

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Jennifer Michelle Williams,)	
<i>Petitioner/Appellee,</i>)	
)	Supreme Court No. 20170152
vs.)	Cass County District Court
)	Civil No. 09-2017-CV-00266
)	
Aron Lyle Williams,)	
<i>Respondent/Appellant.</i>)	

APPEAL FROM THE
DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE SUSAN L. BAILEY PRESIDING

BRIEF OF THE APPELLANT

 /s/ Leslie Johnson Aldrich
 Leslie Johnson Aldrich
 North Dakota ID #04014
 Attorney for Appellant
ljohnson@ljalaw.net

July 27, 2017
 Date

 /s/ Victoria Jones
 Victoria Jones
 North Dakota ID #08112
 Attorney for Appellant
victoria.jones@ljalaw.net

Johnson Law Office, P.C.
 1018 First Avenue North
 Fargo, ND 58102
 (701) 234-0009

[¶1]TABLE OF CONTENTS

	Paragraph
Table of Authorities	2
Jurisdictional Statement	3
Statement of Issues	4
Statement of the Case.....	9
Statement of the Facts	12
Argument and Law	28
I. The Appellant’s acts and words were constitutionally protected	29
II. The procedural matter was res judicata	41
III. Cass County should have deferred jurisdiction to the divorce trial court in Stutsman County, where the matter was still pending.....	47
IV. The District Court erred in granting Appellee a disorderly conduct restraining order without credible evidence of specific acts or threats which constitute disorderly conduct.....	56
Conclusion	68

[¶2]TABLE OF AUTHORITIES

<u>Case</u>	<u>Paragraph</u>
<i>Baker v. Mayer</i> , 2004 ND 105, ¶ 13, 680 N.W.2d 261	59, 64, 66
<i>Combs v. Lund</i> , 2015 ND 10, ¶ 4, 858 N.W.2d 311	30
<i>Cusey v. Nagel</i> , 2005 ND 84, ¶ 7, 695 N.W.2d 697	57, 59, 61
<i>Gitlow v. New York</i> , 268 U.S. 652 (1925)	32
<i>Gullickson v. Kline</i> , 2004 ND 76, ¶ 8 678 N.W.2d 138.....	66
<i>Hoggarth v. Kropp</i> , 2010 ND 197, ¶ 10, 790 N.W.2d 22.....	31
<i>Hutchinson v. Boyle</i> , 2008 ND 150, 753 N.W.2d 881	54
<i>Lindberg v. Lindberg</i> , 2009 ND 136, ¶ 25, 770 N.W.2d 252	39
<i>Ohio Cas. Ins. Co. v. Clark</i> , 1998 ND 153, ¶ 23, 583 N.W.2d 377.....	42
<i>State v. Boyle</i> , 2009 ND 156, 771 N.W.2d 604, ¶ 11	39, 54
<i>State v. Curtis</i> , 2008 ND 93, ¶¶ 7, 10, 748 N.W.2d 709.....	31, 33
<i>Svedberg v. Stammess</i> , 525 N.W.2d 678 (N.D. 1994).....	33, 58
<i>Ungar v. North Dakota State Univ.</i> , 2006 ND 185, ¶ 10, 721 N.W.2d 16	42
<i>Wishnatsky v. Huey</i> , 1997 ND 35, ¶ 14, 560 N.W.2d 878.....	58
 <u>Statutes</u>	
N.D.C.C. § 12.1-31.2-01(1).....	31
N.D.C.C. § 12.1-31.2-01(5)(d)	31
N.D. Const. art. I, § 4	32
N.D.R.Civ.P. 4(b)(5).....	48
U.S. Const. amend. I	32

[¶3] JURISDICTIONAL STATEMENT

The North Dakota Supreme Court has jurisdiction to hear this appeal under North Dakota Century Code Sections 28-27-01 and 28-27-02.

[¶4] STATEMENT OF ISSUES

1. [¶5] Whether the Appellant's acts and words were constitutionally protected
2. [¶6] Whether the procedural matter was res judicata
3. [¶7] Whether Cass County court should have deferred jurisdiction to the divorce trial court in Stutsman County where the matter was still pending
4. [¶8] Whether the district court erred in granting Appellee a disorderly conduct restraining order without credible evidence of specific acts or threats which constitute disorderly conduct

[¶9]STATEMENT OF THE CASE

[¶10]Aron Williams (Aron) appeals the District Court order granting Jennifer Michelle Williams (Jennifer) a two-year disorderly conduct restraining order (hereinafter restraining order). Aron and Jennifer began living together in the Fall of 2013 when Jennifer moved to Jamestown, North Dakota. (App. 7). The couple married on April 11, 2015, (App. 7) and physically separated on April 22, 2016. (App. 5). On May 18, 2016, Jennifer initiated divorce proceedings in Stutsman County, North Dakota. (App. 46). The parties have had many hearings in Stutsman County in relation to their divorce, child support, and spousal support. (App. 46, 63, 68). The divorce proceedings have been steadily ongoing since May 2016 and are still pending in Stutsman County.

