COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICAL COURT
NO. 12452

APPEALS COURT
NO. 2017-P-887

F.K. & another,
Appellee

V.

S.C.
Appellant

ON APPEAL FROM JUDGMENT OF THE
DISTRICT COURT OF ESSEX COUNTY

REDACTED BRIEF FOR THE APPELLANT

FOR THE APPELLANT,
S.C.,
BY HIS ATTORNEY,

LISA S. CORE, ESQ.
42 Pleasant Street
Woburn MA 01801
BBO. No.658709

AUGUST 2017
REDACTED SEPTEMBER 2018

Contents

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUE

The sole question on appeal is whether the student plaintiffs presented sufficient evidence of "three or more acts of willful and malicious conduct" to satisfy G.L. c. 258E when the only evidence consists of a single song published by the student defendant and both plaintiffs describe the song as either "out of the blue" or "random."

STATEMENT OF THE CASE[1]

This motion relates to two harassment orders issued against the defendant, S.C., by two different plaintiffs, M.D. and F.K.[2] The first docket, [REDACTED] issued on March 17, 2017 to M.D., the male plaintiff (R. 1-3,7-10). On March 20, 2017, M.D.'s girlfriend, F.F., applied for and received a separate temporary order, [REDACTED] (R. 4-6,10-11). The extension order hearings were held simultaneously on March 28, 2017 (R. 1,4). The Court, ([REDACTED], J.)

[1] The following record references are used: Transcript of Extension Hearing, March 28, 2017, [REDACTED] District Court (TI. [page #]), Transcript of Motion to Stay/Motion to Reconsider, May 17, 2017, [REDACTED] District Court (TII. [page #]), Record Appendix (R. [page #]and Addendum (Add. [page #]).

[2] Per order of the Single Justice (Green, J.), the parties should be referred to by their initials.

extended the orders after hearing on March 28, 2017 (R. 2,5). The orders require the defendant:

a. not to abuse either plaintiff;
b. not to contact either plaintiff;
c. to stay at least 50 yards from the plaintiffs;
d. to stay away from both of the plaintiff's residences; and
e. a notation that with respect to M.D. that an [REDACTED] High School Representative was present for the hearing and will ensure order abided by within the high school regarding plaintiff and his brother (R. 2,5,8,11).

The defendant filed timely notices of appeal on April 20, 2017 (R. 2,5,44,45).

On May 8, 2017, the defendant filed a Motion to Stay and/or Motion to Reconsider in the [REDACTED] District Court (R. 2,5). The Honorable Judge [REDACTED] heard the motion on May 17, 2017 (R. 3,6). The Court denied the motion on May 25, 2017 (3,6) and provided written findings and rulings of law (R. 18-27).

The defendant filed an emergency Motion to Stay in the Appeals Court, 17-J-248, on May 30, 2017 (R. 46-48). On June 2, 2017, the Appeals Court (Green, J.) found a substantial likelihood of success on the merits (R. 28-29). On June 27, 2017, the Court (Green, J.) held a hearing with all parties present

(R. 48). After hearing, the Court again ruled that the Defendant had a substantial likelihood of success on the merits (R. 48).

On June 30, 2017, the defendant filed a motion for extension of time for filing notice of appeal with respect to the Motion to Stay/and or Motion to Reconsider together with the Notice of Appeal (R. 3,6). The Court ([REDACTED], J.,) allowed the motion on July 5, 2017 (R. 31). On July 7, 2017, the record was fully assembled for appeal (R. 3,6). The district court sent supplemental filings related to the Motion to Stay and/or Motion to Reconsider on July 21, 2017 (R. 3,6).

STATEMENT OF THE FACTS

The underlying harassment orders arise out of a single rap song performed by the defendant, S.C., a second semester senior at [REDACTED] High School (TI. 4). The song, titled, “Callin' Out Pussies In The School” (R. 34-35) was posted to Sound Cloud, a public website (TI. 4,5). The defendant sent the link via Snapchat to six other [REDACTED] students (TI. 49). Those students brought the song to the attention of the plaintiffs M.D. and F.F., also seniors at

[REDACTED] High (TI. 49). The song was online for about two hours (R. 41). Based on the lyrics of the song, the parties applied for a harassment order.

The undisputed evidence is that the defendant barely knows either of the plaintiffs (TI. 10). M.D. indicated that he only knew S.C. from a science class the year before, had never had an issue with him and had probably only spoken one or two words to him (TI. 10). He stated that the song was “out of the blue” (TI. 10) and not part of any historical pattern (TI. 20). Similarly, F.F., who was not specifically named in the song, described the incident as “random” (TI. 50) and only knew of S.C. from a math class in her sophomore year (TI. 12). Both parties stated they were nonetheless disturbed and frightened by the lyrics (TI. 10-12).

When interviewed by the police, S.C. said that he was “free styling”[3] the song (R. 41). Just before he and his friend started the free style, the friend told him that M.D. had “shaded” S.C. last year in science class (R. 41). S.C. said he was just trying to act

[3] His mother explained that free styling means that the lyrics are not pre-planned. One person creates the background music and the rapper spontaneously creates the lyrics (TI. 40).

like a rapper and got caught up in the moment (R. 41). When speaking to the assistant principal the next day, S.C. was crying and upset, repeating, “I messed up, I messed up” (TI. 25). He also told the police that he never had any intention of hurting anyone (R. 41). The assistant principal confirmed that there were no previous disciplinary issues at school (TI. 37). His mother testified that there were no weapons in their home and that she had never seen him behave in a violent or dangerous way toward anybody (TI. 43). The school fashioned a safety plan to provide for the safety of the plaintiffs while at school (TI, 43). The plan required S.C. not to initiate any physical, verbal, written or electronic contact before, during, or after school or he would face discipline (R. 43). The school was comfortable with S.C. returning to school under those conditions (TI. 26).

After hearing, the Court issued the orders on the basis that the song consisted of individual statements that would satisfy the three acts required by the statute (TI. 60). The Court added that the act of Snapchatting the link to six other individuals was further evidence of harassment (TI. 60). S.C. stayed

out of school for fear of being criminally charged for inadvertent conduct (TII. 4).

ARGUMENT

The standard for issuing a harassment order is whether the judge could find by a preponderance of the evidence, together with all permissible inferences, that the defendant committed "three or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property that did in fact cause fear or damage to property." Petriello v. Indresano, 87 Mass. App. Ct. 438, 444(2015)(quoting G.L.c. 258E, § 1). In O'Brien v. Borowski, 461 Mass. 415, 420 (2012), the Supreme Judicial Court emphasized that harassment is a "**knowing pattern of conduct** or series of acts **over a period of time** directed at a specific person." (Emphasis added).

