State of New Hampshire
Supreme Court

NO. 2007-0789

2008 TERM

APRIL SESSION

Kristy Sparks

v.

Kara Larson

RULE 7 APPEAL OF FINAL DECISION OF
HOOKSETT DISTRICT COURT

BRIEF OF PLAINTIFF/APPELLEE KRISTY SPARKS

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QUESTION PRESENTED

1. Did the court correctly issue an order of protection?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In 2004, John Sylvia broke up with Kara Larson, the defendant here. At the time of trial (and still), Mr. Sylvia was engaged to Kristy Sparks, the plaintiff here, with whom he resides.

Ms. Larson has a daughter whose paternity was in some doubt. Although another man's name is on the birth certificate, 1 *Trn*. at 26, Ms. Larson claims the girl was as a result of her relationship with Mr. Sylvia.[1] 1 *Trn*. at 12, 21-22. In 2006 and 2007, Ms. Larson became increasingly interested in resolving the paternity issue and thus began a campaign of regular phone calls, letters, faxes, text messages, and other communications to Mr. Sylvia and Ms. Sparks.

Many of these communications referred to Ms. Sparks as a "home wrecker" and a "home-wrecking whore." LETTER FROM LARSON TO SPARKS, *exh.* 2, *Appx.* at 31, 32 ("home wrecker"); FAX FROM LARSON TO SYLVIA, *exh.* 1 (July 12, 2007), *Appx.* at 30 ("home-wrecking whore Kristy"); EMAIL FROM LARSON TO SYLVIA, *exh.* 4 (July 10, 2007), *Appx.* at 38 ("home wrecking whore Kristy"); PHONE MESSAGE FROM LARSON TO SYLVIA, 1 *Trn.* at 97 ("precious little Kristy, the home-wrecking whore"); VOICEMAIL FROM LARSON TO SYLVIA, 1 *Trn.* at 94 ("She's a little fucking home-wrecker"). The phrase "home wrecking whore," referring to Ms. Sparks, appeared in additional communications authored by Ms. Larson but that were not in evidence. 1 *Trn*. at 57. Ms. Larson freely admitted that she repeatedly used the phrase "home wrecking whore" to refer to Ms. Sparks, 1 *Trn*. at 13, and Ms. Sparks knows of no one else who has

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[1]The name of the father on the child's birth certificate is one Edward Dubois. 1 *Trn.* at 26. Ms. Larson claims here, however, that DNA testing shows that Mr. Sylvia is the biological father. 1 *Trn.* at 27, 2 *Trn.* at 56. When Ms. Larson sought child support from Mr. Sylvia, however, the Derry Family Division Court found that Edward Dubois was the biological father. The court took umbrage at Ms. Larson for her various deceptions, writing that her "actions are living proof of the statement 'What a tangled web we weave when first we practice to deceive.'" *Larson v. Sylvia*, Derry Fam.Div.No. 07-M-0425, ORDER (Feb. 27, 2008), *Appx.* at 47, 48; *Larson v. Sylvia*, Derry Fam.Div.No. 07-M-0425, ORDER (Mar 24, 2008), *Appx.* at 49.

scorned her that way. 2 *Trn*. 34, 39.

In July 2007, Ms. Sparks found a letter from Ms. Larson posted on her car which was parked in the lot at her workplace. The letter alleged many unkind things, including some that even Ms. Larson admits could be considered threats, 2 *Trn*. at 66, both to Ms. Sparks and her family, 2 *Trn.* at 29, although she contends no harm was intended. 2 *Trn.* at 60.

Beyond the contents of the letter, several aspects of it lent a further threatening tone, and caused Ms. Sparks fear and concern. 2 *Trn.* at 28. Although Ms. Sparks believed that until they saw each other in court the two women had never met, 2 *Trn*. at 28, 53, the contents of the letter indicated that Ms. Larson knew a great deal about her. The letter appeared on Ms. Sparks's car at her workplace just two weeks after Ms. Sparks's employer moved its place of business from Manchester to Salem, indicating to Ms. Sparks that Ms. Larson had inquired into the details of her life, whereabouts, and the make, model, and color of Ms. Sparks's car. 2 *Trn.* at 27. During trial, Ms. Larson admitted that she directed one of her employees to track down Ms. Sparks and to post the letter on her car, 1 *Trn*. at 16-17; 2 *Trn*. at 53-55, 63-65, that she knows a lot about Ms. Sparks, including the fact that she cohabits with Mr. Sylvia. 1 *Trn.* at 18.