[¶11]Jennifer petitioned for a Temporary Domestic Violence Protection Order in Cass County, North Dakota, on June 28, 2016, and subsequently dismissed the request on July 7, 2016. (App. 51, 62). On January 30, 2017, Jennifer filed for a restraining order again, this time for disorderly conduct. (App. 3). Her petition was filed in Cass County. (App. 3). The Cass County District Court entered a Temporary Disorderly Conduct Restraining Order on January 30, 2017, and entered the final Disorderly Conduct Restraining Order against Aron on March 7, 2017. (App. 10, 43). Aron filed his Notice of Appeal on April 17, 2017. (App. 71).

[¶12]STATEMENT OF THE FACTS

[¶13]Jennifer and Aron married on April 11, 2015. (App. 7). They have two minor children together: D.K.W. and D.C.W. (App. 27). The parties have been separated since April 22, 2016, and are currently in the process of obtaining a divorce. (App. 5, 27). Aron is allowed visitation rights to see D.K.W. and D.C.W. (App. 69). Visitation times are outlined in the Second Amended Interim Order, ordered in Stutsman County on January 13, 2017. (App. 69). The order states that exchanges shall be at the West Fargo Police Department. (App. 69). Aron has been court-ordered to drive the full hour and a half to pick up and drop off D.K.W. by the Second Amended Interim Order. (App. 69). The distance between Jamestown to Moorhead is 99.5 miles and 90.9 miles from Jamestown to West Fargo. Jennifer was not given any of the burden for transportation for exchanges. (App. 69).

[¶14]Jennifer currently resides in West Fargo, North Dakota, where she moved after separating from Aron. (App. 3). She is not employed. (App. 15). Jennifer relies on spousal and child support to provide for herself and the parties' children. (App. 15). Aron is self-employed and resides in Jamestown. (App. 22).

[¶15]Jennifer now claims that Aron has a history of physically abusing her while she was living with him. (App. 3). The only evidence of abuse Jennifer gave is her own testimony. (App. 3). Although Jennifer alleged many instances of abuse while she was living with Aron, she stated that she "didn't realize all of the manipulation until after moving out." (App. 9:13).

[¶16]Jennifer filed for a Temporary Domestic Violence Protection Order on June 28, 2016, which both parties agreed to dismiss on July 7, 2016, before the hearing. (App. 27). The parties just had a court hearing in Jamestown, North Dakota, as to parenting time

and exchanges on June 13, 2016. (App. 46). Jennifer stated that she only agreed to dismiss the Temporary Domestic Violence Order if the exchanges would be made at Rainbow Bridge. (App. 8). On July 7, 2016, Jennifer and Aron signed a dismissal for the Domestic Violence Order and on July 11, 2016, Jennifer filed a stipulation to amend the interim order, stating that Rainbow Bridge will be the place of exchange. (App. 62).

[¶17]The parties had another hearing on December 28, 2016, after which a Second Amended Interim Order was entered on January 13, 2017. (App. 68). The Second Amended Interim Order ordered the exchanges to be at the West Fargo Police Department. (App. 69). Jennifer filed a Petition for Disorderly Conduct Restraining Order on January 30, 2017, less than three weeks after the Second Amended Interim Order was entered. (App. 3). In her petition, Jennifer urged the court again to have exchanges at Rainbow Bridge in Moorhead, MN. (App. 9:25-27). Jennifer included many of the same allegations for this Disorderly Conduct Restraining Order as she did for the Domestic Violence Protection Order. (App. 3, 58).

[¶18]Jennifer filed testimony to support her request for the restraining order, which contains allegations of Aron taking D.K.W. to the doctor and letting their son visit Jennifer's father, with whom she no longer has a relationship. (App. 5). She also included much testimony that broadly described Aron's alleged disorderly conduct. (App. 3). For example, "I feel like my safety is being threatened almost daily by the continuing intimidation and harassment." (App. 6). Jennifer claimed that Aron physically assaulted her while she was pregnant, she stated Aron grabbed her arms and that she had a "physical struggle" with him on April 21, 2016. (App. 8). No physical markings or further details

were included regarding the incident, which Jennifer stated was a result of Aron becoming angry when he saw her video recording him. (App. 8). Aron has reported of numerous times when Jennifer recorded him, including harassing him and recording him even while he was in the shower. (App. 30).