One continuous act cannot be parsed into individual acts in order to satisfy the statute. Smith v. Mastalerz, 467 Mass. 1001 (2014). For example, driving by the plaintiff's home three separate times during the same encounter constitutes one continuous act. Id. (rejecting district court's

ruling to treat each drive-by as a separate act). Similarly, in an unpublished opinion after Smith, the Appeals Court ruled that the 58-year-old male defendant's conduct of approaching a 17-year-old female from behind and taking her photograph, then driving by her, turning around and taking another photograph a few minutes later constituted one continuous act. Mielke v. Hardie, No. 13-P-104, slip op. June 19, 2014 (Add. 2). Instead, acts so closely related in fact must be viewed as a single act. See Commonwealth v. St. Pierre, 377 Mass. 650, 662-663 (1979)(acts closely related in fact constitute in substance but a single crime).

Each act must be separate and distinct from one another. For example, in Commonwealth v. Welch, 444 Mass. 80, 82-84 (2005)(abrogated for other reasons), the Court analyzed "each" of seven separate incidents that occurred overtime: 1) a May 31, 1999 incident prompting a call to the police; 2) an incident occurring the following Saturday that prompted another call to the police; 3) an incident that occurred in October 1999; 4) an incident occurring in December 2000; 5) an incident in January 24, 2001; 6) a January 26, 2001 incident that prompted another call to the

police; and 7)yet another incident on January 27, 2007 that caused the plaintiffs to call the police. Similarly, in Seney v. Morhy, 468 Mass. 58, 59-60 (2014) described three separate incidents: 1) a telephone conversation where the defendant threatened to punch him and break his knees; 2) an email the plaintiff viewed as threatening; and 3) an in-person altercation at a baseball practice. Finding that only one of those distinct acts possibly satisfied the statute, the Court vacated the order because "there were not three requisite acts forming a pattern of harassment." Id. at 64.

The judge far exceeds her authority by treating each individual fact as an independent act under G.L. c. 258E. According to the lower court, because the song has over thirty lyrics, it potentially contains over thirty separate acts sufficient to satisfy the statute. Furthermore, the judge similarly held that the conduct described involved separate acts of creating, producing, publishing and publicizing. Finally, by noting that "three or more recipients" received notice of the song via Snap Chat and "at least six separate individuals" approached the plaintiffs about the song, the district court suggests

that those facts constitute at least nine more independent acts to satisfy the statute.

The Single Justice (Green, J.) ruling on the underlying Motion to Stay flatly rejected the lower court's reasoning:

> "The District Court judge concluded that the 'three acts' requirement was satisfied by the inclusion of at least three threatened acts in the lyrics of the rap video he posted on line.[4] However, he did not commit any of those acts; it is instead the communication of a threat that constitutes the harassment in the present case, and that communication occurred as part of the single act of posting the video.[5] The District Court judge also suggested that the three acts might alternatively be found in the separate and discrete efforts undertaken by the defendant to (1) create, (2) produce, and (3) publish the rap video (with its threatening lyrics). To the contrary, the creation and communication of the threat are part and parcel of the same continuous act; indeed, the creation and production of the rap song would not constitute a threat unless and until communicated" (R. 28).

Adoption of the lower court's reasoning suggests virtually unfettered discretion to parse a course of conduct into separate acts. In fact, dividing a single incident into its component parts is precisely what Smith prohibits. Like the drive-bys in Smith, the lyrics of the song are indivisible for the purposes of the statute. Similarly, Smith prohibits the single act

[4] It is undisputed that the rap is audio only.
[5] Id.

of publishing a song to be reduced to its component parts of creating, producing, publishing and publicizing the song. Moreover, a fair reading of Smith suggests that the number of witnesses to an incident is irrelevant in determining how many individual acts occurred. Though the number of witnesses likely affected the intensity of the harassment the parties experienced from this isolated act of harassment, it is improper for the number of witnesses to function as a multiplier.

The facts underlying these orders are so closely related that this Court should rule that they are one continuous act. St. Pierre, 377 Mass. at 663. When viewed as a single act, it is clear that the plaintiffs cannot demonstrate the requisite pattern required by the statute. Welch, 441 Mass. at 90. The plaintiffs' own testimony belies any hint of the necessary pattern over time. O'Brien, 461 Mass. at 420. It is undisputed that the parties barely knew one another and had virtually no contact in the years prior to this incident. In fact, the plaintiffs themselves described the song as "out of the blue" and "random." Though the song is understandably upsetting

and distressing to both of them, standing alone, it is insufficient to support a harassment order.

For all of these reasons, this Court should rule that the plaintiffs presented insufficient evidence to issue an order pursuant to G.L.c. 258E. On that basis, the Defendant respectfully requests that this Court vacate the order and require that all records of the order be destroyed by law enforcement. Seney, 467 Mass. at 62 (discussing expungement requirement, G.L.c. 258E, § 9, that removes stigma associated with wrongfully issued harassment order).

CONCLUSION

Based on the foregoing, the Defendant requests that this Court vacate both harassment orders and order that law enforcement destroy any records of the same.

Respectfully submitted
For S.C.
By his attorney,

Lisa S. Core
BBO 658709
42 Pleasant Street
Woburn MA 01801
617-415-1564

August 16, 2017
Redacted September 17, 2018

Rule 16(k) Certification

I, Lisa S. Core, counsel for the Defendant S.C. hereby certify that this brief complies with the rules of the Court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f),16(h), 18 and 20.

Lisa S. Core
BBO #658709

ADDENDUM

TABLE OF CONTENTS

As is demonstrated by the context laden language of the Court's decision in *Smith*, however, the facts individual to each action pursuant to G.L. c. 258E are to be assessed on an individual basis and are often a matter of credibility and interpretation for the finder of fact. "Each harassment order case presents to the fact finder a different constellation of facts, and an evaluation of the evidence will draw heavily on credibility determinations made by the judge who hears them." *Henao v. Abernathy*, 90 Mass. App. Ct. 1107 (unpublished 2016).

The three willful and malicious acts applicable in this case may be related to each other and may occur in succeeding order. In *Commonwealth v. Welch*, albeit in the context of criminal harassment, the Supreme Judicial Court examined the phrase in G.L. c. 265, s. 43A, requiring a "pattern of conduct or series of acts". *Welch*, 444 Mass. 80, 89 (2005). The Court held that the crime of criminal harassment requires the Commonwealth to prove three or more incidents of harassment for the following reasons. The Court relied upon the dictionary definition of "series" as "a group of *usually three or more things or events* standing or succeeding in order and having a like relationship to each other" (emphasis added). *Id.* citing Webster's Third New Int'l Dictionary 2072 (1993). See *Commonwealth v. Bell*, 442 Mass. 118, 124 (2004) (deriving meaning of statutory terms in part from dictionary definitions).

