FILED IN OFFICE
OCT 21 2013
CLERK, COURT OF
APPEALS OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

MATTHEW CHAN, Appellant	)))	DOCKET NO.: A14A0014
vs.	))	LOWER COURT NO.: SU13DM409
LINDA ELLIS, Appellee	))	

RECEIVED IN OFFICE
2013 OCT 21 AM 10: 25
CLERK/COURT ADMINISTRATOR
COURT OF APPEALS OF GA

BRIEF OF APPELLEE LINDA ELLIS

Respectfully submitted,
Elizabeth W. McBride
Attorney for Appellee
Georgia Bar No. 730165
Page, Scrantom, Sprouse, Tucker
& Ford, P.C.
P.O. Box 1199
Columbus, Georgia 31902§
ewm@psstf.com

TABLE OF CONTENTS

PART I: APPELLEE'S RESPONSE TO PRELIMINARY STATEMENT OF APPELLANT AND STATEMENT OF FACTS 1

Jurisdiction..1

Statement of Facts..2

PART II: ARGUMENT AND CITATION OF AUTHORITY WITH RESPECT TO ENUMERATION OF ERRORS 11

A. Jurisdiction 11

B. Appellee's Response to Appellant's Enumeration of Errors 11

Proper Standard of Review....……………………………………………...11

Appellee's Response To Each Enumeration Of Error……………………13

PART III: ARGUMENT AND CITATION OF AUTHORITY 15

A. The Trial Court Had Discretion To Find That The Elements Of O.C.G.A. §16-5-90(a)(1) Were Met 15

B. Appellant Was Not Deprived Of Due Process 19

C. Appellant Failed To Properly Preserve His Objection To The Admissibility Of The Affidavit Of Timothy McCormack 20

CONSTITUTIONAL ARGUMENT 23

D. Chan's Speech Is Not Protected Speech; The Order Is Narrowly Tailored; And The Communications Decency Act Does Not Protect Chan Because His Forum Is Not Content Neutral So The First Amendment Is Upheld 23

1. Chan's Activity, Threats and Intimidation, Are Not Protected Speech...23

2. Even If Chan's Speech Is Protected, The Narrowly Tailored Order Is Proper Because It Allows Other Forms Of Communication. 25

3. Chan's Activities Violate The Communications Decency Act......27

CONCLUSION 30

TABLE OF CITATIONS

Cases

Allen v. Hub Cap Heaven, Inc., Hub Cap Masters International, Inc. v. Hub Cap Heaven, Inc., 484 S.E.2d 259; 225 Ga.App. 533(1997) 2

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 23

Cohen v. California, 403 U.S. 15 (1971) 23

Daker v. Williams, 279 Ga. 782, 621 S.E.2d 449 (2005) 18

F.T.C. v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009) 27

Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008) 28

Fletcher v. State, 199 Ga.App. 756, 406 S.E.2d 245 (1991) 21

Ford v. Ford, 270 Ga. 314 (1998) 19

In re Estate of Love, 274 Ga. App. 316, 618 S.E.2d 97 (2005) 22

Jones v. Dirty World Entertainment Recordings, LLC, 840 F.Supp.2d 1008 (E.D.Ky. 2012) 28

Jones v. State, 310 Ga. App. 705, 713 S.E.2d 895(2011) 17

Miller v. California, 413 U.S. 15 (1973) 23

New York Times Co. v. United States, 403 U.S. 713 (1971) 26

Owen v. Watts 307 Ga.App. 493, 705 S.E.2d 852 (21010).....................................17

Owen v. Watts, 307 Ga.App. at 497...17

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 25

Quinby v. Rausch, 300 Ga.App. 424, (2009) (citing Rawcliffe v. Rawcliffe 283 Ga.App. 264, 265 (2007))..11

Rokowski v. Gilbert, 275 Ga. App. 305, 620 S.E.2d 509 (2005), cert. denied, (Jan. 17, 2006). 22

Schenck v. United States, 249 U.S. 47 (1919) 24

Smoky, Inc. v. McCray, 196 Ga. App. 650, 396 S.E.2d 794 (1990) 22

Texas v. Johnson, 491 U.S. 397 (1989) 23

United States v. Eichman, 496 U.S. 310 (1990) 23

United States v. O'Brien, 391 U.S. 367 (1968) 25

Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) 23

Virginia v. Black, 538 U.S. 343 (2003) 24

Watts v. United States, 394 U.S. 705, 708 (1969) 24

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 23

Zeran v. America Online, Inc., *129 F.3d 327 (4th Cir. 1997)* 29

PART I: APPELLEE'S RESPONSE TO PRELIMINARY STATEMENT OF APPELLANT AND STATEMENT OF FACTS

Appellee Linda Ellis (hereafter, "Appellee", "Linda Ellis", or "Ms. Ellis") respectfully responds to the Brief of Appellant (hereafter, "Appellant" or "Chan") appealing the Stalking Permanent Protective Order issued pursuant to O.C.G.A. §16-5-90, (hereafter, "Georgia's Stalking Statute").