[¶19]Jennifer has testified many times regarding an exchange that occurred on June 25, 2016. During the exchange at Tower City, North Dakota, Jennifer claimed that Aron “physically assaulted” her while she was pregnant. (App. 8). Jennifer called 911 during this exchange and spoke to a deputy on the scene. Aron’s mother was present at this exchange. (App. 8). In Jennifer’s affidavit to support the Petition for Protective Relief, she claimed that “Aron slammed his body into [hers] trying to knock [her] over . . . screaming into [her] face, ‘hit me, hit me!’” (App. 59). Jennifer changed the details of this story in her Petition for the Disorderly Conduct Restraining Order. In the petition, Jennifer stated, “I don’t remember all he was yelling as I was scared I had my back towards him . . . he then forcefully pushed his body into mine, TWICE, focusing on my stomach.” (App. 8). Jennifer’s recount of this story a third time while she was on the witness stand on March 7, 2017, in Cass County. At the hearing for the restraining order, she stated that during the encounter at Tower City, Aron “pushed [her] in the stomach with his body, and he said that he didn’t want [her] to have the baby, he wanted [her] to miscarry the baby. . .” (Tr. 34:21-24).

[¶20]Jennifer alleged that her privacy had been violated by Aron. (App. 6). Jennifer claimed that on December 7, 2016, she saw Aron drive by her residence. (App. 6). She stated that after allegedly seeing Aron drive by, she reported it to West Fargo Police. (App.

6). Jennifer also stated that on December 19, 2016, she found that Aron's mother had taken photos of Jennifer's "townhouse community," not of her house. (App. 6). She once again called the West Fargo Police Department to report the pictures. (App. 6).

[¶21] Jennifer claimed that Aron's "anger seems to be escalating as I have noticed with exchanges since December 28." (App. 5). In the Petition, Jennifer described three incidents of alleged disorderly conduct that occurred during exchanges at the West Fargo Police Department. (App. 3). The two exchanges in January and the alleged conduct occurring in Cass County were noted to be the basis for the District Court's determination. (Tr. 73:11-15).

[¶22] The first allegation of disorderly conduct in Cass County occurred on December 28, 2016, during an exchange at the West Fargo Police Department. (App. 5). She claimed that Aron and his sister were "yell[ing] at [her] for breastfeeding [her] infant." (Tr. 28:3-4). She also claimed they said that she was doing this all for money, that Aron didn't want their newborn, and that she needed to give him 100 percent custody of D.K.W. (Tr. 28:3-4). Jennifer said that two officers were present during the exchange and that they did not interject. (Tr. 28:11-14).

[¶23] The second allegation occurred on January 19, 2017. (App. 5). Jennifer stated that the parties were at the West Fargo Police Department for a parenting time exchange and Aron told Jennifer to "go suck on [her] vagina for awhile" when Jennifer asked Aron if D.K.W. was in a car seat. (Tr. 29:7-10).

[¶24] The third allegation was on January 29, 2017. (App. 5). Jennifer claimed that Aron blocked her car with his, preventing her to leave after exchanging their son at the

West Fargo Police Department. (Tr. 30:14). Aron had his father with him during this exchange. (App. 28). Aron testified that he left before Jennifer had gotten into the driver's seat and that Jennifer did not leave until three minutes after Aron had removed his car. (App. 28). Jennifer claimed that at this exchange Aron was yelling at her in a manner that constituted disorderly conduct. (App. 5). At the parties' hearing on March 7, 2017, Jennifer played a recording of the encounter. (Tr. 47:17-19). The alleged yelling from Aron was inaudible, but the recording did display Jennifer asking Aron if he said that their son doesn't love his mother. (Tr. 47:17-19). When she was on the witness stand, Jennifer admitted that she wanted Aron to repeat the statement because she was recording the incident. (Tr. 47:20).

[¶25]The district court stated that the two events that occurred in January constituted disorderly conduct, calling the exchanges "volatile." (Tr. 82:13-16). The district court noted that it would only "take into account [facts that] are alleged to have occurred after the Second Amended Interim Order was put into place" on January 13, 2017. (Tr. 73:11-13). Therefore, the events occurring on January 19 and January 29 of 2017, were stated to be the sole basis for the district court's decision to enter the Order. (Tr. 73:11-13).