In the instant case, I find that the Defendant engaged not in one continuous act, but rather in three or more separate willful and malicious acts intended to cause fear, intimidation or abuse, which satisfy the requirements of G.L. c. 258E. The individual lyrics sung by the Defendant are specific and describe more than three separate acts of physical and sexual violence to Plaintiffs MD and FF. Although one song, using different and individual lyrics, Defendant SC states he will make "your bitch sittin and stayin' on her knees. . . she gonna suck my D until she bleeds," "soon I'm gonna sit your bitch down in the fuckin' lobby," "slaying your bitch," "I'm takin' your family down one by one, boom," "I'm gonna blow your fuckin' brains out soon," "I'm gonna fuck you up soon," and "'cause I'm gonna blow your brains out."

produce, publish, and publicize the lyrics in question. The steps necessary to create "Callin' Out Pussies in the School," to publically post the song, and to distribute the song to members of the [redacted] High School student body were at least three willful and malicious acts intended to cause fear, intimidation, or abuse. These various steps were testified to during both the March 28, 2017 and May 17, 2017 hearings, and they were identified as a specific source of fear for the Plaintiffs, given the perceived disproportionality between the Defendant's multiple efforts and the prior lack of relationship between the parties.

Finally, the song was distributed on two separate social media platforms (Sound Cloud and Snap Chat). The first distribution was made to the public at large, and the second distribution was aimed at a target audience, members of the [redacted] High School student body, which constituted more than three recipients. Plaintiff [redacted] MD testified that he received notice of the song from at least six separate individuals. Plaintiff [redacted] FF testified that most members of the [redacted] High School senior class were "friends" with Defendant SC via Snap Chat. As of May 17, 2017, Plaintiff [redacted] FF testified that the song remained accessible to via Sound Cloud.

CONCLUSION

For the reasons set forth herein, I hereby DENY the Defendant's Motion to Reconsider Issuance of the Harassment Prevention Orders, I DENY the Defendant's Motion to Stay the Harassment Prevention Orders, and I DENY the Defendant's Motion to Amend the Harassment Prevention Orders.

5/25/17
Date

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title IV. Certain Writs and Proceedings in Special Cases (Ch. 246-258e)
Chapter 258E. Harassment Prevention Orders (Refs & Annos)

M.G.L.A. 258E § 1

§ 1. Definitions

Effective: May 10, 2010
Currentness

As used in this chapter the following words shall, unless the context clearly requires otherwise, have the following meanings:-

"Abuse", attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm.

"Harassment", (i) 3 or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property; or (ii) an act that: (A) by force, threat or duress causes another to involuntarily engage in sexual relations; or (B) constitutes a violation of section 13B, 13F, 13H, 22, 22A, 23, 24, 24B, 26C, 43 or 43A of chapter 265 or section 3 of chapter 272.

"Court", the district or Boston municipal court, the superior court or the juvenile court departments of the trial court.

"Law officer", any officer authorized to serve criminal process.

"Malicious", characterized by cruelty, hostility or revenge.

"Protection order issued by another jurisdiction", an injunction or other order issued by a court of another state, territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, or a tribal court that is issued for the purpose of preventing violent or threatening acts, abuse or harassment against, or contact or communication with or physical proximity to another person, including temporary and final orders issued by civil and criminal courts filed by or on behalf of a person seeking protection.

Credits
Added by St.2010, c. 23, eff. May 10, 2010.

Notes of Decisions (31)

M.G.L.A. 258E § 1, MA ST 258E § 1
Current through Chapter 9 of the 2017 1st Annual Session

End of Document

85 Mass.App.Ct. 1126
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Allison **MIELKE**
v.
Bradford HARDIE, II.

No. 13–P–1604.
|
June 19, 2014.

By the Court (GREEN, MEADE & SULLIVAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** In July, 2013, after a hearing, a judge of the District Court issued a harassment prevention order under G.L. c. 258E. The order directs the defendant to not abuse or harass the plaintiff, to refrain from contacting her, to stay away from her, and to remain away from her residence and workplace. On appeal, the defendant claims that his conduct did not meet the standard for civil harassment.

As found by the judge after the hearing, the seventeen year old pro se plaintiff first encountered the fifty-eight year old defendant when she was running in her neighborhood in Boxborough. Prior to this, the plaintiff and defendant were not known to one another. As the plaintiff was running on the side of the street, the defendant was driving behind her and slowed down to take a photograph of her with his cellular telephone. After driving past the plaintiff, the defendant turned around, drove back toward her, and slowed down again to take another photograph of her. The defendant's conduct upset and intimidated the plaintiff; she notified the police. When the police later stopped the defendant, he admitted to the above facts and that he had a habit of photographing women with his cellular telephone. After being served with a temporary harassment prevention order, the defendant drove by the plaintiff's residence. The judge specifically discredited the defendant's testimony that his driving by the plaintiff's home was inadvertent.

The defendant raises several claims on appeal, but we need only address his claim that there were an insufficient number of acts to justify the issuance of the order. "[A] protective order under c. 258E requires a finding of 'harassment,' defined in G.L. c. 258E, § 1, as '[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property.' " *O'Brien v. Borowski,* 461 Mass. 415, 419 (2012).

In *Smith v. Mastalerz,* 467 Mass. 1001, 1001 (2014), the defendant drove past the plaintiff "while she unpacked her vehicle at the front of her home, stopped a few houses away on that street, turned around, drove past her again, and a few seconds later drove by the home again." While the defendant in *Smith* drove past the plaintiff three times, the Supreme Judicial Court held that this did not constitute three separate acts, but rather was "one continuous act." *Ibid.* The judge here did not have the benefit of *Smith* when she issued the order, and despite the plaintiff's admirable and able representation of herself in the District Court and this court, we are constrained to follow *Smith* 's holding. In other words, approaching the plaintiff from behind and taking her photograph, then driving by her, turning around, and taking another photograph a few moments later, constituted one continuous act. As a result, there were an insufficient number of acts to support the order.[1]

***2** *Harassment prevention order dated July 25, 2013, reversed.*

All Citations

85 Mass.App.Ct. 1126, 10 N.E.3d 670 (Table), 2014 WL 2764864

Footnotes

1 Should the defendant continue with such conduct toward the plaintiff, and that conduct meets all elements of G.L. c. 258E, the matter may be revisited in the District Court.

COMMONWEALTH OF MASSACHUSETTS

Essex, SS [REDACTED] DISTRICT COURT

M.D.

V.