Jurisdiction

The Georgia Court of Appeals has jurisdiction over the instant Appeal pursuant to the Georgia Constitution which states, "The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts of law". *Ga. Const. Art. 6, §5 para, 3.* This appeal does not concern a matter reserved exclusively to the Georgia Supreme Court, which exercises exclusive appellate jurisdiction in (1) all cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States in all cases in which the constitutionality of a law ordinance or constitutional provision has been drawn in question; and (2) all cases of election contest. *Ga. Const. Art. 6, §6 para 2.* The instant Appeal does not

challenge the constitutionality of O.C.G.A. §16-5-90 , merely its application in the instant case. Further, the Georgia Court of Appeals has jurisdiction over appeals involving statutes conferring injunctive relief. *See* *Allen v. Hub Cap Heaven, Inc., Hub Cap Masters International, Inc. v. Hub Cap Heaven, Inc., 484 S.E.2d 259; 225 Ga.App. 533(1997).*

Statement of Facts

Appellee Linda Ellis is the author of a copyrighted poem entitled "The Dash Poem". (HT-52,line 16-18) In order to protect her intellectual property rights under established copyright law, Ms. Ellis notifies those persons engaged in the unauthorized use of her copyrighted material that they are required to compensate her for that usage. Sometime around June of 2012 (HT-85, line 7), Appellant Matthew Chan began a forum specific to Ms. Ellis on his website entitled Extortioletterinfo.com (hereafter, "ELI") used for the purpose of harassing and intimidating persons such as Ms. Ellis into not seeking to protect the use of their copyrighted material. Chan, through the use of ELI, uses not only profane personal insults but also threats and intimidation toward his targeted victims in

exchange for compensation from those persons who wish to use copyrighted material illegally. (HT-25,lines 1-22)

Chan privately owns and completely controls his website. (HT-10, lines 9-12; HT-11,lines 11-14) Although he can delete or remove any post at will (HT-12, lines 18-25; HT-13, lines1-2; lines 17-21); (HT-15, lines 1-3) including any post regarding Linda Ellis (HT-14, lines 13-15), he chooses to allow profane images and threats to remain on his website (HT-13, lines 17-15), including those posts he himself authors. Chan has no terms and conditions for use of the website (HT-15, lines 15-25; HT-16, lines 1-11).

Chan's ongoing and personal harassment of Ms. Ellis consists of numerous sexually explicit, misogynistic imagery; threats and use of personal information obtained by stalking. According to Chan, his website has 1,900 posts about Ms. Ellis out of a total of approximately fourteen thousand (14,000) (HT-96, lines 19-25), "only a small fraction" of his total posts (HT-39,lines 18-22).

Some of the examples of Chan's internet harassment of Ms. Ellis proven at trial are as follows: 1. A reference to Linda Ellis stating "Re: Linda Ellis is also a meme…what an Internet icon" that goes on to say, "Well, she is "dead" right now" (HT-21, lines 21-25; HT-22, lines 1-14). 2. A sexually explicit and

derogatory picture, "meme", with Ms. Ellis' face shown over a naked body, her hands covering her private area, with the caption "Ready, Aim, Fire!", described by Chan as "carryover of a threat" (HT-22, lines 7-14). 3. A posting by Chan stating "Maybe she (referring to Ms. Ellis) will understand the consequences to her personally" (HT-23, lines 5-9); and, describing his own reaction to Ms. Ellis, "I will pull that trigger much quicker if need be" (HT-23, lines 17-20) and "I don't fight alone" (HT-23,line 21).

At trial Chan admitted to several postings dealing with Ms. Ellis' family members as follows: "I predict there will be some collateral damage to innocents on her side, but it doesn't matter to me. This could mean exposing information on her (referring to Ellis') family members." (HT-27, lines 2-7) Chan goes on to post, "Personal Revenge and Payback: I also have a long memory. I make no secret of it. If pushed far enough, I am capable of many things. I won't elaborate on what I might be capable of, and I don't ever want anyone to push me too far." (HT-27, lines 8-15) Chan then says on the posting, "I absolutely subscribe to getting personal revenge and personal payback against those copyright extortion employees". (HT-27, lines 16-19) Chan's message to Ms. Ellis goes on to say, "I'm holding back for a couple of good reasons. One of them is your daughter.

Yes, I know a lot about her." (HT-27, lines 24-25;HT-28, line 1) Chan's postings about Ms. Ellis' daughter include "I believe she is innocent in all this and she could be affected by the info I have released." (HT-28, lines 11-14) The posting goes on to say "I hesitate a bit on going more personal simply because I know there will be a ripple effect". (HT-29, lines 15-16) clearly demonstrating the personal nature of Chan's messages to Ms. Ellis. Chan admitted the postings were directed at Ms. Ellis (HT-31, lines 1-5).