[¶26]The restraining order prohibits Aron from communicating with Jennifer through anyone other than his attorney or a law enforcement officer. (App. 43). Jennifer claimed Aron's behavior requires the use of the program "Talking Parents" for communication regarding the children, but this was not included in her restraining order. (App. 9). The restraining order also makes no exception or stipulation for communication

regarding or with the parties' children. (App. 43).

[¶27]When presented with the facts, the Cass County District Court ruled that a Disorderly Conduct Restraining Order be issued against Aron for two years from March 7, 2017. (App. 43). Aron filed his Notice of Appeal on April 17, 2017. (App. 71).

[¶28]ARGUMENT AND LAW

[¶29]I. The Appellant's acts and words were constitutionally protected

[¶30]The Supreme Court of North Dakota applies the following standard of review for a district court's decision on a disorderly conduct restraining order:

“[The North Dakota Supreme Court] will not reverse a district court's decision to grant a restraining order or to conduct a hearing absent an abuse of discretion. The district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination.”

Combs v. Lund, 2015 ND 10, ¶4, 858 N.W.2d 311.

[¶31]“Disorderly conduct does not include constitutionally protected activity.” N.D.C.C. § 12.1-31.2-01(1). This statement of law is reiterated on the first page of the Disorderly Conduct Restraining Order entered against Aron. (App. 43). “A court imposing a disorderly conduct restraining order must address a respondent's constitutional claims, because constitutionally protected conduct cannot be a basis for the order.” *Hoggarth v. Kropp*, 2010 ND 197, ¶10, 790 N.W.2d 22. Whether speech is constitutionally protected is a question of law, which is fully reviewable on appeal. *State v. Curtis*, 2008 ND 93, ¶¶ 7, 10, 748 N.W.2d 709. The district court failed to determine whether Aron's actions were constitutionally protected and exclude evidence of any constitutionally protected activity

as required by N.D.C.C. § 12.1-31.2-01(5)(d).

[¶32]The First Amendment guarantees an individual's right to freedom of speech. U.S. Const. Amend. I; *Gitlow v. New York*, 268 U.S. 652 (1925). (holding the First Amendment right to freedom of speech applies to the states). Article I, Section 4 of the North Dakota Constitution provides an individual's right to freedom of speech, stating:

“Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege. In all civil and criminal trials for libel the truth may be given in evidence, and shall be a sufficient defense when the matter is published with good motives and for justifiable ends; and the jury shall have the same power of giving a general verdict as in other cases; and in all indictments or informations for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.”

[¶33]However, not all speech is constitutionally protected speech. Fighting words and true threats, as defined by the courts, are not protected speech. *Curtis*, at ¶5. The test used in North Dakota to determine whether words constitute a true threat is whether the communication would be considered a threat by a reasonable person standing in the recipient's shoes. *Id.* The test to determine what are fighting words is outlined in *Svedberg v. Stamness*, 525 N.W.2d 678, 683 (N.D. 1994), which states:

The test is what [a person] of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . .

[¶34]*Id.* It is not sufficient, however, if words merely offend, cause one to be

indignant, or rouse anger in the person hearing the words; they must incite an addressee to breach the peace immediately. *Id.*

[¶35] Jennifer included alleged quotes of Aron in her testimony to support her Petition for the restraining order. However, none of Aron's statements rose to the level of fighting words or true threats. Jennifer claimed that Aron told her to, "go suck on [her] vagina for awhile." (Tr. 29:9). This statement is not a threat and does not incite fighting. It is therefore protected speech.

[¶36] Jennifer also claimed that Aron said to their son "I know you don't love your mother." (Tr. 18:11). Under the test used in North Dakota, the court should have found that a reasonable person standing in Jennifer's shoes would not have been threatened by the statement. The statement was not even directed at Jennifer, it was said to the child. Further, Jennifer admitted that her reaction to the statement was a desire for Aron to repeat it because she was recording the conversation. (Tr. 47:20). This invalidates any claim that the statement incited fighting or was perceived as a true threat.

[¶37] Jennifer also claimed that Aron and his sister were "yelling at her" for breastfeeding her infant. (Tr. 28:3-4). This type of remark does not incite fighting and is not a true threat. However, Jennifer may argue that it was not the actual words, but the manner in which they were said that make them unprotected activity. This argument is without merit even if yelling occurred; which is doubtful as law enforcement was present. Yelling this particular statement does not make it more likely to incite fighting or to be a true threat. Further, Jennifer never established who yelled the remark. Any conduct performed by Aron's sister cannot be imputed upon him. He is responsible only for his own

actions.