A few weeks after the letter on the windshield, Ms. Sparks learned from friends that she was featured in graffiti on the wall of the women's bathroom at Shorty's restaurant in Hooksett, the town in which Ms. Sparks lives. 1 *Trn*. at 56-57; 2 *Trn.* at 16, 33-34, 38-39. The graffiti says: "Kristy Sparks is a home wrecking whore!" PHOTO, *exh*s. 5&6 (July 26, 2007), *Appx.* at 42 & 43. When Ms. Sparks saw the graffiti, pictures were taken. 1 *Trn.* at 57; 2 *Trn.* 33-34.

Mr. Sylvia and Ms. Sparks suspect that Ms. Larson was the graffitist. 1 *Trn.* at 57. Ms. Larson denies it, believes it was aimed at *her*, 2 *Trn.* at 52, and named those she believes

responsible. 2 *Trn.* at 51-52, 62-63.

There were numerous other communications as well. Although (or because) Mr. Sylvia had no intention of parlaying, Ms. Larson sent dozens of voice mails, text messages, emails and letters. Some of the communications were to Mr. Sylvia individually, but many were sent to the home or to devices he shared with Ms. Sparks. They were thus readily retrieved, and read or heard, by Ms. Sparks. 1 *Trn*. at 87, 94, 97; 2 *Trn*. at 32, 33, 35, 49-50.

Among these was a birthday card sent to Mr. Sylvia's son (from an earlier marriage) who is handicapped and cannot read, and who Ms. Larson knew is being raised in Ms. Sparks's home. The card and the note it contained, were Mr. Sylvia or Ms. Sparks so cruel as to read it to the boy, would have been upsetting and inappropriate. 2 *Trn*. at 32, 43, 46; CARD & NOTE, *exh.* 3 (Sept. 2006), *Appx.* at 34, 35.

Based on these communications, Mr. Sylvia filed a Domestic Violence Petition and Ms. Sparks filed a Stalking Petition, on the same day in the Hooksett District Court. Ms. Sparks's Petition alleged that Ms. Larson sent mail to her home, that the communications from Ms. Larson contain details suggesting she "seems to know everything that is going on," that Ms. Larson left messages intended for her, and that Ms. Larson "showed up at my work (in Salem) and left [a] letter on my car." Ms. Sparks did not allege that the graffiti was part of the course of stalking conduct, STALKING PETITION (July 12, 2007), *Appx* at 1, although Mr. Sylvia did. DOMESTIC VIOLENCE PETITION at 3 (July 12, 2007).

At the request of the parties, the Hooksett District Court (***Robert L. LaPointe, Jr.***, P.J.) heard the two actions together. ASSENTED TO MOTION TO CONTINUE (Aug. 8, 2007) ¶ 4, *Appx.* at 3-4 (suggesting consolidation); 1 *Trn.* 3-4 (parties indicate agreement, and court agrees, that

cases to be heard together). The hearing took place over two days, separated by about a month.

In its order, the court compared the handwriting in pictures of the bathroom wall to a known exemplar admitted in evidence, and found "that said handwriting/printing in correspondence from the defendant is virtually identical to that shown in the said photographs." ORDER, *Appx.* at 12, 14. The court found Ms. Larson's "testimony that she did not write the messages on the bathroom wall at Shorty's not credible" *id.*, and that "given their location in the ladies' restroom" the graffiti was "designed by the defendant to come to the attention of Ms. Sparks." *Id.*

Although the court found Mr. Sylvia's allegations did not warrant a domestic violence order, it granted Ms. Sparks's request for a stalking order. The court found that the graffiti, along with Ms. Larson's "causing a letter to be placed upon the plaintiff's motor vehicle at the plaintiff's (new) place of employment in Salem," were a course of conduct sufficient to constitute stalking. *Id.*, *Appx.* at 15. The court found Ms. Sparks's fear was reasonable given those things and Ms. Larson's "additional actions and statements to John Sylvia regarding the plaintiff." *Id.*, *Appx.* at 14.

The Hooksett District Court issued its Final Order of Protection on September 21, 2007.[2] FINAL ORDER OF PROTECTION (Sept. 21, 2007), *Appx.* at 6.