Chan then went on to admit that he himself posted the following: "But I will leave a few nuggets to let you know I mean business. Some of this will mean very little to most people, but YOU (capitalized in the quote) should get it. 1. Linda Marie Hicks Ellis, 50. (Referring to Ms. Ellis and her age) 2. David Lynn Ellis, 52. (Referring to her husband and age) 3. MEE, Museum. (Referring to the initials of Ms. Ellis' daughter and the museum, where her daughter works) 4. Roswell Downs. (Referring to the name of Ms. Ellis' subdivision/neighborhood where her home is located) (HT-31,lines 6-22) Chan also admitted he posted: "So there are people who hate you and looking to put you in the ground." (HT-32, lines 6-7)

In addition to posting Ms. Ellis' subdivision of Roswell Downs along with other personal information, Chan allowed a posting by Robert Krausankas entitled, "Matthew Chan visits Linda Ellis's hometown of Marietta, Georgia" (HT-35, lines 4-5); and a post by Krausankas stating "Just spoke with Matthew, he's en route to none other than Marietta, Georgia for a special event … Wouldn't it be ironic if he, quote 'happened upon Dash author and copyright troll Linda Ellis'"?- implying Chan might be going for the express purpose of visiting Linda Ellis. (HT-35, lines 9-13) Chan replied with his own posting, "Re: Matthew Chan visits Linda Ellis's hometown in Marietta, Georgia. I'm not going to say where exactly in Marietta I was, but let's just say I was in East Cobb very close to a Kroger grocery store, essentially a short distance from Roswell Downs," (Ms. Ellis' subdivision) (HT-35, lines 17-22) Chan blamed the posting of a picture of Ms. Ellis' home near that posting on Mr. Krausankas; but admitted it was a picture of her home (HT-36,lines 4-8).

Chan's website also had a posting that stated: "Re: Ellis, get ready, we are coming after you,!!" posted on December 4, 2012 but remaining on his website up until and at the time of the hearing. (HT-55, lines 4-7) While Chan was cross-

examining Ms. Ellis, he accidentally admitted to conducting surveillance on her. Chan asked her if she had evidence he had followed her – to which she replied that his postings on the internet stated he'd been near her home. Chan replied "On Surveillance. Okay. Have you ever seen me drive by your house?" (HT-63,lines 16-21) He later admitted to "boasting" of going to her house, but his defense was he didn't actually go to her house. (HT-66, lines 18-25) Ms. Ellis testified that they had had voice to voice communication; and that Chan had sent her a letter. (HT-62, lines 15-18) Ms. Ellis also testified to having seen a posting in which Chan states he's coming to her home with high powered lens cameras and video cameras. (HT-64, lines 10-12) Ms. Ellis testified to and played a portion of a video in which Chan states that Ms. Ellis understands "nothing but brute force". (HT-71, lines 20-23)

Chan made many statements at the hearing of this case which were ultimately proven to be false. One such statement was his denial of ever telephoning the fiancée of Ms. Ellis' employee, John W. Jolin. Chan denied ever making a cell phone call to Mr. Jolin or his then fiancée. (HT-40, 22-25) On rebuttal, Mr. Jolin testified that after posting on the internet, on Facebook, that he

would be out of town for the weekend, while he was out of town, a call came into his then fiancée's phone. When she re-dialed the number, it went to Chan's voicemail. (HT-99, lines 4-11) Chan admitted that the number (762) 359-0425 was his phone number and that he was "flabbergasted" (HT-101, 9-14), apparently because he was caught lying to the trial court. Chan's pattern of personally directed threats on his internet website involving not only Ms. Ellis but her family; his boasts of going to her home and references to death and persons wanting to kill Ms. Ellis; coupled with her testimony that she was in fear for her safety; were sufficient for the trial Court to find that the elements of O.C.G.A. §16-5-90 were met justifying the issuance of a Stalking Protective Order.

Appellant states, incorrectly, that it was not disputed that Chan and Ellis had never had any form of personal relationship and that they had never corresponded. Appellant's chart of the evidence presented and dates of occurrence is misleading. The *date of posting* of each of these posts might be accurate, but the *dates of occurrence* are ongoing, over a period of several months through and including the date of the hearing. While Appellant's chart attempts to mount a defense as to the individual postings on the ground that the information is public, or posted by

someone other than Chan, the cumulative effect of all of the postings was a pattern of communication to Ms. Ellis for the purpose of harassment and intimidation.

Regarding the Affidavit of Timothy McCormack, (hereafter "Affidavit") Appellant failed to object to its admissibility, and only objected to the weight and credibility of some of the testimony in the affidavit. Further, even if Chan's objection to the Affidavit could be taken as an objection to its admissibility, he did not make a proper hearsay objection or authenticity objection.

Appellant's statement that he is simply a publisher, broadcaster and reporter writing about the phenomenon of "copyright trolling" on ELI is deceptive; he admitted to receiving three hundred dollars ($300.00) compensation from a gentleman named Peter Burwash, referred to on Chan's website as his "client"; and who paid Chan to provide help in "motivating Linda to settle the case" she had against Burwash by posting offensive content about her. (HT-24, lines 21-25; HT-25, lines 1-15)

Regarding the Stalking Ex Parte Temporary Protective Order, Chan was served with a copy of the Petition For Stalking Protective Order contemporaneously with a copy of the Ex Parte Temporary Protective Order on

February 15, 2013 in accordance with Georgia law. (HT-51, lines 7-13); Trial Record (hereafter "R") at page 12, Sheriff's Entry of Service. The Petition referred to O.C.G.A. §16-5-94, which authorizes restraining orders for violations of either O.C.G.A. §16-5-90(a) or O.C.G.A. §16-5-90(b). Appellant therefore had notice that a stalking protective order could be issued against him pursuant to either code section and was therefore afforded his full due process as required by law.