S.C.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER AND/OR MOTION TO STAY

Now comes the Defendant pursuant to Mass. R. Crim. P. 29 and Mass. R. App. P. 6(a) and moves this Honorable Court (Ellis, J.) to reconsider the issuance of the above captioned harassment order and/or stay the order pending appeal. As reasons therefore, the defendant would like to direct the Court's attention to Smith v. Mastalerz, 467 Mass. 1001 (2014) which is directly applicable to the circumstances of this case. In addition, the underlying issue is worthy of presentation to an appellate court. Commonwealth v. Allen, 378 Mass. 489, 498 (1979), Ward v. Coletti, 10 Mass. App. Ct. 629, 633 (1980). Alternatively, the defendant respectfully requests that this Court modify the order for graduation day only, June 5, 2017 so that the defendant can attend graduation without fear of violating the order. For the following reasons, the defendant respectfully requests that this Court **ALLOW** the motion.

PROCEDURAL BACKGROUND[1]

This motion relates to two harassment orders issued against the defendant with two different plaintiffs. The first

[1] The following record references are used: Record Appendix (R. [page #], Addendum (Add. [page #).

temporary order, Docket [REDACTED], issued on March 17, 2017 to M.D.[2](R.1-3). On March 20, 2017, M.D.'s girlfriend, F.F., applied for and received another temporary order, [REDACTED] (R.4-7). The extension order hearings were scheduled for March 28, 2017(R.1,4).

The hearing took place before the Honorable Judge Ellis (R.2,5). After hearing, the Court extended both of the orders (R.2,5). The following conditions were imposed:

1) No abuse of either of the plaintiffs;

2) No contact with either of the plaintiffs;

3) Stay at least 50 yards from the plaintiffs;

4) Stay away from both of the plaintiffs' residences; and

5) A notation that with respect to M.D., that an [REDACTED] High School representative was present for the hearing and will ensure order abided by within the high school regarding plaintiff and his brother (R.2).

The defendant filed a timely notices of appeal on April 20, 2017 (R.16-17). The orders remain in effect.

FACTS

The underlying harassment orders arise out of a single rap song performed by the defendant, S.C., a second semester senior at [REDACTED] High School. The song, titled, "Callin' Out Pussies In The School" was posted to Sound Cloud, a public website.[3] The defendant sent the link via Snapchat to six other [REDACTED] students. Those students brought the song to the attention of the plaintiffs M.D. and F.F., also seniors at [REDACTED] High. The song was on line for about two

---

[2] On that same day, a second temporary order issued to M.D.'s father, [REDACTED], Docket [REDACTED]. This order was not extended at the hearing.

[3] The complete lyrics are attached (R.8-9).

hours. Based on the lyrics of the song, the parties applied for a harassment order.

The undisputed evidence is that the defendant barely knows either of the plaintiffs. M.D. indicated that he only knew S.C. from a science class the year before, had never had an issue with him and had probably only spoken one or two words to him. He stated that the song was "out of the blue" and not part of any historical pattern. Similarly, F.F. who was not specifically named in the song, described the incident as "random" and only knew of S.C. from a math class in her sophomore year. Both parties stated they were nonetheless disturbed and frightened by the lyrics.

When interviewed by the police, S.C. said that he was "free styling"[4] the song (R.13). According to S.C. just before he and his friend started the freestyle, the friend told him that M.D. had "shaded" S.C. last year in science class (R.13). S.C. said he was just trying to act like a rapper and got caught up in the moment (R.13). When speaking to the assistant principal the next day, S.C. was crying and upset, repeating, "I messed up, I messed up." He also told the police that he never had any intention of hurting anyone (R.13). The assistant principal confirmed that there were no previous disciplinary issues at school. His mother testified that there were no weapons in their home and that she had never seen him behave in a violent or dangerous way toward anybody. The school fashioned a safety plan to provide for the safety of the students while at the school (R.15). The plan required S.C. not to initiate any physical, verbal, written or electronic contact before, during, or after school or he would face

---

[4] His mother explained that freestyling means that the lyrics are not pre-planned. One person creates the background music and the rapper spontaneously creates the lyrics (R.12).

discipline (R.17). The school was comfortable with S.C. returning to school under those conditions.

After hearing, the Court issued the orders on the basis that the song consisted of individual statements that would satisfy the three acts required by the statute. The Court added that the act of Snapchatting the link to six other individuals was further evidence of harassment. S.C. remains out of school for fear of being charged criminally for inadvertent conduct.

DISCUSSION

The standard for issuing a harassment order is whether the judge could find by a preponderance of the evidence, together with all permissible inferences, that the defendant committed "three or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property that did in fact cause fear or damage to property. Petriello v. Indresano, 87 Mass. App. Ct., 438, 444 (2015) (quoting G.L. c. 258E § 1). In O'Brien v. Borowski, 461 Mass. 415, 420 (2012), the court describes it as a "knowing *pattern of conduct* or *series of acts over a period of time* directed at a specific person." (Emphasis added). See also Seney v. Morhy, 467 Mass. 58, 64 (2014)(the order must be based on three separate and distinct acts that form a pattern of harassment).

One continuous act cannot be severed into individual acts in order to satisfy the statute. Smith v. Mastalerz, 467 Mass. 1001 (2014)(Add. 2-3). For example, driving by the plaintiff's home three separate times during the same encounter constitutes one continuous act. Id. (rejecting district court's ruling to treat each drive-by as a separate act). Similarly, in an unpublished opinion after Smith, the Appeals Court ruled that the 58 year old male defendant's conduct of approaching a 17 year old female plaintiff from behind and taking her photograph,

then driving by her, turning around and taking another photograph a few minutes later constituted one continuous act. Mielke v. Hardie, No. 13-P-104, slip op. June 19, 2014. (Add.4).

Applying Smith and Mielke to the facts of this case requires that the song be viewed as one continuous act. Like the drive-bys, the individual statements within the song cannot be separated from one another. In fact, the lyrics of the song are even more closely interrelated in time and space than the conduct described in Smith and Mielke. For similar reasons, the number of students who heard the song may not function as a multiplier. Though the number of students who heard the song likely exacerbated the plaintiffs' distress, the question is not the degree of harassment caused by one particular incident. Rather, the question is whether there are three separate acts to support the order.

Thus, there is no "a pattern of harassment . . . over a period of time" present in this case. O'Brien, 461 Mass. 415, 420 (2012). See also Demayo v. Quinn, 87 Mass. App. Ct, 115, 117 (2015) citing Commonwealth v. Welch, 444 Mass. 80, 90 (2005) (plaintiff must show the defendant intended to target the victim with harassing conduct on at least three occasions). The plaintiffs themselves described the song as "out of the blue" and "random." In fact, M.D. specifically testified that there was no historical pattern between S.C. and him either before or after the song. Though the song is understandably upsetting, standing alone it is an insufficient basis to issue a harassment order. As the court noted in Mielke, the plaintiffs are not left without remedy. If the defendant continued with such conduct towards the plaintiffs and the conduct meets the requirements of G. L. c. 258E, the matter maybe revisited in the district court. Mielke, No.13-P-104, slip op. fn. 1, June 19,2014). At present, however, the record is inadequate.