In her motion to reconsider, Ms. Larson raised a plethora of issues. She did mention that

[2]Ms. Larson has violated the order on at least one occasion. She was found guilty of the crime of Violating the Protective Order "by tailgating and making offensive hand gestures" toward Ms. Sparks and her children " while traveling in a motor vehicle on Route 101 in Manchester." *State v. Larson*, Manchester Dist.Ct. No. 07-CR-13211, COMPLAINT (Dec. 22, 2007), *Appx.* at 51; *State v. Larson*, Manchester District Court No. 07-CR-13211, ORDER (Feb. 20, 2008), *Appx.* at 52 (indicating finding of guilt). Sentencing has not occurred as of this writing.

the graffiti was not in Ms. Sparks's Stalking Petition, but that matter was raised only in the context of the court's alleged error regarding admissibility of photographs of the graffiti, and rated only a dozen words in the six-page motion. MOTION TO RECONSIDER ISSUANCE OF STALKING PETITION (Oct. 1, 2007) §3, *Appx.* at 16, 17.

The court denied reconsideration, ORDER (Oct. 12, 2007), *Appx.* at 28, and Ms. Larson appealed.

SUMMARY OF ARGUMENT

Kristy Sparks first notes that the central issue on appeal – that Ms. Sparks's Stalking Petition did not contain sufficient information – was not raised below, or in Ms. Larson's notice of appeal, and was therefore not preserved. She argues that Ms. Larson nonetheless got sufficient notice, and that thus the Order of Protection is valid.

Ms. Sparks then suggests that the standard-form Stalking Petition mislead her into not providing comprehensive allegations because the form itself suggests that no such comprehensiveness is necessary.

She then argues that writing on a bathroom wall is an act that constitutes a course of stalking conduct, and that the court acted properly in finding that Ms. Larson stalked Ms. Sparks. Finally, Ms. Sparks lists plenty of other evidence, proved to the trial court, demonstrating that she was stalked by Ms. Larson.

ARGUMENT

I. Ms. Larson Did Not Preserve the Issue of Whether the Writing on the Wall was an Act Forming the Course of Conduct

A. Issue was not Presented to the Trial Court nor Raised on Appeal

It is undeniable that Ms. Sparks did not list in her Stalking Petition the writing on the bathroom wall in Shorty's. The issue, however, is not preserved for review because it was not brought to the attention of the trial court.

The only place it is arguably present is in Ms. Larson's motion for reconsideration. In the motion, however, Ms. Larson used a scatter-gun approach and raised innumerable issues. The only ones that are developed beyond passing references are allegations that the timing of the photographs should make them inadmissible, the court was wrong in its assessment of the similarity of the handwriting, the phrase "home wrecking whore" was not enough evidence to link Ms. Larson to the defacing, the writing was neither a communication nor sufficiently targeted at Ms. Sparks, and that Mr. Larson has free speech rights. Except for the last constitutional item, they are all factual issues within the discretion of the trial court.

To the extent the issue she presses here was raised, it was only in the context of the court's alleged error regarding admissibility of photographs of the graffiti, and rated only a dozen words in the six-page motion. MOTION TO RECONSIDER ISSUANCE OF STALKING PETITION (Oct. 1, 2007) §3, *Appx.* at 16, 17. In this passing reference, Ms. Larson did not raise the ***legal*** issue she presents in her brief – that as a matter of law the court may not consider the bathroom wall because it was not mentioned in the Stalking Petition. The reference was made only to support the contention that the court should not have relied on the photos and that there was therefore

insufficient evidence of a course of conduct.

A "passing reference … does not preserve an issue" for appeal. *In re Estate of Leonard*, 128 N.H. 407, 409 (1986). In *Boston and Maine Corp. v. Sprague Energy Corp.*, 151 N.H. 513, 518 (2004), this Court wrote:

> Although [the party's] requests for rulings of law make broad passing reference to the prohibition against taking private property without just compensation, the record before us reveals that [the party] made no specific arguments to the trial court on this issue. Passing reference, otherwise ignored, does not preserve an issue on appeal.

The purpose of preservation is to give the trial court a chance to repair the alleged error. *See Cadreact v. Citation Mobile Home Sales, Inc.*, 147 N.H. 620, 622-23 (2002). The passing reference Ms. Larson made in her motion, in the context of an allegation that the evidence was insufficient, was not sufficient to apprize the trial court that there was an error it could correct.

In all three cases Ms. Larson cites, the defendants squarely raised the issue of the content of the original petition before the trial court. *South v. McCabe*, __ N.H. __, 943 A.2d 779, 781 (decided Mar. 12, 2008) (contemporaneous trial court objections); *Comer v. Tracey*, 156 N.H. 241, 244 (2007) (issue raised in motion for reconsideration); *In re Aldrich*, 156 N.H. 33, 34 (2007) (contemporaneous trial court objection).