Although the Court, during the morning portion of the hearing, mentioned a time constraint, it gave Appellant his requested thirty (30) minutes to review the exhibits prior to presenting his case-in-chief (HT-59, lines 21-25) when it reconvened the hearing after lunch; and it considered Chan's memorandum of law (HT-60, lines 5-10) which was admitted as Exhibit D-A. (HT-61, line 3)

When the Court issued its final ruling, it recited the language of O.C.G.A. §16-5-90(a)(1) and applied the facts of this case correctly, concluding that Appellant communicated with Ms. Ellis via the internet for the purpose of harassing and intimidating her and that Ms. Ellis was placed in reasonable fear for her safety. The Permanent Stalking Protective Order was authorized by law; supported by the evidence; and did not violate Appellant's Constitutional rights

under the First Amendment. For this reason, the trial Court's Order should be upheld and affirmed.

PART II: ARGUMENT AND CITATION OF AUTHORITY WITH RESPECT TO EACH ENUMERATION OF ERROR

A. Jurisdiction

The Georgia Court of Appeals has jurisdiction over this Appeal, as set forth above.

B. Appellee's Response to Appellant's Enumeration of Errors

Proper Standard of Review. The proper standard of review for this case is the abuse of discretion standard as to each and every enumeration of error. The abuse of discretion standard is applicable for appellate review of a trial Court's issuance of a permanent restraining order. "The grant or denial of a motion for protective order generally lies within the sound discretion of the trial Court. Accordingly, we will not reverse absent an abuse of that discretion" *Quinby v. Rausch, 300 Ga.App. 424, (2009) (citing Rawcliffe v. Rawcliffe 283 Ga.App. 264, 265 (2007)); Pilcher v. Stribling, 282 Ga. 166 (2007).* The evidence must be reviewed in light of the most favorable to the trial Court. *Quinby v. Rausch, 300 Ga.App.at 425*. As stated in

Quinby, “It is not this Court’s function to second guess the trial Court in cases such as this, which turn largely on questions of credibility and judgments. The trial Court is in the best position to make determinations on these issues, and we will not overrule its judgment if there is any reasonable evidence to support it”. *Quinby v. Rausch, 300 Ga.App. at 424 (citing Rawcliffe v. Rawcliffe 283 Ga.App. 265).* In the instant case, the trial Court heard the live testimony of both Appellee and Appellant and was in the best position to judge the candor and credibility of each party. As set forth in detail in the Statement of Facts above, the trial Court was given extensive proof that Chan controlled the content of his website; authored numerous postings himself personally directed at Ms. Ellis; and intended the postings to “pressure Ms. Ellis into settling” a dispute with one of his “clients”. The trial Court considering evidence that Chan boasted that he had gone to Ms. Ellis’ house; placed her under surveillance; and used her publically available personal information and that of her family members, properly found Chan’s conduct amounted to a pattern of threats and harassment for the purpose of intimidation. Chan’s use of sexually explicit images of Ms. Ellis with the caption “ready, aim, fire”; his references to death; and, use of postings such as “there are those who hate you and wanting to see you in the ground”; coupled with Ms. Ellis

testimony that she was afraid for herself and her family members (HT-54, Lines 7-23); supported the Court's decision as trier of fact to find that Chan put Ms. Ellis in reasonable fear for her safety.

Appellee's Response to Each Enumeration of Error

1. The evidence at the hearing of this matter was sufficient to support the trial Court's findings that all of the elements of O.C.G.A. §16-5-90(a)(1) and §16-5-90(a)(2) were established; the trial Court had sufficient evidence and discretion to find that Appellant not only contacted Ms. Ellis without her consent for the purpose of harassing and intimidating her; Appellant also placed her under surveillance, within the meaning of O.C.G.A. §16-5-90(a)(1) and O.C.G.A §16-5-90(a)(2).

2. Appellant's conduct violated both O.C.G.A. §16-5-90(a)(1) and §16-5-90(a)(2); and the Stalking Permanent Protective Order was issued pursuant to O.C.G.A. §16-5-94, which authorizes restraining orders for violations of either O.C.G.A. §16-5-90(a)(1) or §16-5-90(a)(2). Appellant had notice of the pendency of the proceedings when he was served with a copy of the Petition For Stalking Protective Order, which clearly sets forth that the Petition is brought pursuant to O.C.G.A. §16-5-94, which includes both O.C.G.A. §16-5-90(a)(1) or §16-5-

90(a)(2). At the time Appellant was served with the Petition, he was also served with a copy of the Ex Parte Temporary Protective Order, authorized under O.C.G.A. §16-5-94, if the requirements of either O.C.G.A. §16-5-90(a)(1) or §16-5-90(a)(2) are met. Appellant therefore had full due process because he was afforded notice of the entire statute under which the trial Court had discretion to find his conduct constituted a violation; his failure to adequately preserve this issue constitutes a waiver; and the abuse of discretion standard of review applies, rather than plain error.