Given the holding of Smith, the defendant has demonstrated an issue worthy of presentation to an appellate court and a reasonable possibility of a favorable decision. Ward v. Boletti, 10 Mass. App. Ct. 629, 633(1980). See supra 2-5. In the meantime, S.C. remains out of school for fear of potential criminal violations arising from a chance meeting at school. The potential impact a criminal charge could have on his future is overwhelming. For similar reasons, S.C. cannot risk attending graduation. Missing graduation is a considerable loss to both S.C. and his parents and one that cannot be remediated. In addition, he continues to suffer the irreparable harm to his reputation associated with a harassment order that should not have issued.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this Court **ALLOW** the Motion To Reconsider the Issuance of the Order and/or Stay the order pending appeal. In the alternative, the defendant requests that for graduation ceremonies on June 5, 2017 only, that the conditions in effect be limited to: 1) No abuse of either plaintiff and 2) Stay away from the plaintiffs' residences.

Respectfully submitted
S.C.,
By his attorney,

Jane D. Prince
27 Congress Street
Salem, MA 01970
(978)745-6200
BBO # 661187

May 5, 2017

COMMONWEALTH OF MASSACHUSETTS

Essex, s.s. District Court

Docket Nos.

MD
and
FK
v.
S.C.

MEMORANDUM OF DECISION AND FINDINGS ON
MOTION TO RECONSIDER ISSUANCE OF HARASSMENT PREVENTION ORDERS

After a hearing on May 17, 2017, I hereby **DENY** the Defendant's Motion to Reconsider. I find the following:

PROCEDURAL HISTORY

On Friday, March 17, 2017, Plaintiffs and M.D. father and son, respectively, appeared at the District Court to obtain ex-parte harassment prevention orders pursuant to G.L. c. 258E against Defendant . The orders were issued and scheduled for a two-party hearing on Tuesday, March 28, 2017. The conditions ordered included that Defendant SC stay 100 yards away from the Plaintiffs, and stay away from the Plaintiffs' residence and High School. On Saturday, March 18, 2017, Plaintiff FK appeared at the Police Station and obtained an ex-parte harassment prevention order against Defendan SC from the on-call judge.

On Monday, March 20, 2017, Defendant SC filed and appeared in District Court on a Motion to Vacate the harassment prevention orders. Plaintiffs were present to oppose the Defendant's Motion to Vacate. The motion was denied. Additionally, the court issued an harassment prevention order for Plaintiff FK , active until March 28, 2017, with the conditions that Defendant SC stay 10 yards away from Plaintiff FK , and stay away from her residence and High School.

On Tuesday, March 28, 2017 all parties were present in District Court for a hearing to extend the temporary harassment prevention orders. The Plaintiffs appeared pro se. Defendant SC was also present, represented by counsel, to oppose the issuance of any further orders.

At the hearing on March 28, 2017, all three Plaintiffs testified and were subject to cross examination by the attorneys for SC . The Plaintiffs introduced exhibits, including a typed copy of song lyrics, which the defendant stipulated were a fair and accurate representation

of the song lyrics at issue, and a written statement of Plaintiff FK The Defendant presented evidence in the form of testimony from his mother, e, and an Assistant Principal from High School. Plaintiff father cross-examined the witnesses presented by the defendant. The Defendant admitted into evidence a letter from his parents, and the High School Student Safety Plan generated on March 20, 2017, which was signed by the Defendant and his mother. The Defendant also introduced a police report from March 17, 2017, written by Police Officer]

As a result of the hearing on March 28, 2017 the Court extended the harassment prevention order on behalf of Plaintiffs MD and FK until March 27, 2018. The terms of the harassment prevention orders were modified to include the following: defendant ordered not to abuse plaintiffs, not to contact plaintiffs, remain 50 yards away from plaintiffs, and remain away from plaintiffs' residences. The provision ordering the defendant to stay away fror High School was not extended. The Court denied an extension of the ex-parte harassment prevention order on behalf of Plaintiff [father].

On May 8, 2017, the Defendant filed a Motion to Reconsider and / or Motion to Stay Harassment Prevention Order Pending Appeal. On May 17, 2017 a hearing was held in the District Court on the Defendant's Motion to Reconsider. Plaintiffs MD a and FK appeared pro-se to oppose the Motion to Reconsider. The Defendant appeared and was represented by counsel. At the hearing, Plaintiffs MD and testified and were subject to cross examination by counsel for the Defendant.

FINDINGS OF FACT

Based on the testimony of witnesses under oath and the exhibits entered into evidence during two hearings in the District Court, on March 28, 2017 and May 17, 2017, I hereby find the following facts:

Plaintiffs MD & F.K and Defendant SC , at the time of these actions, are seniors at High School. On March 16, 2017, Plaintiff MD became aware through friends of a rap song posted on a public web site for sharing music, Sound Cloud (www.soundcloud.com). The song had been posted by the defendant, SC The song had lyrics, which referenced MD n by name. The song, titled, "Callin' Out Pussies in the School," was over three minutes long. Defendar SC had posted the song on Sound Cloud, and then further distributed his Sound Cloud posting via Snap Chat, a social media platform. Defendan SC Snap Chat "story" contained the instruction to check out his song posting, with the tag line, "Callin' Out the Pussies in the School." This posting was visible to Defendant SC 's Snap Chat followers, known as "friends," which include many of the students in the senior class at High School.

Plaintiff knew Defendant because they were in the same chemistry class the preceding year at School. Plaintiff MD and Defendant SC minimally interacted during the chemistry class junior year, and to Plaintiff MD's s knowledge, there was no reason for ill-will between Plaintiff MD and Defendant SC . Plaintiff MD and Defendant SC barely knew

each other, did not have friends in common, and did not move in the same social circles. Plaintiff MD was a member of the School hockey team, and prior to these allegations, Defendant SC been the team.

On Thursday, March 16, 2017, Plaintiff MD was informed, via social media, by at least six different individuals, of the posting of Defendant SC 's song about him on Sound Cloud. Plaintiff MD was able to listen to the song on the Sound Cloud public website. After listening to the song, Plaintiff MD was placed in fear of imminent serious physical harm. In addition to the fear for his own safety, Plaintiff MD also feared for the physical safety of his girlfriend, Plaintiff FK , and the physical safety of his family members.

Plaintiff MD 's fear of imminent serious physical harm was based on several, related factors. His fear was based on violent song lyrics directed at him by name and distributed to numerous members of the High School student body.[1] The lyrics included reference to Plaintiff MD by name, Mr. 's chemistry class, and the statements, among others, that, "I'm gonna blow your fuckin' brains out," "I'm takin' your family down one by one, boom," and "I'm gonna fuck you up soon." Plaintiff MD 's fear was also based on the fact that Plaintiff MD barely knew Defendant SC had not interacted with Defendant SC since chemistry class the year before, and had no idea why Defendant would harbor him any ill-will. Plaintiff MD felt this song was "coming out of nowhere." Further, the nature of the song, which was rapped over a musical track, appeared to have been "produced," uploaded to Sound Cloud, and then further distributed via Snap Chat. The depth of these efforts concerned Plaintiff MD as they evinced a level of commitment to communicating, and thereby possibly following through with, the message contained in the violent lyrics.