That the parties and the court was not aware of the allegation of error is made plain by both the content of Ms. Sparks's objection and by the court's order denying reconsideration. Ms. Sparks's objection answered each allegation in the Motion to Reconsider, but nowhere betrays an understanding of an argument that the original Petition was lacking. OBJECTION TO DEFENDANT'S MOTION TO RECONSIDER ISSUANCE OF STALKING ORDER (Oct. 10, 2007), *Appx.* at 23. Likewise, the court's order denying reconsideration shows it understood Ms. Larson was making an

argument attacking the sufficiency of the evidence regarding the bathroom wall, ORDER (Oct. 12, 2007), *Appx.* at 28, but not that it completely lacked authority to consider the matter, as Ms. Larson now suggests.

The issue was thus not preserved in the trial court and this Court should not further address it.

Had Ms. Larson raised the issue in the trial court, it would have been cured. The proceeding could have been delayed, Ms. Sparks might have re-filed her petition, or other process to give Ms. Larson notice could have been arranged. Such cures would not have caused any party any prejudice because the temporary stalking orders were in place. But by withholding objection to the procedure used until long after the stalking order was in effect, the entire process is sandbagged.

Moreover, the issue was not mentioned in Ms. Larson's notice of appeal, and is therefore doubly unpreserved. *In re Baldoumas Enterprises, Inc.*, 149 N.H. 736, 740 (2003). In her notice of appeal Ms. Larson raised three issues: whether there was "any direct evidence linking [Ms. Larson] to the writing" on the bathroom wall, whether a message written in a public place may be "one of the required 'acts' sufficient to establish a course of conduct," and whether such writing is constitutionally protected. NOTICE OF APPEAL (Nov. 8, 2007) at 3.

B. Ms. Larson Got Sufficient Notice that Writing on the Wall was Part of the Course of Conduct

Even if the issue were preserved, Ms. Larson got the statutory notice to which she claims entitlement.

The statutory provision on which Ms. Larson relies requires that "'[n]otice of … the facts

alleged against the defendant shall be given to the defendant….' The petition may be supplemented or amended 'only if the defendant is provided an opportunity prior to the hearing to respond to the supplemental or amended petition.'" *In re Aldrich*, 156 N.H. at 34 (quoting RSA 173-B:3, I, which is referenced by RSA 633:3-a, III-a).

In two separate ways, Ms. Larson got adequate notice that the writing on the wall was an incident in the stalking course of conduct.

As noted, the hearing in the Hooksett District Court took place over two days about a month apart, the first of which was about a month after Ms. Sparks and Mr. Sylvia filed their respective stalking and domestic violence petitions. The parties agreed at that outset of the first hearing, and the court ordered, that evidence on Mr. Sylvia's domestic violence petition would be heard first, and then evidence on Ms. Sparks's stalking petition. 1 *Trn*. at 4-5. The court followed that procedure.

Evidence regarding the bathroom wall – what it said, to whom it was directed, the circumstances of its discovery, 1 *Trn.* at 56-57 – was presented during the first day. All the exhibits, including the picture of the bathroom wall, were admitted as evidence during the first day of hearing. 1 *Trn.* at 16, 24, 30, 36, 52, 58, 85. This gave Ms. Larson plenty of notice before the subsequent hearing day, when Ms. Sparks finally testified, that the writing on the wall was at issue.

In addition, the writing on the bathroom wall was specifically mentioned in the domestic violence petition filed by Mr. Sylvia. His Petition stated: "I discovered that there was writing on the bathroom stall in the girls bathroom at Shorty's Restaurant (Have Picture)." *Sylvia v. Larson*, Hooksett Dist.Ct. No. 07-DV-43, DOMESTIC VIOLENCE PETITION at 3 (July 12, 2007). As noted,

the parties agreed, *before* the hearings, that the cases were to be heard together.

Because the issue was mentioned in Mr. Sylvia's petition with which Ms. Sparks's was combined, and because it was squarely placed at issue before that portion of the hearing regarding Ms. Sparks, Ms. Larson was on notice that the wall-writing, and the picture of it, would be an issue at trial.

Mr. Larson's claim of further notice requirements for "a penal statute," and her citations to criminal cases, LARSON BRF. at 13, are inapposite because this case is a civil stalking petition, not a criminal stalking prosecution, and does not incorporate criminal procedure or criminal burdens of proof.

