NO. 48662-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PAUL TRUMMEL,

Appellant,

v.

STEPHEN MITCHELL and COUNCIL HOUSE, INC.,

Respondents.

BRIEF OF APPELLANT

(BRIEF NO. 2 -- CONTEMPT ISSUES)

WILLIAM JOHN CRITTENDEN
ERIC BROMAN
Attorneys for Appellant

William John Crittenden
Attorney at Law
927 N. Northlake Way,
Suite 301
Seattle, WA 98103
(206)729-0259
wjcrittenden@attbi.com

Eric Broman
Attorney at Law
NIELSEN, BROMAN & KOCH, PLLC
810 Third Avenue, Suite 320
Seattle, WA 98104
(206)623-2373

TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR AND RELATED ISSUES 1

B. STATEMENT OF THE CASE 3

1. Contempt Proceedings - October 2001 4

2. Trummel Jailed - February 2002 5

3. New Antiharassment Order - June 2002 7

C. ARGUMENT 8

1. TRUMMEL DID NOT VIOLATE THE "SURVEILLANCE" PROVISION OF THE APRIL 19th ORDER. 8

2. THE TRIAL COURT'S CONTEMPT FINDINGS ARE VOID. 12

a. The Provisions of the Antiharassment Orders Relating to All Persons Other than Mitchell Are Void for Lack of Jurisdiction. 13

b. Mitchell Is Not a "Fiduciary" or Legal Representative of the Tenants of Council House. 15

TABLE OF CONTENTS (CONT'D)

Page

c. The Prohibitions on Publication of Information about Mitchell (or Anyone Else) Are Void as Unconstitutional Prior Restraints. 18

3. THE TRIAL COURT VIOLATED TRUMMEL'S RIGHT TO COUNSEL AT THE FEBRUARY 27, 2002 CONTEMPT HEARING. 20

a. Trummel Was Never Advised Of, and Did Not Waive, His Right to Appointed Counsel. 23

b. Attorney Siegel's Ongoing Representation of Trummel on Appeal Did Not Satisfy Trummel's Right to Counsel in the Contempt Proceedings. 25

c. Any Alleged Defects in Siegel's Withdrawal Are Irrelevant. 27

d. The Violation of Trummel's Right to Appointed Counsel Is Not Moot. 31

4. MITCHELL IS NOT ENTITLED TO ATTORNEY'S FEES OR COSTS. 33

5. JUDGE DOERTY SHOULD HAVE RECUSED HIMSELF. 34

D. CONCLUSION 38

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Bellevue v. Acrey,
103 Wn.2d 203, 691 P.2d 957 (1984) 23-25

Bering v. SHARE,
106 Wn.2d 212, 721 P.2d 918 (1986) 19, 35

Bresolin v. Morris,
86 Wn.2d 241, 534 P.2d 325 (1975) 13

Burchell v. Thibault,
74 Wn. App. 517, 874 P.2d 196 (1994) 14, 15

Eugster v. City of Spokane,
115 Wn. App. 740, 63 P.3d 841 (2003) 32

Hart v. Dep't of Soc. & Health Servs.,
111 Wn.2d 445, 759 P.2d 1206 (1988) 32

Hough v. Stockbridge,
113 Wn. App. 532, 54 P.2d 192 (2002) 14, 15, 32

In re Marriage of Humphreys,
79 Wn. App. 596, 903 P.2d 1012 (1995) 11

Johnson v. Beneficial Management Corp.,
96 Wn.2d 708, 638 P.2d 1201 (1982) 11

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

Kingdom v. Jackson,
78 Wn. App. 154, 896 P.2d 101 (1995) 28

Lockhart v. Grieve,
66 Wn. App. 735, 834 P.2d 64 (1992) 29, 30

Mead School Dist. No. 354 v. Mead Ed. Ass'n,
85 Wn.2d 278, 534 P.2d 561 (1975) 9, 13

Moon v. Phipps,
67 Wn.2d 948, 411 P.2d 157 (1966) 16

Pierce v. Pierce,
37 Wn.2d 918, 226 P.2d 895 (1951) 10, 14, 15, 17

Seattle v. Parker,
2 Wn. App. 331, 467 P.2d 858 (1970) 14

Sherman v. State,
128 Wn.2d 164, 905 P.2d 355 (1995) 34

State ex rel. Erhardt v. MacGillivray,
52 Wn.2d 485, 326 P.2d 738 (1958) 9

State v. Coe,
101 Wn.2d 364, 679 P.2d 353 (1984) 12-13, 17, 19, 27

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Dagenais,
47 Wn. App. 260, 734 P.2d 539 (1987) 34