[1] The song lyrics, admitted as a Plaintiff's exhibit, include the following lyrics identified by the Plaintiff as placing them in fear of imminent serious physical harm: "Makin' your bitch sittin' and stayin' on her knees, ya I like bitches on her knees / Then she gonna suck my D until she bleeds, ya / Soon to be I'm gonna sit your bitch down in the fuckin' lobby / Hey you know how it is because you can't stand up / You're a pussy just like MD yay a / Callin' out every name 'cause you know her world is a fuckin' shame / You can't do shit, all you know is how to steal the booze and you never know how to act / 'Cause you're a dick and you can't do shit 'cause your girlfriend is a boy, ya, ya / You can talk shit cause every single day I'm spittin' these rhymes and slaying your bitch, ya / I'm takin' your family down one by one, boom / And you can't do shit 'cause I'm a fuckin' runt, ya / You can't do anything but I'm gonna blow your fuckin' brains out soon / You're gonna see how to arrange out, ya / I'm just doin' this shit for the world telling you how I can fucking blow up, / And go places, now you're talking shit, like why? I'm gonna fuck you up soon, don't you fucking / try, ya. You don't know how to fucking go. / I'm spittin' these so you know where to fucking go in the future instead of being on the fucking side and not homeless and you can fucking fly like me. / I'm gonna show you how to do this shit every day. I don't know why you fucking complain. / I'm just going places and showing you how to always go and never talk back to me. / 'Cause I'm gonna blow your fucking brains out. / I told you, you better fuckin' cut the shit man. / I gonna show you how to fucking go all the places. I'm gonna shit on your face if you don't / fuckin' change, you stupid pussy. / You can't do shit, all I can hear is my name being called, ya. / I don't know what you are talkin' about, talking shit in Mr. Bledsoe's class. / Like bitch get the fuck off my name. / You don't fucking know how to rap, you don't know how to trap. / You don't know anything in this fucking world. All you do is play with your dick and jack off to / the fucking boy you're fucking dating."

Plaintiff I MD 's father, Plaintiff redacted also listened to the song and was placed in fear of imminent serious physical harm for himself, his son MD , and his other immediate family members, including a younger son and a nephew at High School, and a younger son at an middle school. Plaintiff redacted s fear was based on the same factors identified by his son, and also specifically by the lyrics, "I'm takin' your family down one by one, boom."

Plaintiff FK listened to the song and was placed in fear of imminent serious physical harm. Although she was not named in the song, Plaintiff FK is in a dating relationship with Plaintiff MD and she was made fearful and intimidated by the song lyrics that detailed what she believed to be violent sexual acts against her. In addition to being fearful of the lyrics identified by Plaintiff MD Plaintiff FK was placed in fear by additional lyrics including, "Makin' your bitch sittin' and stayin' on her knees, ya I like bitches on her knees," "Then she gonna suck my D until she bleeds, ya," "soon to be I'm gonna sit your bitch down in the fuckin' lobby," and "everyday I'm saying these rhymes and slaying your bitch."

Plaintiff [father] informed school officials of the posted song and his concerns for the safety of his sons, family members, and Plaintiff FK On Friday, March 17, 2017, at 7:30 a.m., School Resource Officer of the Police met with Plaintiff [father], his wife, and MD at the high school.

After meeting with the [family] Officer then spoke with Defendant SC High School Assistant Principal was present. Defendant SC told Officer that Plaintiff MD had "shaded" him in the science class junior year. Defendant SC explained that by "shaded," he meant that Plaintiff MD had said things that made others look negatively at Defendant SC , although Defendant SC could not remember specifically what Plaintiff MD had said.[2] Defendant SC told Officer he was "free styling" rap, meaning that the song was not planned out. Instead, Defendant SC asserted that as he was creating the song he got "caught up" in the moment and tried to sound like a rapper. Defendant SC said he had no intention of hurting Plaintiff MD or his family. Defendant SC told Officer that he took the song off of Sound Cloud the same day he posted it, after receiving threats from the hockey team.[3]

On March 17, 2017 High School suspended Defendant SC for three days. Defendant SC was also removed as the of the High School team. On March 17, 2017, Plaintiffs MD + father appeared in District Court, applied for, and obtained, ex-parte temporary harassment prevention orders against Defendant SC The harassment prevention orders included provisions ordering Defendant

[2] Argument was presented by defense counsel that an unidentified friend of Defendant SC told Defendant SC that Plaintiff MD had "shaded" Defendant SC in the junior year chemistry class. Aside from Defendant SC 's mother alluding to the negative influence of this unidentified friend in the creation of the song at issue, there was not additional testimony or evidence presented on this point.

[3] Plaintiff FK testified at the May 17, 2017 hearing that the song continues to be accessible via the public Sound Cloud website and application.

SC to stay away from High School. The ex-parte orders were placed in effect until March 28, 2017.

After his conversation with Defendant SC, Officer spoke with Plaintiff FK to advise her of her right to obtain an harassment prevention order. Plaintiff FK was told that Defendant SC confirmed to Officer that his lyrics referred to Plaintiff FK in particular. This communication increased Plaintiff FK's fear of imminent serious physical harm by the defendant. Plaintiff FK went to the Police Station and obtained an emergency harassment prevention order from the on-call judge on Saturday, March 18, 2017. Officer applied for a criminal complaint against Defendant SC for the charge of threats. After a hearing before a clerk magistrate, the complaint was dismissed.

On Monday, March 20, 2017, Defendant SC filed a motion to vacate the harassment prevention orders. After a hearing in the District Court, at which the Plaintiffs and the Defendant were present, the Defendant's motion to vacate was denied. The Court granted Plaintiff FK's a temporary harassment prevention order, which included an order that Defendant SC remain away from High School, in effect until March 28, 2017.

On March 26, 2017, officials at High School executed a "Student Safety Plan." The Safety Plan was agreed to by Defendant SC and his parents. The Safety Plan directed Defendant SC to, "use social media responsibly and refrain from posting in appropriate materials or contacting the students that were threatened, not initiate in physical, verbal, written or electronic contact (including social media) before, during, or after school with the students that have been identified in recent incident, cease and desist from making inappropriate verbal or online comments toward any student which interferes with their sense of dignity." High School officials presented this Safety Plan to Plaintiffs MD+ FK and Plaintiff FK remained in fear of imminent serious physical harm from the defendant, and she felt that the school's Safety Plan was inadequate to prevent Defendant SC from interacting with her or coming into physical contact with her.