In several ways Mr. Larson was thus apprized that the writing on the wall was one of the incidents of the stalking course of conduct.

C. Plain Error Rule Does Not Apply

In an offhand reference in her brief, Ms. Larson appears to suggest that "plain error," LARSON BRF. at 7, gets around the preservation problem. The plain error rule allows this Court to "consider errors not brought to the attention of the trial court." The rule, however, "should be used sparingly, and should be limited to those circumstances in which a miscarriage of justice would otherwise result." To apply the rule, "(1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Lopez,* 156 N.H. 416, 423 (2007); *East Derry Fire Precinct v. Nadeau,* 155 N.H. 429 (2007).

> 'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' At a minimum, a court of appeals cannot correct an error unless the error is clear under current law. Thus, an error is plain if it was or should have been 'obvious' in the sense that the governing law was clearly settled to the contrary. Generally, when the law is not clear at the time of trial, and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error.

Lopez, 156 N.H. at 424 (quotations, citations, ellipsis omitted).

The plain error rule does not apply here for several reasons. First, no question raising the plain error rule itself appears in Ms. Larson's notice of appeal.

Second, all three of the cases making clear that a stalking allegation must be specifically present in the stalking petition were handed down by this Court *after* the petition was filed in this case.

The trial here took place on August 22 and September 18, 2007. The Hooksett District Court issued its initial order on September 21, and its order denying reconsideration on October 15. *In re Aldrich*, 156 N.H. 33 (2007), the earliest of the cases, was issued by this Court on August 22, 2007, the same day as the first hearing in this case. It deals with petitions brought under the domestic violence statute, and not the stalking statute, however. The first case making clear that stalking petitions must specify the precise conduct on which a stalking order may rely was *Comer v. Tracey*, 156 N.H. 241 (2007), which was decided by this Court on September 25, 2007, a week after the final trial date in Ms. Sparks's case. *South v. McCabe*, __ N.H. __, 943 A.2d 779, 781 (2008), which decisively settled the matter, was decided by this Court months after the present dispute was appealed.

Although the law may now be settled, it was not "at the time of trial," *Lopez*, 156 N.H. at 424, and thus the plain error rule does not apply.

The third reason the plain error rule does not apply is because, as noted further *infra*, there were several other incidents of stalking such that there was a "course of conduct," 633:3-a, II, even without the bathroom wall evidence. Thus even if the error were "plain" it doesn't "affect substantial rights," nor "seriously affect the fairness, integrity or public reputation of judicial proceedings." The plain error rules does not apply because these are not "circumstances in which a miscarriage of justice would otherwise result."

Accordingly, this Court should not reach the issue Ms. Larson addresses for the first time in her brief.

D. Ms. Larson Did Not Preserve Constitutional Issues

In her brief Ms. Larson suggests that the stalking statute is void for vagueness. LARSON BRF. at 12-13. This issue was not presented in the court below, and was not mentioned in the notice of appeal. Even if it were preserved, there is nothing vague about the statute. It provides clarity enough for a reasonable person to know that the conduct in which Ms. Larson engaged constitutes a course of stalking conduct.

II. Stalking Petition Form Unconstitutionally Misleads Person Filling it Out

Even if the issue of whether Ms. Sparks's stalking petition was sufficient were preserved, she cannot be held to a standard of filing a perfectly comprehensive and specific petition because the stalking petition form violated her due process rights.

The two-page form stalking petition used by the State of New Hampshire Judicial Branch (and dutifully provided to Ms. Sparks by the Hooksett District Court) contains 14 boxes requiring information regarding such matters as the relationship of the stalker to the victim, whether children are involved, what sort of protective orders the victim is seeking, and other data necessary for enforcement. *See* STALKING PETITION (July 12, 2007), *Appx*. at 1-2. About half-way down the first page, the form says:

> TO THE JUSTICE OF THE COURT: I believe I am being stalked by the defendant. I base my request for protection from stalking on the following facts which occurred on the following dates, and ask the court to issue orders as noted below:

Following that, there are four horizontal lines spaced about ¼ inch apart, occupying a total of about an inch of space on the page. This set-up does not provide any graphic clue of a need to be comprehensive – or even wordy– such as it might if the remainder of the page were lined in a way that invites lots of description. In fact, the four narrow lines imply the petitioner ought to write sparse and small.