[¶38]The district court mistakenly found Aron’s alleged conduct in January to establish disorderly conduct. It stated that the exchanges were “volatile” and “upsetting to the child [and] Plaintiff” (Tr. 82:13-17). These are not valid reasons for infringing upon an individual’s constitutional right to freedom of speech. The district court not only failed to apply North Dakota precedent when analyzing the claim, but it failed to address Aron’s claim of constitutional protection in its entirety. Since Aron’s actions are constitutionally protected, they must be excluded from evidence.

[¶39]In addition to Aron’s freedom of speech, Aron’s constitutional right as a parent is also infringed upon through the enforcement of the restraining order provisions. Parents have a constitutional right to parent their children. *Lindberg v. Lindberg*, 2009 ND 136, ¶ 25, 770 N.W.2d 252. The North Dakota Supreme Court has noted that restraining orders should not interfere with a person’s right to contact his/her child. *State v. Boyle*, 2009 ND 156, ¶11, 771 N.W.2d 604. The restraining order should be consistent with the visitation order. *Id.* The restraining order restricts Aron from having any physical contact with or come within 1000 feet of Jennifer. (App. 43). It made no exception for contacting the children through Jennifer. (App. 43). This directly conflicts with the Stutsman County Second Amended Interim Order of January 13, 2017, which governs the visitation rights for Aron. (App. 68).

[¶40]The restraining order granted by the district court unlawfully infringed upon two of Aron’s constitutional rights. First, the restraining order found Aron’s constitutionally protected speech to constitute disorderly conduct. Second, it infringed

upon Aron's right to parent his children by failing to make an exception for Aron to contact his children. The abuse of discretion by the district court justifies a reversal of the restraining order.

[¶41]III. The procedural matter was res judicata

[¶42]"Res judicata means that a valid, existing final judgment from a court of competent jurisdiction is conclusive, with regard to the issue raised, and determined therein, as to the parties and their privies in all other actions." *Ohio Cas. Ins. Co. v. Clark*, 1998 ND 153, ¶ 23, 583 N.W.2d 377 (citation omitted). "The doctrines of res judicata and collateral estoppel bar courts from relitigating claims and issues . . ." *Ungar v. North Dakota State Univ.*, 2006 ND 185, ¶ 10, 721 N.W.2d 16. The issues raised in the restraining order hearing had been litigated, except for the events allegedly occurring in Cass County. Therefore, they are barred by res judicata, as they were raised in at least one of two prior hearings.

[¶43]First, Jennifer had previously filed for a Temporary Domestic Violence Protection Order prior to the Petition for the Disorderly Conduct Restraining Order. (App. 58). The protective order was dismissed on July 7, 2016. (App. 62). Many of the same allegations, including an alleged history of domestic abuse, were raised in support of the prior protective relief and therefore should have been barred from relitigation in the hearing for the Disorderly Conduct Restraining Order.

[¶44]The District Court properly excluded conduct that occurred prior to the hearing in Stutsman County on January 13, 2017. (Tr. 73:11-15). The District Court acknowledged that the issues should not have been raised again by stating that the

restraining order was based “on conduct that occurred in Cass County and occurred since the entry of the Stutsman County prior order.” (Tr. 83:3-5). However, just seconds before, the court references to the “history of domestic violence.” (Tr. 82:8-9). This implies that the district court improperly found the restraining order necessary based partially on issues that are barred by res judicata. The district court erred in considering issues that have been litigated by referencing any allegations that were before the court in Stutsman County.

[¶45]Second, two of the issues raised for the restraining order were discussed in an evidentiary hearing on December 28, 2016, for the Second Amended Interim Order in Stutsman County, North Dakota. (Tr. 7). Jennifer alleged abuse in support of her request to change the place of exchanges. A Second Amended Order was entered on January 13, 2017, which did not grant Jennifer’s request for exchanges to be made at Rainbow Bridge. (App. 68). Jennifer filed the Petition for Disorderly Conduct Restraining Order on January 30, 2017, raising the same exact issue. Therefore, the events that occurred before December 28, 2016, should be excluded from evidence for the restraining order. The District Court claimed to have properly excluded evidence, but then referenced a history of abuse. (Tr. 82:8-9). This indicates the court improperly considered the alleged abuse as a need for the restraining order.

[¶46]After removing those issues barred by res judicata, only the allegations of disorderly conduct that Jennifer claims to have occurred in Cass County remain. The relitigation of whether the exchanges should occur at Rainbow Bridge and any allegation of domestic abuse was improper. The relitigation of these issues led to an unfair hearing and abuse of discretion by the Cass County District Court. The restraining order therefore

should be vacated.