3. Appellant failed to object to the admissibility of the Affidavit of Timothy McCormack (hereafter "Affidavit") and, though he made an objection, failed to raise a specific hearsay objection. The admission of the affidavit is therefore harmless error.

4. The application of Georgia's Stalking statute in this instance did not violate Appellant's First Amendment rights under the United States Constitution, as the communications by Appellant to Ms. Ellis, which included threats and intimidation, were not protected speech. Further, the Communications Decency Act of 1996 (47 U.S.C. §230) does not protect Appellant; rather, Appellant's internet activities violate the Communications Decency Act, because he used the

internet to harass and intimidate Ms. Ellis. Appellant is not protected by the "Safe Harbor" provisions of that Act because he owns and controls his website and contributes/publishes many of the postings.

5. The trial Court's Permanent Stalking Protective Order is not overly broad because it is content-neutral; narrowly tailored; serves the State's interest in protecting safety; and leaves open other forms of communication.

PART III: ARGUMENT AND CITATION OF AUTHORITY

A. The Trial Court Had Discretion To Find That The Elements Of O.C.G.A. §16-5-90(a)(1) Were Met

The evidence at the hearing supported a finding that the elements of O.C.G.A. §16-5-90(a)(1) and §16-5-90(a)(2) were established. The numerous threats and proof of surveillance by Appellant are set forth in detail in the Statement Facts above. To summarize, Appellant created and posted insults and threats on his website to intimidate Ms. Ellis. (HT-25,lines 1-22) He and his authorized users made references to killing her and wanting her in the ground (HT-32, lines 6-7). Postings made by Chan himself included direct communications to Ms. Ellis to let her know he had obtained information about her husband; her

daughter and daughter's place of employment; her neighborhood subdivision; a picture of her home; and boasts that he traveled to her home. The threats and attempts at intimidation were deliberate and directed personally to Ms. Ellis. They were not one-time postings; they were ongoing on a website completely controlled by Appellant. The entirety of each and every posting; the subject matter of the postings; and Chan's statements on his website that he travelled to her home, were more than sufficient to meet the requirements of O.C.G.A. §16-5-90(a)(1) and §16-5-90(a)(2).

In particular, Appellant conducted surveillance on Ms. Ellis by going to her subdivision and noting the nearby Kroger grocery store; finding out the names of her husband and daughter and where her daughter works. Appellant made threats with the use of his internet website on a computer and broadcasted the threats. These threats were received by Ms. Ellis where she lives and works, and are therefore "places" covered by the statute. Chan admitted his conduct was knowing and willful, and that its purpose was harassment and intimidation. Ms. Ellis testified to her fear and intimidation. There was sufficient evidence for the trial judge to determine that the elements of O.C.G.A. §16-5-90(a)(1) were met.

This Court recently interpreted the meaning of surveillance in *Jones v. State, 310 Ga. App. 705, 713 S.E.2d 895(2011)* as "close watch kept over someone or something" where the defendant, after being indicted for violations of a good behavior bond, parked outside of the place where the victim was staying. The Court held, "Thus, there is no basis whatsoever to believe that [the defendant] was somehow misled or surprised as to the incident referred to in the indictment, that his ability to prepare for trial had been impeded, or that he could be tried again for the same offense." *Jones at 708,*

Further, Chan's obtaining personal information about Ms. Ellis through the internet constitutes surveillance and his postings simply confirm that he did the surveillance. In *Owen v. Watts 307 Ga.App. 493, 705 S.E.2d 852 (2010),* this Court held that where a defendant placed the victim and her family under extensive surveillance through a combination of internet searches and third-party observations of the victim's home for purposes of obtaining information to file a complaint with the Department of Family and Children Services, the court had discretion to find this constituted surveillance and was authorized to grant a stalking protective order under O.C.G.A. §16-5-90(a)(1). *Owen v. Watts, 307 Ga.App. at 497.* Chan's numerous postings, over a period of several months,

whether they were ongoing or simply posted and removed, would constitute a pattern of harassment. *See Daker v. Williams, 279 Ga. 782, 621 S.E.2d 449 (2005*) In that case the Georgia Supreme Court held that a defendant who had contacted a victim twice in one week had engaged in a pattern of behavior within the meaning of the Stalking statute. *Daker at 785.* Clearly Chan's numerous postings which are ongoing and cumulative constitute a greater pattern.

Appellant's argument that he did not email Ms. Ellis the postings is insufficient to show he did not communicate with Ms. Ellis, as the statute clearly states that the communication may be done by "broadcast", which would cover an internet post.

Appellant cites *Autry v. State, 306 Ga.App. 125 (2010)* for the proposition that there was no pattern of conduct. In *Autry,* the victim thought she was being followed by the defendant on two separate occasions but the jury found the defendant not guilty on one of the incidents the Court held the evidence was insufficient to establish a pattern. That case is distinguishable because of the apparent random nature of the two incidents involving the victim. In this case Chan admits his purpose is to pressure Ms. Ellis; the communications are deliberate, willful and numerous.