Nothing on the form says or shows or asks or requires the petitioner to be comprehensive. Nothing tells the (usually, as here) *pro se* petitioner that what s/he lists here will be ***dispositive*** and not simply ***examples*** of what are the incidents of stalking. The words, "I base my request for protection from stalking on the following facts" does not convey, even to one legally trained, that failure to be comprehensive on this form operates as a waiver to the ability of the victim to later

tell the judge of *any other* incident the stalker did that constitutes the stalking.

Such an important waiver without any disclosure haphazardly denies all but the most knowledgeable or lucky petitioners of their statutory right to be free from stalking.[3]

Poorly designed forms lacking adequate instructions, which operate to waive important rights, are a due process violation. U.S. CONST. amds. 5 & 14; N.H. CONST. pt. I., art. 15.

In *Vargas-Garcia v. I.N.S.*, 287 F.3d 882 (9th Cir. 2002), the court reviewed an immigration-related form. The court noted that the law underlying the form requires specificity and that the tribunal to which the form is directed enforces its rules with "rigidity." *Id*. at 885. Yet the form gives the usually *pro se* alien just 1¾ inches to list the reasons he should not be granted asylum and not summarily deported. The court wrote:

> Because minimal space is provided for petitioners to state their reasons for appeal, the form creates the misimpression that most petitioners are expected to state those reasons within the space of 1.75 inches and can do so with sufficient clarity. That simply is a normal way to approach forms – it is reasonable to believe that, in the majority of cases, one can say enough in the space provided.… However, it is highly unlikely that an alien who has been denied asylum will be able to state his case with the specificity required by the [appeals tribunal] in the 1.75 allotted inches. We expect that no lawyer would even attempt it. In other words, what these forms suggest is the norm is in fact the extraordinary case.

Vargas-Garcia, 287 F.3d at 884. Accordingly, the court held where the consequences of insufficient specificity are dismissal, combined with a form dissuading one from being specific, the form becomes "so misleading that it can result in a denial of due process." *Id.* at 886. *See also, Washington v. Crowder*, 12 P.3d 857, 860 (Colo.App. 2000) (form for filing inmate disciplinary

[3]"The purpose of this act is to eliminate behavior which disrupts normal life for the victim of stalking and to prevent such behavior from escalating into violence. In furtherance of this purpose it is the intention of the general court that persons convicted of stalking shall generally serve at least the minimum sentence provided by law. Further, it is the intention of the general court that law enforcement organizations in this state cooperate fully in enforcing this act." LAWS 1993, ch. 173(civil action added forming RSA 633:3-a, III-a, by LAWS 2000, ch 151).

appeal, in which there are limited due process interests, constitutional where form provided ½-page space to list issues); 3 C.J.S. *Aliens* 467 (2008).

When Ms. Sparks filled out the stalking petition form, she had no clue of the need for absolute comprehensiveness, nor of the consequences of failing to be absolutely comprehensive.[4] The form she filled out – with its mere four tightly-spaced lines – would mislead any reasonable form-filler into believing that she was expected to fit everything necessary into the small space.

Accordingly her failure to be specific and comprehensive cannot constitutionally be held against her.[5]

[4]All of this court's jurisprudence on the issue was decided *after* Ms. Sparks filed the form.

[5]This constitutional defense to the allegation that Ms. Sparks's Stalking Petition was lacking was not raised in the trial court because, as noted, the first time Ms. Larson made the allegation was in her appellate brief.

III. Ms. Larson's Graffiti was an Incident of Stalking

A. Any Stalking Act may Constitute a Stalking Course of Conduct

Ms. Larson argues that because "[p]lacing graffiti on a bathroom wall is not an act itemized" in the stalking statute and because it "is not similar to any of the itemized acts which would constitute a course of conduct," it cannot be one of the incidents in the course of conduct. LARSON BRF. at 11.

The doctrine of *ejusdem generis* holds that when statutes contain a list of items, general terms will be construed in the nature of the items in the list. *In re Hennessy-Martin*, 151 N.H. 207 (2004). But the doctrine does not apply when the statute indicates it shouldn't. *Hackett v. Gale*, 104 N.H. 90 (1962).

The stalking statute clearly disclaims the doctrine. It provides: "A course of conduct may include, *but not be limited to*, any of the following acts." RSA 633:3-a, II(a) (emphasis added); *Fisher v. Minichiello*, 155 N.H. 188 (2007) (construing stalking statute) ("[T]he statute, through its use of the phrase "may include, but not be limited to," provides that the enumerated acts do not constitute an exhaustive list. When a statute sets forth a nonexhaustive list of acts, we have held that other acts which are similar may be considered."). Thus any act of stalking, regardless of whether it is in the list, may constitute a course of conduct necessary to prove civil stalking.