On Tuesday, March 28, 2017, a hearing was held in the District Court to extend the harassment prevention orders of Plaintiff father L, Plaintiff L, MD and Plaintiff FK. All parties were present. After a hearing, the Court amended the terms of the harassment prevention orders issued on behalf of Plaintiffs n and , permitting Defendant SC to return to High School by lifting the provision of the temporary orders that compelled the defendant to stay-away from the high school, and changing both stay-away provisions from 100 yards (Plaintiff MD), and 10 yards (Plaintiff FK), to 50 yards. The 50 yard stay-away provision was imposed in consideration of testimony from an High School Assistant Principal, who testified that given the geography of High School, Defendant SC could attend High School without violating the 50 yard stay away provision, and further, that High School would work with the Plaintiffs and the Defendant to ensure against incidental contact or other actions that might result in violations of the harassment prevention order on school grounds. The Assistant Principal also testified that High School intended to undertake measures to

keep Defendan SC separate from Plaintiff I MD's s younger brother and cousin, who also attend the high school.

On Wednesday, March 29, 2017, Defendant SC returned to High School. Plaintiff FK was informed by High School that they would allow for Defendant SC to leave classes five minutes early, thereby eliminating the possibility of contact in the school hallways between classes, or other violations of the harassment prevention order on school grounds. That same day, Plaintiff FK encountered the defendant in a stairwell in High School. The contact appeared to be "incidental," in that Defendant SC encountered Plaintiff I FK stared at her, but did not speak. Plaintiff was distraught, fearful, and felt unsafe at school due to the interaction with Defendant despite the imposition of school safety plans and the harassment prevention order. She immediately alerted school officials. Plaintiff FK was later advised by school officials that Defendant SC had declined to leave his class five minutes early because he was embarrassed to do so. Plaintiff FK filed a criminal complaint for violation of harassment prevention order. The complaint was dismissed after a clerk's hearing.

Since March 29, 2017, Defendan SC has chosen not to return to School, notwithstanding the provisions of the harassment prevention order that allowed him to do so. Instead he has continued his academic work through High School from home, and he is scheduled to graduate from High School in June. Plaintiffs MD and I FK have been made aware via other students that Defendant SC continues to maintain a presence on social media, although there have been no further incidents alleged as of May 17, 2017, which could constitute violations of the harassment prevention orders.

The School graduation ceremony is scheduled for June 5, 2017 at the l. Plaintiffs MD and I FK remain in fear of harassment, and specifically in fear of imminent serious physical harm and intimidation, if the defendant is permitted to attend the graduation ceremony.

FINDINGS OF LAW

A party seeking a harassment prevention order under G. L. c. 258E, § 3, must demonstrate "harassment," which the statute defines in relevant part to mean "[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property that does in fact cause fear, intimidation, abuse or damage to property." *Van Liew v. Stansfield*, 474 Mass. 31, 36-37 (2016), citing G. L. c. 258E, § 1. The word, "malicious" is also defined in G.L. c. 258E, § 1, and means "characterized by cruelty, hostility or revenge." *Van Liew*, 44 Mass. at 37 n. 9.

I find that the conduct of Defendar SC constituted three or more acts of willful and malicious conduct, aimed at Plaintiffs MD + FK with the intent to cause fear, intimidation or abuse, which did, in fact cause fear, intimidation, and abuse.

Fighting Words and True Threats. The definition of "harassment" in G.L. c. 258E was crafted by the Legislature to "exclude constitutionally protected speech," and to limit the

categories of constitutionally unprotected speech that may qualify as "harassment" to two: "fighting words" and "true threats." *Van Liew*, 474 Mass. at 37, citing *O'Brien*, 461 Mass. at 425. *See Seney* v. *Morhy*, 467 Mass. 58, 63 (2014). To qualify as "fighting words" the words "must be a direct personal insult addressed to a person, and they must be inherently likely to provoke violence." *Id.* citing *O'Brien v. Borowski*, 461 Mass. 415, 423 (2012). As for "true threats," these include "direct threats of imminent physical harm," as well as "words or actions that — taking into account the context in which they arise — cause the victim to fear such [imminent physical] harm now or in the future." *Id.* citing *O'Brien*, 461 Mass. at 425.

Moreover, to constitute "harassment" within the definition of the term in G.L. c. 258E, the fighting words or true threats must have been made with an intention to cause, and must actually cause, abuse, fear, intimidation, or damage to property. *Van Liew*, 474 Mass. at 37, citing G. L. c. 258E, § 1. Fear is narrowly defined as fear of physical harm or fear of physical damage to property; it must be more than "a fear of economic loss, of unfavorable publicity, or of defeat at the ballot box." *Van Liew*, 474 Mass. at 37, citing *O'Brien, supra* at 427.

I find that the song, "Callin' Out Pussies in the School," is not constitutionally protected speech and constitutes harassment within the definition of G.L. c. 258E. The song contained fighting words that were direct personal insults addressed specifically to Plaintiff MD 1, by name. Defendant SC raps, "You're a pussy just like MD ," and then continues to direct the following fighting words at Plaintiff MD 1, among others, "'Cause you're a dick and you can't do shit," "'cause your girlfriend is a boy," "you stupid pussy," and "all you do is play with your dick and jack off to / the fucking boy you're fucking dating." The fact that these lyrics were directed at Plaintiff MD 1 were confirmed by Defendant SC 's statements to Officer

The song contained direct person insults addressed specifically to Plaintiff FK 1 as well, given her known status as Plaintiff MD 's s girlfriend. After speaking with Defendant SC , Officer 1 nformed Plaintiff FK that lyrics in the song were directed at her.[4] Defendant SC refers to Plaintiff FK as "your bitch," and "the fucking boy you're fucking dating."

The lyrics, when viewed as a whole, were inherently likely to provoke violence. This was evinced not only by the lyrics themselves, but by the claim of the defendant that he removed the song from Sound Cloud the same day he posted the song, after he was threatened by members of the hockey team, who had listened to the song on Sound Cloud.

The lyrics also constitute true threats, which are direct threats of imminent physical harm. Specific lyrics do contain, on their face, true threats to Plaintiff MD , including, "I'm

[4] Plaintiff FK 's testimony and written statement, admitted into evidence, provide evidence of this statement by the defendant. In G.L. c. 258E proceedings, as in G.L. c. 209A proceedings, "the rules of evidence need not be followed, provided that there is fairness in what evidence is admitted and relied on." *Frizado v. Frizado*, 420 Mass. 592, 597-598 (1995). *See S.T. v. E.M.*, 80 Mass.App.Ct. 423, 429 (2011); *F.A.P. v. J.E.S.*, 87 Mass.App.Ct. 595, 602 (2015). See also, Guidelines for Judicial Practice: Abuse Prevention Proceedings s. 5:03 (2011)("The common law rules of evidence, e.g., those regarding hearsay, authentication, and best evidence, should be applied with flexibility, subject to considerations of fundamental fairness").

takin' your family down one by one, boom," "I'm gonna blow your fuckin' brains out soon,". 'Cause I'm gonna blow your fucking brains out," and "I'm gonna fuck you up soon." Other lyrics contain true threats to Plaintiff FK including, "Makin' your bitch sittin' and stayin' on her knees, ya I like bitches on her knees," "she gonna suck my D until she bleeds," and "soon to be I'm gonna sit your bitch down in the fuckin' lobby."