B. Appellant Was Not Deprived Of Due Process

As discussed in the Statement of Facts above, Chan was served with a copy of the Petition For Stalking Protective Order on February 15, 2013, along with a copy of the Ex Parte Temporary Protective Order and therefore had notice of the pendency of the proceedings against him. The Petition For Stalking Protective Order specifically states that it is filed pursuant to O.C.G.A. §16-5-94, which authorizes restraining order if the elements of either O.C.G.A. §6-5-90(a)(1) or O.C.G.A. §6-5-90(a)(2) are satisfied. The trial Court had sufficient evidence to issue the Stalking Permanent Protective Order pursuant to O.C.G.A. §6-5-90(a)(1). The fact that Appellant was cross-examined and admitted to conduct which arguably violates O.C.G.A. §6-5-90(a)(2) is irrelevant, because the Permanent Protective Order was issued after the trial Court found the elements of (a)(1) were satisfied.

Appellant is incorrect in his assertion that *Ford v. Ford, 270 Ga. 314 (1998)* applies in the instant case. In that case the defendant was found in willful contempt of an order without first receiving a copy of the order or notice of a hearing. In the instant case, Appellant received a copy of the Order; notice in the

petition referring to the applicable statute which includes both O.C.G.A. §6-5-90(a)(1) or O.C.G.A. §6-5-90(a)(2); and Appellant was not found to be in willful contempt of the Temporary Protective Order. Respondent was therefore afforded his full due process as required by Georgia law.

C. Appellant Failed To Properly Preserve His Objection To The Admissibility Of The Affidavit Of Timothy McCormack

The trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *In re Estate of Love, 274 Ga. App. 316 at 318, 618 S.E.2d 97 at 101 (2005)* The Affidavit of Timothy McCormack (hereafter "Affidavit) consists of Mr. McCormack's statements about himself; attaches his resume; gives an opinion about Chan; and attaches numerous postings by Chan on his website. When the Affidavit was tendered into evidence, Chan objected to specific testimony of Attorney McCormack, but did not object to the admissibility of the Affidavit. (HT-48, lines 17-25; HT-49, lines 1-3) Further, Chan made no hearsay objection. Chan simply objected to some of the testimony of McCormack, as follows: McCormack "can't speak to the motives of the people"; he's not anywhere in Georgia; he can't speak to the …he's in Seattle, thousands of

miles away. He has no context whatsoever. And he is – I don't believe he's ever met Linda Ellis. He can't speak to that." (HT-48, lines 17-24) Chan did not object on the basis of hearsay, which is the proper objection to the admissibility of an affidavit at trial.

Further, much of the Affidavit was admissible hearsay. Chan admitted that some of the statements in McCormack's affidavit were true, such as the statement that Chan and his operatives often obtain publically available personal information of persons and post the information on their website. (HT-46, lines 12-21) Therefore much of the attachments to the Affidavit were admissible hearsay as party admissions. Most importantly, Chan agreed that McCormack could give his opinion about Chan (HT-48, line 24); such as McCormack's opinion that Chan was likely to carry out his threats against Ms. Ellis. The trial Court properly ruled that his objection went to the weight and credibility of the testimony in the affidavit, not its admissibility. (HT-49, lines 2-4)

A general objection to hearsay evidence is insufficient to preserve a ground of error. Counsel must specify that an objection is based on hearsay in order to preserve the ground for appeal. *Fletcher v. State, 199 Ga.App. 756, 406 S.E.2d*

245 (1991). Moreover, where only a portion of the evidence offered constitutes inadmissible hearsay, counsel must identify that portion at the time he raises his hearsay objection. Objections to evidence must state the grounds upon which they are based; merely objecting is not enough. *Hayes v. State, 189 Ga.App. 39, 40(1), 375 S.E.2d 114 (1988).* Defendant had to do more than merely state: "I object," to preserve a ground of error. *Griffin v. State, 123 Ga.App. 820, 821(3), 182 S.E.2d 498 (1971).* In addition an otherwise valid reason why evidence should not be admitted will not be considered on appeal unless the specific reason was urged below. *See Smith v. State, 189 Ga.App. 244, 246(7), 375 S.E.2d 496 (1988)*; where the defense objections were insufficient to notify the trial court of the legal ground so that its applicability could be measured and error avoided.

The admissibility of hearsay evidence is harmless error where the hearsay evidence is merely cumulative of other evidence properly admitted. *See Smoky, Inc. v. McCray, 196 Ga. App. 650, 396 S.E.2d 794 (1990).* There is no reversible error for the introduction of hearsay evidence where the evidence introduced, not including the hearsay, is sufficient to support the findings of the trial judge *Rokowski v. Gilbert, 275 Ga. App. 305 at 315, 620 S.E.2d 509 at 518 (2005), cert. denied, (Jan. 17, 2006).*

CONSTITUTIONAL ARGUMENT

D. <u>Chan's Speech Is Not Protected Speech; The Order Is Narrowly Tailored; And The Communications Decency Act Does Not Protect Chan Because His Forum Is Not Content Neutral So The First Amendment Is Upheld.</u>