[¶47]III. Cass County Court should have deferred jurisdiction to the divorce trial court where the matter was still pending

[¶48]“If the court finds, in the interest of substantial justice, the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just.” N.D.R.Civ.P. 4(b)(5). The Defendant’s counsel objected that Cass County had jurisdiction over the restraining order, because the divorce trial court in Stutsman County has pending matters over the parties. (Tr. 5:11-22). In the interest of substantial justice, the action should have been heard in the divorce court.

[¶49]Stutsman County is where the parties’ divorce proceedings were filed. (App. 46). The parties still have pending matters in the court to this day. Several hearings have been conducted in Stutsman County between the parties. (App. 46 ,63, 68). Over the past year, the divorce trial court has become very familiar with the parties, their conduct, character, relationship, and procedural history. For this reason, the divorce trial court was much more appropriately situated to determine the veracity of Jennifer’s allegations and if a restraining order was truly appropriate.

[¶50]Jennifer filed the restraining order in Cass County and the hearing was held before a judge who was viewing the allegations for the first time. This gave Jennifer a substantial advantage, as she embellished multiple events in her favor. Jennifer showed that she is an untrustworthy witness through her many contradicting testimonies.

[¶51]Jennifer’s testimony regarding one particular exchange shows her tendency to manipulate facts. Jennifer changed the details of the events that occurred on June 25, 2016,

at least three different times. (see App. 8:13-15, App. ; App. 59; and Tr. 34:22-24). First, in her Petition for Protection Relief, on June 28, 2016, she claimed that “Aron slammed his body into [hers] trying to knock [her] over . . . screaming into [her] face, ‘hit me, hit me!’” (App. 59). Jennifer then changed the story in her Petition for the Disorderly Conduct Restraining Order on January 30, 2017. Jennifer claimed her back was to Aron right before he pushed her in the stomach, which is factually impossible. (App. 8). She claimed that Aron pushed her hard in the stomach twice. (App. 8). She also stated that she could not remember what Aron was saying, even though she claimed he said “hit me” in June of the prior year, which she reduced to writing. Also, if the allegation were true, she would have taken the opportunity to report it to the deputy that came to the scene and she would have gotten a hospital statement. In the restraining order hearing, Jennifer decided to change the facts of this exchange a third time. She added that Aron also said that he wanted her to miscarry the child while allegedly pushing her stomach. (Tr. 34:22-24). The story gets bigger every time she tells it.

[¶52] Jennifer’s contradicting statements and actions would lead a reasonable person to believe her testimony is without merit. The inconsistencies of Jennifer’s testimonies and affidavits are evidence showing her tendency to exaggerate and alter events. The divorce court would not have issued a restraining order premised on questionable oral allegations.

[¶53] In addition to embellishing events in her favor, Jennifer was also able to raise issues that should have been barred by res judicata. It was evident that Jennifer wished to have a new judge review the situation, since she raised the same issues just weeks later in

a different jurisdiction. This showed that Jennifer was unhappy about the ruling on exchanges and filed for a restraining order to make a second attempt to change them. The divorce court would have quickly identified Jennifer's ulterior motive for filing the petition for the restraining order. Stutsman County would not have allowed Jennifer to raise an identical issue raised, and litigated, between the parties not even three weeks prior. Jennifer made it clear in the restraining order hearing that she was very interested in making the exchanges occur at Rainbow Bridge. (Tr. 40:3-17). Obviously, the filing for the restraining order appeared to be for the sole purpose of modifying the exchanges to be made at Rainbow Bridge. The fact that Jennifer agreed to dismiss the first restraining order if Aron agreed to use Rainbow Bridge is proof that she knows a protection order is not necessary. Restraining orders and protection orders should be used as a shield, not a weapon.

[¶54]The divorce court was better situated to hear the case also because of its knowledge of the order it has in place regarding the parties' children. Cass County issued a restraining order that is problematic in the Stutsman County divorce case. As stated in *Hutchinson v. Boyle*, there is a possibility that the terms of a restraining order may conflict with the terms of a visitation order. 2008 ND 150, ¶11, 753 N.W.2d 881. "[C]ourts must ensure the orders are consistent and do not conflict." *Boyle*, at ¶11. The court must require that the restraining order states that it does not interfere with a person's right to contact their child to ensure consistency. *Hutchinson*, at ¶11.