B. Writing on the Wall Constitutes Communication

Even if each incident in a stalking course of conduct must be one of the items listed, the statute includes in its list, "Any act of communication." RSA 633:3-a, II(a)(7). "Communication is broadly defined as "to impart a message by any method of transmission." RSA 644:4, II. There is no reasonable argument that writing on a bathroom wall cannot impart a message.

C. Communication Imparted a Message to Ms. Sparks

Whether a communication imparts a message to its intended recipient is a factual issue left to the fact finder. *State v. Gubitosi*, 152 N.H. 673, 682-83 (2005). "The statute does not require that the act of communication take place between the defendant and the intended victim." *Id.* at 682.

Here, the court found as a matter of fact that Ms. Sparks was the intended recipient of the communication. "The Court further finds that said messages (given their location in the ladies' restroom) were designed by the defendant to come to the attention of Ms. Sparks." ORDER ¶6, *Appx*. at 14. The finding is supported by the record because, after friends pointed it out, the message undeniably came to the attention of Ms. Sparks. *See Fisher v. Minichiello*, 155 N.H. 188 (2007) ("threats directed at the targeted person's co-workers may be considered as acts constituting a course of conduct").

That the message was in a public place does not undo its targetedness. In *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition*, 290 F.3d 1058 (9th Cir. 2002), protesters published posters with the names of abortion providers on the internet. The court found that the "posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor." *Id.* at 1086; *Commonwealth v. Simmons*, 868 N.E.2d 158 (Mass.App. 2007) ("when a defendant utters a threat to a third party who would likely communicate it to the ultimate target, the defendant's act constitutes evidence of his intent to communicate the threat to the intended victim.") (quotations and citations omitted).

D. Court Found that Ms. Larson was the Graffitist

The court found as a matter of fact that Ms. Larson was the author of the graffiti, based on three pieces of evidence. It found that "the wording and language (name-calling) used in the bathroom wall messages is virtually identical to that contained in the defendant's other correspondence to John Sylvia." ORDER ¶6, *Appx*. at 14. Second, the court found that "the defendant's denials regarding said bathroom wall message are found by the Court to be not credible." *Id.*

Finally, the court compared known examples of Ms. Larson's handwriting to the picture of the graffiti. Handwriting comparisons can be done by the court in judge-trials without the aid of an expert. *Herndon v. State*, 543 S.W.2d 109 (Tex. 1976); *People v. Harter*, 282 N.E.2d 10 (Ill. App. 1972). Here, the court found that the pictures, "when compared to the defendant's handwriting/printing … reveals that said handwriting/printing in correspondence from the defendant is virtually identical to that shown in the said photographs." ORDER ¶6, *Appx*. at 14.

IV. Other Acts That Form the Course of Stalking Conduct

In *State v. Gubitosi*, 152 N.H. 673 (2005), the defendant attempted to telephone the stalking victim at a restaurant where she was dining, but the call was taken by a fellow diner and the defendant never spoke to the intended victim. This Court nonetheless found that the call was an act forming part of the "course of conduct" because the intended victim reasonably felt fear upon learning of the call.

Here, there were several acts proven by the evidence beyond the two identified by the court to support its order. Had Ms. Larson brought the lacking petition to the attention of the trial court, these other acts would have formed a course of stalking conduct and thus been sufficient to support the ultimate verdict. "When a trial court reaches the correct result, but on mistaken grounds, this court will sustain the decision if there are valid alternative grounds to support it." *Sherryland, Inc. v. Snuffer*, 150 N.H. 262, 267 (2003).

The court found that these other acts, described below, contributed to the fear Ms. Sparks had as a result of being stalked.

> The court finds that the plaintiff is not only in fear of the defendant for the plaintiff's safety but that the plaintiff's fear is reasonable given the defendant's actions directed toward the plaintiff, and especially so given the defendant's *additional actions and statements* to John Sylvia regarding the plaintiff."

ORDER ¶7, *Appx.* at 14 (emphasis added).

Moreover, the acts enumerated below were contained in Ms. Sparks's pleadings, thus solving any preservation problem. STALKING PETITION (July 12, 2007), *Appx* at 1; OBJECTION TO DEFENDANT'S MOTION TO RECONSIDER ISSUANCE OF STALKING ORDER (Oct. 10, 2007), *Appx*. at 23. Had Ms. Larson pointed out below that the writing on the bathroom wall was not mentioned in Ms. Sparks's Stalking Petition, it is suggested that the district court probably would have cited these other acts to support its Final Order of Protection.