1. Chan's Activity, Threats and Intimidation, Are Not Protected Speech.

The trial court's Protective Order restricts all postings concerning Linda Ellis. In First Amendment parlance, this is a content-based restriction since it is based on particular content. Content-based restrictions are permissible for unprotected speech. While the First Amendment of the Constitution insures some freedom of speech, such as the right to stay silent, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (finding the right not to salute the flag); to use offensive words to convey a political message, *Cohen v. California*, 403 U.S. 15 (1971); to advertise, *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976); and to engage in symbolic speech, such as burning the flag in political protest, *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990), it does not protect all speech. as

the First Amendment does not protect speech that is threats, [1] fighting words, [2] obscene, [3] or incites illegal activity. [4]

Speech that is a "true threat" is stripped of its First Amendment protection based on the victim's fear from that speech. *See Virginia v. Black*, 538 U.S. 343 (2003). A statement is a true threat if the speaker intends to communicate a serious

---

[1] See detailed discussion below.

[2] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (defining fighting words as those with a "direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed").

[3] *Miller v. California*, 413 U.S. 15 (1973) (defining obscenity by a three-prong test: appealing to the prurient interest considering contemporary community standards; depicts or describes, in a patently offensive way, sexual conduct defined by state law; and lacks serious literary, artistic, political, or scientific value).

[4] *See e.g. Schenck v. United States*, 249 U.S. 47 (1919)(creating the clear and present danger test that speech will create the danger proscribed against, providing the example of shouting fire in a crowded theater). Chan urges people to visit Ellis, and others, at their homes to intimidate. Intimidation is prohibited by law.

expression of an intent to commit an act of violence on a specific person or group, even if the speaker does not act on the threat. *Id.* at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)). Even intimidation is a true threat if "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*. at 360.

Ellis testified that she was in fear for her safety and that of her family from Chan's website postings. Chan intended Ellis to read them. The trial court found Chan's postings concerning Ms. Ellis to be harassing and intimidating, within the meaning of O.C.G.A. §16-5-90 *et. seq*.

Therefore, Chan's postings insofar as they are of a harassing and threatening nature are not protected by the First Amendment, and a content based restriction is permissible.

2. Even If Chan's Speech Is Protected, The Narrowly Tailored Order Is Proper Because It Allows Other Forms Of Communication.

Even if Chan's speech is protected speech, the Order is proper because it is reasonably limited and allows other forms of communication.

The validity of time, place, and manner restrictions are reviewed based on "intermediate scrutiny" and must be content neutral, narrowly tailored, serve a

significant government interest, and leave open other channels of communication. *See United States v. O'Brien*, 391 U.S. 367 (1968); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The present Order limits the place for speech, namely the Internet, so we review under intermediate scrutiny.

Assuming arguendo the First Amendment protects Chan's harassment, the Restraining Order is valid because it survives intermediate scrutiny. The restriction is content neutral because the offensive speech would be restricted if it were about another individual. The restriction is narrowly tailored because it only applies to Ellis. The restriction serves the important interest of protecting the safety of individuals and the community by preventing the possibility of completing the threatened actions. Finally, the order allows other means of communication for Chan to discuss copyright, book publishing, and other issues. Even if Chan's speech were protected, which it is not, Chan has ample other avenues of speech despite the Restraining Order. The Georgia courts have a right and an obligation to stop this hateful campaign and protect the safety of its citizens.[5]

---

[5] The government must clearly define what is illegal, cover the minimum amount of speech necessary, and show that the speech would result in a "direct, immediate,

3. Chan's Activities Violate The Communications Decency Act

Chan's unprotected threatening speech also violates federal law, specifically the Communications Decency Act (CDA). In accordance with the First Amendment, the CDA attempts to protect people from Internet harassment by prohibiting the anonymous utilization of a telecommunications device, including the Internet, with the intent to annoy. 47 U.S.C. §223. Although there is a safe harbor provision for interactive computer services (internet service providers), it does not apply if the internet service provider is providing the information or they have a role in posting, inducing, or designing the website as a portal for defamatory material. 47 U.S.C. §230; *F.T.C. v. Accusearch Inc.*, *570 F.3d 1187*

---

and irreparable damage to …people" if it is exercising prior restraint of speech. *New York Times Co. v. United States*, 403 U.S. 713 (1971)(allowing the publication of the Pentagon Papers detailing classified material about the Vietnam War despite the President's attempt to prohibit such publication). The Order covers the minimum amount of speech necessary and clearly defines the content only as relating to Ellis.

(10th Cir. 2009) As found illegal in *F.T.C.*, Chan and his Extortion website associates have knowingly turned virtually unknown information such as Ellis' home address, family names, and daughters' workplace into public information, even having done so for profit with the intent of "motivating Linda to settle." (HT-25)

If a service provider is responsible for the development of illegal offensive content or specifically encourages what is illegal or offensive about the content, its immunity is also void. *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, *521 F.3d 1157 (9th Cir. 2008).* Chan routinely posts offensive content, comments, and encourages others to do so by responding to pending forum posts. Chan's offensive postings about Ellis include statements alluding to his stalking her in her own neighborhood, information about her address, family names and daughter's work, and "commentaries and editorials."