[¶55]Cass County did not follow North Dakota precedent when it failed to include language in the restraining order that noted the order would not conflict with Aron's right

to contact the children. Stutsman County would have made any order consistent with the current order because it had just entered the Second Amended Interim Order just weeks before the restraining order hearing. Stutsman County should have retained jurisdiction so that a fair depiction of the parties' situation was shown and any orders issued would be consistent. Cass County District Court should have followed North Dakota's Rule 4 of Civil Procedure hearing this matter and given jurisdiction to the divorce court, as it was in the interest of "substantial justice." N.D.R.Civ.P. 4(b)(5).

[¶56]IV. The court erred in granting Appellee a disorderly conduct restraining order without credible evidence of specific acts or threats which constitute disorderly conduct

[¶57]The North Dakota Supreme Court in *Cusey v. Nagel* stated its standard of review for determining whether a disorderly conduct restraining order should have been granted: "The district court has discretion to grant a disorderly conduct restraining order, and we will not reverse that decision unless the court clearly abused its discretion." 2005 ND 84, ¶ 7, 695 N.W.2d 697. N.D.C.C. § 12.1-31.2-01(1), defines disorderly conduct as, ". . . intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person . . . [d]isorderly conduct does not include constitutionally protected activity."

[¶58]The District Court may grant a disorderly conduct restraining order if it finds that "there are reasonable grounds to believe that the respondent has engaged in disorderly conduct." N.D.C.C. § 12.1-31.2-01(5)(d). "Reasonable grounds exist for obtaining a restraining order under Chapter 12.1-31.2, N.D.C.C., when the facts and circumstances

presented to the judge are sufficient to warrant a person of reasonable caution to believe that acts constituting disorderly conduct have been committed.” *Wishnatsky v. Huey*, 1997 ND 35, ¶14, 560 N.W.2d 878. (citing *Svedberg* at 682).

[¶59]The petitioner must present evidence of specific acts or threats which constitute disorderly conduct to support a request for a disorderly conduct restraining order. *Baker v. Mayer*, 2004 ND 105, ¶ 13, 680 N.W.2d 261. The petitioner must show that specific unwanted acts were intended to adversely affect her safety, security, or privacy. *Id.* at ¶ 12. Subjective fear alone is insufficient to support the issuance of a disorderly conduct restraining order. *Cusey*, at ¶ 7.

[¶60]Jennifer did not satisfy her burden. The testimony in support of the restraining order contains false allegations, constitutionally protected activity, behavior that does not constitute disorderly conduct, and issues barred by res judicata. After striking improper issues, Jennifer has no claim left. The district court claimed to have considered just two events as a basis for issuing the restraining order. (Tr. 73:11-15). Even if the district court had determined those events were not constitutionally protected, those events still do not constitute disorderly conduct. It was an abuse of discretion to issue a restraining order based on said events.

[¶61]The first event, on January 19, 2017, Jennifer claimed that Aron acted disorderly by saying “go suck on your own vagina” when Jennifer asked Aron if D.K.W. was in a car seat. (Tr. 29:9). As previously discussed, this is constitutionally protected speech and cannot be a basis for a restraining order. However, even if this statement were not constitutionally protected, it still does not satisfy the requirements of disorderly

conduct. This statement was not made to affect Jennifer's safety, security, or privacy. Any claim by Jennifer to the contrary is subjective and shall not be the basis for a finding of disorderly conduct. *Cusey*, at ¶ 7.

[¶62]The second event, on January 29, 2017, the parties met at the West Fargo Police Department for another exchange. (Tr. 30:14). Jennifer claimed at this event that Aron blocked her in with his car and told their son, "I know you don't love your mother." (Tr. 18:11). Again, if this occurred, it is constitutionally protected speech. Jennifer stated what she "claimed" to have heard and asked Aron to repeat this statement, in front of their child, so that she could record Aron saying it. By definition, disorderly conduct must be unwanted; therefore, his statement did not constitute disorderly conduct, even if it wasn't constitutionally protected. The fact that Jennifer wanted Aron to engage in alleged disorderly conduct at the exchange, then filed for a restraining order the following day, also shows that she clearly had ulterior motives.

[¶63] Further, Aron testified that he did not block Jennifer in during this exchange. (App. 28). Rather, he double parked to do the exchange. (App. 28). Aron also has testified that Jennifer stayed in the parking space three minutes after he left. (App. 28). He also had his father with him during this exchange. Aron did not double park with the intent to affect Jennifer's safety, security, or privacy. It was improper for the Cass County District Court to find this conduct as disorderly.

