper,* 532 U.S. 514 (2001). In *Hess v. Indiana,* 414 U.S. 105 (1973), the Court found no imminent action in a demonstrator's shout, "We'll take the fucking street later [or again]," as police attempted to move a crowd of demonstrators off the street. *Id. at* 106-108. Speech that incites others to violate the law is not protected by the First Amendment, but the incitement to lawless action must be imminent and likely. *Id.* Here, the speech did not incite anyone to lawless action but it was also not imminent or likely.

[2] This holding also undermines the claim that by posting about Appellee, Appellant "contacted" her. Appellee learned of the posts because she repeatedly chose to visit ELI, click into the forums and voluntarily read them.

Appellant's posts arose out of a desire to get people to help combat what he believed is an abusive and extortionate copyright infringement scheme. It was a call to "rally the troops" to use public information about Appellee to show her hypocrisy vis-a-vis the theme of her poem. This type of language and speech is afforded great protection.

For example, in *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982)involving the efforts of civil rights leader Charles Evers and others to organize an NAACP-sponsored boycott of white-owned businesses in Claiborne County, the Court noted that the boycott had a "chameleon like character…; it included elements of criminality and elements of majesty." *Id. at* 888:

Evers publicly proclaimed that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." *Id. at* 900 n.28. He "warned that the Sheriff could not sleep with boycott violators at night," and told his audience, " 'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.' " *Id. at* 902.

The Court found that Evers' speech - even set against a backdrop of violence, and even including apparent threats - did not exceed the limits of protected speech. The Court noted that the speeches consisted of impassioned political pleas within which Evers' seemingly threatening language was used, and that no imminent unlawful conduct followed the speeches. *Id.* Focusing on the political nature of Evers' speeches, the Court wrote:

Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with

spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. *Id.*

While not equating the speech here to that of Evers', and while not equating the issue over "copyright trolling" to the civil rights movement, the issue of intellectual property enforcement is an issue of national importance that is the subject of a large amount of speech on the Internet and in the media. See, for example,*www.fightcopyrighttrolls.com;www.eff.org/issues/copyright-trolls andwww.techdirt.com/blog/?tag=copyright+trolls*. Appellant is entitled to protection similar to that of the traditional press. The Supreme Court has upheld an inclusive definition of "press," including individual publishers who may not have special affiliations or education, but who may use leaflets and other sorts of publications that provide both information and opinion. *Lovell v.City of Griffin,* 303 U.S. 444, 452 (1935);*Branzburg v. Hayes,* 408 U.S. 665,704 (1972)(the newsgatherer's privilege applies to "the lonely pamphleteer" as much as the "large metropolitan publisher.")

Appellee most stridently objected to the posting of her home address and family information on ELI. T -35, line 17. But the Supreme Court has long held that there is nothing actionable about the posting of publicly available information. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 494–96, (1975*)*(no claim can be based on a fact open to public inspection in government records; "We are reluctant

to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man.”). In deciding that there was no invasion of privacy when a reporter in Georgia published the name of a rape victim in contravention of a Georgia law prohibiting such publication, the Court held that to the extent the law prohibits the publication of information already contained in a public document, the law is unconstitutional and unenforceable. *Id.* at 496-497.

Appellant only disseminated public information about Appellee, all of which was derived from public documents and records. T-46 line 15.

While the *Cox* case alone is sufficient to exempt Appellant’s conduct from the statute, persons who are public personalities have an even lower expectation of privacy. *See*, *Carafano v. Metrosplash.com Inc*. 207 F.Supp. 1055(Cent. Dist.Ca. 2002)(television actress could not complain of publication of a false profile of her on match-making site which contained her true address). Appellee is a public figure and therefore has an even lower expectation of privacy.

Finally, the image of her home and other posts complained of were posted by another party - not Appellant. Section 230 of the Communications Decency Act, 47 U.S.C. §230 (1996) (“CDA”) states:

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

Effectively, this section immunizes interactive forums like ELI from liability for torts committed by others using their website or online forum. *Carafano v. Metrosplash.com Inc.,* 339 F.3d 1119 (9th Cir. 2003)(CDA is intended to facilitate the use and development of the Internet by providing certain services immunity from civil liability arising from content provided by others). The CDA was held to immunize a publisher of an electronic newsletter from liability for publication of defamatory material even though the publisher edited portions of the defamatory material. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