In *Jones v. Dirty World Entertainment Recordings, LLC*, *840 F.Supp.2d 1008 (E.D.Ky. 2012)* the operator of a website was liable for offensive content under the CDA because he specifically encouraged development of offensive content on the site. Such message included claims that a teacher was sexually promiscuous with members of a football team, had sexually transmitted diseases,

and provided the name where the teacher taught. Like Chan, this operator encouraged posting of this content by adding his own comments to the postings, refusing to remove the postings upon objection, and acted as editor of the forums.

The immunity provision is inapplicable to Chan and his business partners because he engages in creating offensive content, encourages the posting of offensive content, and has profited from posting the offensive content. Chan is more than a mere spectator on the ELI website, he is the ringleader.

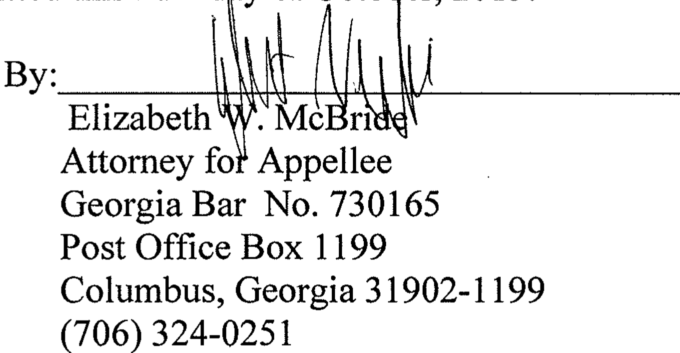
Since Chan does not have immunity under the CDA, the CDA is violated if the postings are made with an intent to annoy. 47 U.S.C. §223 This also applies to "anonymous" content posted under a screen name. *See Zeran v. America Online, Inc.*, *129 F.3d 327 (4th Cir. 1997)(discussing online bulletin board posts as anonymous).* Although Chan's website uses screen names such as "Peeved," "Lettered" "Atlantainfo" and "Couch-potato," among many others, the CDA applies to these postings. The trial court found the online electronic postings to be harassing and intimidating and Ellis testified that she was scared. (HT-54). Chan's use of his website, that he completely controls, meets the criteria set forth in O.C.G.A. §16-5-90, *et. seq*. As such, Chan violates the CDA since the postings

were made with the intent to harass, intimidate, and scare, which is much more extreme than only an intent to annoy.

CONCLUSION

The trial Court properly issued a Permanent Stalking Protective Order after considering extensive evidence which meets the requirements of O.C.G.A. §16-5-90. Appellant's threats, harassment and profanity are not protected by the First Amendment and his website postings violate the Communications Decency Act. Appellant's due process was satisfied by service of the Petition which afforded him proper notice of the appropriate statute involved and notice of a hearing. For these reasons, the trial court's Order should be upheld and affirmed.

Respectfully submitted this 21st day of October, 2013.



By:______________________________

Elizabeth W. McBride
Attorney for Appellee
Georgia Bar No. 730165
Post Office Box 1199
Columbus, Georgia 31902-1199
(706) 324-0251

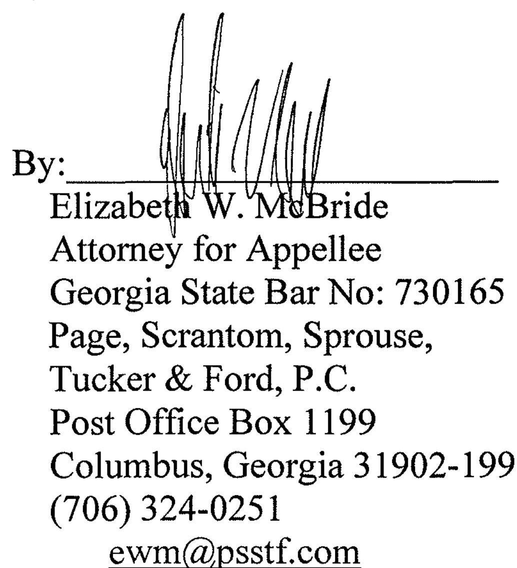
CERTIFICATE OF SERVICE

This is to certify that pursuant to Rule 6 of the Uniform Rules For the Courts Of Appeals Of The State Of Georgia I have this date served a copy of the foregoing BRIEF OF APPELLEE LINDA ELLIS by depositing a copy of the same in the United States Mail with sufficient postage attached to insure delivery to the following:

Oscar Michelen
Counsel for Appellant
Cuomo LLC
9 East 38th St.
New York, NY 10016

William J. McKenney
Counsel for Appellant
McKenney & Froehlich
50 Polk Street NW
Marietta, Georgia 30064

This the 21st day of October, 2013.



By:____________________
Elizabeth W. McBride
Attorney for Appellee
Georgia State Bar No: 730165
Page, Scrantom, Sprouse,
Tucker & Ford, P.C.
Post Office Box 1199
Columbus, Georgia 31902-199
(706) 324-0251
ewm@psstf.com