[¶64]Although the court addressed only the events in January as the basis for its determination, Jennifer included many allegations that the court may have improperly contributed to their decision. Jennifer's allegations that Aron took D.K.W. to the doctor

and took him to visit her father do not constitute disorderly conduct, as she was not present or affected by either event. (App. 3). Therefore, neither was done to adversely affect her safety, security, or privacy. She also included many broad statements of Aron's alleged disorderly conduct, like "I feel like my safety is being threatened almost daily by the continuing intimidation and harassment." (App. 6). These statements carry no weight in her favor, since the court requires specific acts and threats to support the Protection Order. *Baker*, at ¶ 13. After excluding testimony that is barred by res judicata or protected by the constitution, Jennifer has no claim.

[¶65] The district court stated that it would only consider the events that occurred in Cass County and since the order of Stutsman County had been in place. (Tr. 83:3-5). However, it is quite clear the district court did not limit the consideration to those events, as it referenced the parties' "history of abuse" as one of the reasons that a restraining order is needed. (Tr. 82:8). Jennifer did not supplement her testimony with any evidence of the alleged abuse and the district court clearly assumed a "history of abuse" based on Jennifer's testimony alone. Aron was asked, under oath, if they had a history of domestic violence and he stated that there was none. (Tr. 61:5-12). If the court would have stuck to the relevant events, it should not have considered any of Jennifer's claims of domestic abuse to determine if a restraining order was necessary. The occurrences in Cass County do not constitute disorderly conduct, and the district court certainly would not have issued a restraining order, if it would have only considered these events.

[¶66] The North Dakota Supreme Court has "recognized the grave consequences that a disorderly conduct restraining order may have on the respondent. [It] significantly

restricts the person's liberty." *Baker* at ¶14. The charge also may create a stigma for the individual in their community. *Id.* "Because of the stigma and grave consequences to the respondent associated with a [disorderly conduct restraining order], we have repeatedly stressed that a person who petitions for an order must allege specific facts or threats." *Baker*, at ¶16. In addition to requiring specific facts or threats, North Dakota has recognized the importance of a full and fair hearing before the issuance of a restraining order. *Gullickson v. Kline*, 2004 ND 76, ¶8, 678 N.W.2d 138. The many defects in the restraining order hearing in Cass County also deprived Aron of his right to a full and fair hearing.

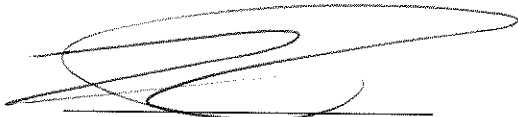
[¶67]As a result of Jennifer's failure to show that Aron intentionally, adversely affected the safety, security, or privacy of her person the restraining order should not have been granted by the district court. The Cass County District Court acted unconscionably when it considered matters that were barred by res judicata, considered conduct that was constitutionally protected, and granted a restraining order when the petitioner did not meet her burden. The District Court's abuse of discretion demands the judgment to be vacated.

[¶68]CONCLUSION

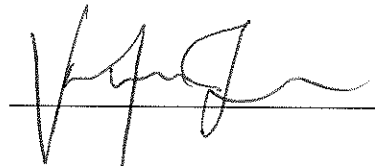
[¶69]The Cass County District Court issued a two year Disorderly Conduct Restraining Order against Aron on behalf of Jennifer. However, the Appellant, Aron Williams, did not adversely affect the safety, security and privacy of the Appellee, Jennifer Williams, by intrusive and unwanted acts, words and gestures. In fact, his rights to his children were adversely affected. The District Court unlawfully issued the restraining order after Jennifer failed to satisfy her burden of proof.

[¶70]The restraining order hearing had many defects that warrant the restraining order to be dismissed. Jurisdiction of the restraining order should have been deferred to Stutsman County, as it had pending matters with the parties and was better situated to determine if a restraining order was necessary. Aron's constitutional rights to freedom of speech and freedom to parent his child were also violated. Res judicata should have also barred the relitigation of many issues raised by Jennifer. Finally, the conduct that Jennifer claims Aron performed did not constitute disorderly conduct. The Appellant requests costs on appeal and will request attorney fees for this response. The Appellant requests that the Court remand this matter to the divorce court in Stutsman County, which is familiar with the parties and allegations.

Dated this 27th day in July, 2017.



/s/ Leslie Johnson Aldrich
Leslie Johnson Aldrich
North Dakota ID #04014
Attorney for Appellant
ljohnson@ljalaw.net



/s/ Victoria Jones
Victoria Jones
North Dakota ID #08112
Attorney for Appellant
victoria.jones@ljalaw.net

Johnson Law Office, P.C.
1018 First Avenue North
Fargo, ND 58102
(701) 234-0009