The *Batzel* decision joined the consensus developing across the country that § 230(c)provides broad immunity for publishing content provided primarily by third parties. See *Green v. America Online,*318 F.3d 465, 470-71 (3d Cir.2003) (upholding immunity for the transmission of defamatory messages and a program designed to disrupt the recipient's computer);*Ben Ezra, Weinstein, & Co. v. America Online Inc.,* 206 F.3d 980, 985-86 (10th Cir.2000) (upholding immunity for the on-line provision of false stock information); *Zeran v. America Online,* 129 F.3d 327, 328-29 (4th Cir.1997) (upholding immunity for both initial publication and delay in removal of false messages connecting offensive tee-shirts to the plaintiff's name and home telephone number). Under the CDA, therefore, as long as a third party willingly provided the published content, the publisher is not deemed the "speaker" of the content and receives full immunity. Appellant cannot

be held liable for the posts of others and cannot be held responsible for failing to take down the post of others. *Zeran v. America Online*, 206 F.3d at 985-986.

b. State Law Analysis

Georgia courts have held that the State Constitution provides even broader protection of speech than the First Amendment to the United States Constitution. *Statesboro Pub. Co. Inc. v. City of Sylvania*, 271 Ga. 92, 95 (1999);*State v. Miller,* 260 Ga. 669, 671 (1990). Therefore, Appellant's words are entitled to protection under the State Constitution as well.

Without any threat of imminent illegal activity and without any incitement of anyone to imminently engage in illegal activity, even if the court finds that the actions of Appellant make out the elements of the statute, the statute's exemption for constitutionally protected speech would apply to exempt the posts from the statute's reach. Allowing Appellee to succeed on this petition would cast a chilling effect on future speech and has in fact stopped all discussion on ELI regarding Appellee. It would expose countless other websites to be subjected to orders of protection for similar legal behavior. *See also*, *Smith v. Daily Mail*, 443 U.S. 97 (1979) (punishing media for truthful reporting causes improper restraint on media).

E.

THE ORDER WAS OVERLY BROAD AND BANNED ALL SPEECH ABOUT APPELLEE

The court below did not just require the Appellant to remove the few offending posts that Appellee placed in the record; it forced Appellant to remove all 1,900 posts on ELI related to Appellee and her business practices and it forced him to do so forever. T-124 lines 10-28.

This order was a far broader and more expansive restraint on speech than the law allows. It is even broader than the relief the Appellee was seeking. T-86 line 6 to pg. 87 line 15. While this argument was not raised by Appellant below it constitutes "plain error" as defined in page 20 of this brief.

Content-based speech regulations, like the court's order below, face "strict scrutiny," the requirement that the government use the least restrictive means of advancing a compelling government interest. *United States v. Playboy Entm't Group,* 529 U.S. 803, 813 (2000). Similarly, permanent injunctions that restrict First Amendment rights are proper only if they serve an overriding interest based on findings that the restriction is essential to preserve higher values and is narrowly tailored to serve that interest. *U.S. v. Miami University*, 294 F.3rd 797 (6th Cir. 2002). Here, the court unnecessarily violated Appellant's First Amendment rights by requiring him to forever remove all posts regarding Appellee and to forever stop discussing Appellee. Therefore, even if this court denies all of Appellant's other

arguments, it must tailor the protective order issued more narrowly to allow Appellant to include posts by others and all posts which do not constitute a pattern of harassment or intimidation of Appellee; at most Appellant should have been required to remove only those posts of which Appellee complained.

IV. CONCLUSION

The court below improperly interpreted OCGA § 16-5-90(a)(1) and should not have held Appellant responsible for conduct that only violates OCGA § 16-5-90(a)(2). Furthermore, the court improperly allowed the admission of an ex-parte affidavit and held Appellant responsible for the posts made by third parties despite the language of the Communications Decency Act of 1996. As the Appellant was merely exercising his First Amendment rights in making posts about Appellee, the request for a protective order should have been denied or at the very least more narrowly tailored than the sweeping order issued by the court. Wherefore, Appellant prays that the order below be reversed and the petition dismissed or in the alternative, order that a new hearing be held on the petition.

Dated: September 30, 2013 _/S/ Oscar Michelen___________

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CERTIFICATE OF SERVICE

This is to certify that pursuant to Appellant Rule 6, I have on this day served counsel for the opposing party a copy of this "Brief of Appellant" before filing same by faxing a copy of the "Brief of Appellant" to the below listed opposing counsel and by sending a copy of the "Brief of Appellant" to the below listed opposing counsel by United States Mail in a properly addressed envelope with adequate postage addressed to:

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This 30th day of September, 2013.

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