The violent and sexual nature of the song lyrics, as well as contextual factors such as the creation, production, posting of the song to Sound Cloud, and further publication of the song via Snap Chat to numerous members of the High School student body, constitute words and actions that, taking into account the context in which they arise, caused Plaintiffs MD and FK fear imminent serious physical harm. The evidence before the Court demonstrated a growing fear on the part of the Plaintiffs as they contemplated these additional, unsettling contextual factors, which the Court finds to be a reasonable. The context of the high school environment, mass distribution and communication via social media, and a general heightened societal awareness and desire to prevent school shootings adds a sinister backdrop to this song, which impacted the Plaintiffs' fear of Defendant SC. These factors, combined with the limited contact between Defendant SC and the Plaintiffs preceding this song, leaves unexplained the disproportionate and incongruous level of vitriol contained in the explicit lyrics.

Defendant SC's statements to Officer contained in Officer s police report and entered into evidence by the Defendant, demonstrate that the Defendant's rap song was a response to the Defendant's impression that Plaintiff MD had "shaded" him, or verbally slighted him, a year ago in chemistry class. The effort involved for Defendant SC to engage in the various steps to create, produce, distribute, and publicize this song are willful acts that evince a malice and desire for revenge, which caused abuse, fear of physical harm, and intimidation of the Plaintiffs. Further, the Defendant's use of the public forum of Sound Cloud, as well as Defendant SC's outreach to members of the High School student body via Snap Chat evince his intent to cause abuse, fear, and intimidation.

Three Acts of Willful and Malicious Conduct. A plaintiff seeking protection through a civil harassment order must show that the defendant engaged in at least three willful and malicious acts, and that for each act the defendant intended to cause fear, intimidation, abuse, or damage to property. *O'Brien v. Borowski*, 461 Mass. 415, 426 n. 8 (2012).

Defendant SC argues that the holding in *Smith v. Mastalerz* is dispositive and mandates a finding in favor of the Defendant under the theory that, "Callin' Out Pussies in the School," is a single song and does not constitute three separate acts. *See Smith*, 467 Mass. 1001 (2014). In *Smith*, the Supreme Judicial Court examined whether a defendant's acts in repeatedly circling back to drive by a plaintiff's home constituted three separate acts. The Court found, "Even if we were to conclude the defendant's conduct constituted one act of harassing conduct, we disagree with the judge that driving by the plaintiff constituted three separate acts of harassment. In the circumstances here, where there was no evidence refuting the defendant's claim that he lived down the street from the plaintiff, we conclude that driving by the plaintiff's home within a very short period of time was one continuous act." *Smith*, 467 Mass. at 1001.

As is demonstrated by the context laden language of the Court's decision in *Smith*, however, the facts individual to each action pursuant to G.L. c. 258E are to be assessed on an individual basis and are often a matter of credibility and interpretation for the finder of fact. "Each harassment order case presents to the fact finder a different constellation of facts, and an evaluation of the evidence will draw heavily on credibility determinations made by the judge who hears them." *Henao v. Abernathy*, 90 Mass. App. Ct. 1107 (unpublished 2016).

The three willful and malicious acts applicable in this case may be related to each other and may occur in succeeding order. In *Commonwealth v. Welch*, albeit in the context of criminal harassment, the Supreme Judicial Court examined the phrase in G.L. c. 265, s. 43A, requiring a "pattern of conduct or series of acts". *Welch*, 444 Mass. 80, 89 (2005). The Court held that the crime of criminal harassment requires the Commonwealth to prove three or more incidents of harassment for the following reasons. The Court relied upon the dictionary definition of "series" as "a group of *usually three or more things or events* standing or succeeding in order and having a like relationship to each other" (emphasis added). *Id.* citing Webster's Third New Int'l Dictionary 2072 (1993). See *Commonwealth v. Bell*, 442 Mass. 118, 124 (2004) (deriving meaning of statutory terms in part from dictionary definitions).

In the instant case, I find that the Defendant engaged not in one continuous act, but rather in three or more separate willful and malicious acts intended to cause fear, intimidation or abuse, which satisfy the requirements of G.L. c. 258E. The individual lyrics sung by the Defendant are specific and describe more than three separate acts of physical and sexual violence to Plaintiffs MD and FK. Although one song, using different and individual lyrics, Defendant SC states he will make "your bitch sittin and stayin' on her knees. . . she gonna suck my D until she bleeds," "soon I'm gonna sit your bitch down in the fuckin' lobby," "slaying your bitch," "I'm takin' your family down one by one, boom," "I'm gonna blow your fuckin' brains out soon," "I'm gonna fuck you up soon," and "'cause I'm gonna blow your brains out."

Additionally, the defendant engaged in a series of separate acts necessary to create, produce, publish, and publicize the lyrics in question. The steps necessary to create "Callin' Out Pussies in the School," to publically post the song, and to distribute the song to members of the [redacted] High School student body were at least three willful and malicious acts intended to cause fear, intimidation, or abuse. These various steps were testified to during both the March 28, 2017 and May 17, 2017 hearings, and they were identified as a specific source of fear for the Plaintiffs, given the perceived disproportionality between the Defendant's multiple efforts and the prior lack of relationship between the parties.

Finally, the song was distributed on two separate social media platforms (Sound Cloud and Snap Chat). The first distribution was made to the public at large, and the second distribution was aimed at a target audience, members of the [redacted] High School student body, which constituted more than three recipients. Plaintiff [redacted] MD testified that he received notice of the song from at least six separate individuals. Plaintiff [redacted] FK testified that most members of the [redacted] High School senior class were "friends" with Defendant SC via Snap Chat. As of May 17, 2017, Plaintiff [redacted] FK testified that the song remained accessible to via Sound Cloud.

CONCLUSION

For the reasons set forth herein, I hereby DENY the Defendant's Motion to Reconsider Issuance of the Harassment Prevention Orders, I DENY the Defendant's Motion to Stay the Harassment Prevention Orders, and I DENY the Defendant's Motion to Amend the Harassment Prevention Orders.

5/25/17
Date

Hon. Sarah W. Ellis
Associate Justice of the District Court