A. Calls, Cards, Letters and Faxes

Ms. Larson sent a birthday card to Mr. Sylvia's child who cannot read, knowing that Ms. Sparks lived in the same home, was parenting the child, and was therefore likely to see the card. CARD & NOTE, *exh.* 3 (Sept. 2006), *Appx.* at 34. Ms. Sparks believed the card was directed at her and Mr. Sylvia, 2 *Trn*. at 32, and ripped up the note that came inside it when she received it on the child's behalf. Ms. Sparks kept the card and the (repaired) note because it was an example of Ms. Larson's on-going behavior. 2 *Trn*. at 39.

The court heard a number of voice-mail messages that Ms. Larson had left on Mr. Sylvia's cell phone. One of them called Ms. Sparks "your cheesy fucking girlfriend. She's a little fucking home-wrecker." 1 *Trn*. at 94. Another threatened that Ms. Larson would be "going to ADP [Ms. Sparks's workplace], and I'm going to have a fucking conversation with her, too. 1 *Trn*. at 94. Another warns that, "I'm going to start showing up." 1 *Trn*. at 96. In one call Ms. Larson threatens, "If I have to go down to your office and go to your house, I'm going to pursue it even further." 1 *Trn*. at 92. Several times Ms. Larson says, "it's going to get ugly." 1 *Trn.* at 94, 95, 96. In one message she insists, "I'm not giving it up." 1 *Trn.* at 94. The last recording ends, "Trust me, I'll come see the precious little Kristy, the home-wrecking whore, and I will make it a nightmare." 1 *Trn*. at 97.

The calls made Ms. Sparks feel "afraid," and "fear." 2 *Trn*. at 35. That they were left on Mr. Sylvia's cell phone is of no moment. Ms. Larson knew that Mr. Sylvia and Ms. Sparks lived together. Because Ms. Larson suggested she would pay Ms. Sparks a visit, she could reasonably expect, as reliably as the caller in *Gubitosi*, that the content of the messages would be shared with Ms. Sparks.

Mr. Sylvia got a fax at work from Ms. Larson. The fax not only referred to "that home-wrecking whore Kristy," but also seemed to threaten that "[m]aybe Kristy needs some more encouragement." FAX FROM LARSON TO SYLVIA, *exh.* 1 (July 12, 2007), *Appx.* at 30. Like the phone messages, it could reasonably be expected that Mr. Sylvia would tell Ms. Sparks about the fax, which made her feel "Horrible." 2 *Trn*. at 33.

B. Research and Delivery

The stalking statute provides that a "'[c]ourse of conduct' means 2 or more acts over a period of time, however short, which evidences a continuity of purpose." RSA 633:3-a, II(a).

The court already found that the letter Ms. Sparks found on her car at work from Ms. Larson was one of the acts that formed the course of stalking conduct. But getting the letter to Ms. Sparks's car at work required several additional steps that, although close in time, evidenced a clear continuity of stalking purpose.

Just two weeks before the letter appeared on her car in the lot at work, Ms. Sparks's job location changed from Manchester to Salem. Ms. Larson admitted that she directed one of her employees to track down Ms. Sparks, and to put the letter on her car. These two acts – research, and delegation to a third person – are separate and distinguishable from the writing and then the posting of the letter.

C. Enough Evidence to Support the Order of Protection

Given these various acts, there is plenty of evidence, which must be found only by a preponderance, RSA 633:3-a, III-a, to support the order issued by the district court. Even if this Court finds that there are problems with the acts used by the court below to support its Order of Protection, the outcome should be sustained on alternate grounds.

CONCLUSION

For the foregoing reasons, this Court should sustain the Final Order of Protection issued by the court below.

Respectfully submitted,

Kristy Sparks
By her Attorney,

Law Office of Joshua L. Gordon

Dated: April 27, 2008

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Kristy Sparks requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case are novel in this jurisdiction.

I hereby certify that on April 27, 2008, copies of the foregoing will be forwarded to Jaye L. Rancourt, Esq.

Dated: April 27, 2008

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State of New Hampshire
Supreme Court

NO. 2007-0789

2008 TERM

APRIL SESSION

Kristy Sparks

v.

Kara Larson

RULE 7 APPEAL OF FINAL DECISION OF
HOOKSETT DISTRICT COURT

APPENDIX TO BRIEF OF PLAINTIFF/APPELLEE, KRISTY SPARKS

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