State v. Madry,
8 Wn. App. 61, 504 P.2d 1156 (1972) 34

State v. Noah,
103 Wn. App. 29, 9 P.3d 858 (2000) 9, 11, 13, 18

State v. Williams,
144 Wn.2d 197, 26 P.3d 890 (2002) 18

Stella Sales, Inc. v. Johnson,
97 Wn. App. 11, 985 P.2d 391 (1999) 11

Tetro v. Tetro,
86 Wn.2d 252, 544 P.2d 17 (1975) 5, 23-25, 31

FEDERAL CASES

Alabama v. Shelton,
535 U.S. 654, 122 S. Ct. 1764,
152 L. Ed. 2d 888 (2002) 23, 24, 29

Argersinger v. Hamlin,
407 U.S. 25, 92 S. Ct. 2006,
32 L. Ed. 2d 530 (1972) 23, 24

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Florida Star v. B.J.F.,
491 U.S. 524, 109 S. Ct. 2603,
105 L. Ed. 2d 443 (1989) 18, 19

Vance v. Universal Amusement Co., Inc.,
445 U.S. 308, 100 S. Ct. 1156,
63 L. Ed. 2d 413 (1980) 18, 19

RULES, STATUTES AND OTHERS

17 Am. Jur. 2d Contempt, § 157 (1990) 11

CJC 3(A) 37

CR 71 . . . . 22, 28-30

CR 71(c) 27

CrR 3.3(c)(1) 35

ER 1101(a) 9

ER 1101(c) 9

RCW 7.21.50 9

RCW 10.14.020(1) 13

RCW 10.14.040 14

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

RCW 10.14.040(6) 14

RCW 10.14.040(7) 14

RCW 10.14.080(4) 31

RCW 10.14.080(6) 18

RCW 74.34.210 16

U.S. Const. amend. 1 . . . . 35, 36

A. ASSIGNMENTS OF ERROR AND RELATED ISSUES

1. The trial court erred in finding that appellant violated the "surveillance" provision of the April 19, 2001 antiharassment order. CP 325, 466; CP (2d) 4, 6.[1]

Issues:

a. Whether the trial court's finding of contempt was based on inadmissible evidence and supposition.

b. Whether the trial court failed to strictly construe the "surveillance" provision in appellant's favor.

2. The trial court erred in finding that the appellant violated the October 26, 2001 antiharassment order by publishing "personal identification information" on his internet web site. CP 413-14, 418, 466; CP (2d) 42-43.

Issues:

a. Whether the prohibition on publishing "personal identification information" is void because the trial court lacked jurisdiction to impose restrictions on appellant's publications for the benefit of persons who are not parties to this case.

b. Whether the respondent's claim that he is a "fiduciary" or legal representative of the tenants of Council House lacks any legal or factual basis.

c. Whether the prohibition on publishing "personal identification information" is void as an unconstitutional prior restraint of speech.

---

[1] The Clerk has provided several volumes of Clerk's Papers. This brief refers to them as follows:

CP - Indexes dated August 22, 2001, November 25, 2002, and March 10, 2003 (No. 48662-4-I); pages 1-620.

CP (2d) - Index dated April 8, 2002 (No. 50135-6-I); pages 1-48.

3. The trial court erred in failing to appoint counsel to represent the appellant before commencing a contempt proceeding in which the appellant was in jeopardy of incarceration.

Issues:

a. Whether the trial court violated appellant's right to counsel where the trial court failed to advise appellant of his right to counsel, and appellant never waived his right to counsel.

b. Whether the assistance of an attorney in a civil appeal from antiharassment orders fails to satisfy the constitutional right to assistance of counsel in a contempt proceeding in which appellant was in jeopardy of incarceration for allegedly violating those orders.

c. Whether alleged defects in the notice of withdrawal by appellants' prior attorney are irrelevant where appellant was actually denied assistance of counsel, and where the court and opposing counsel expressly recognized that appellant was proceeding without assistance of counsel.

d. Whether the violation of appellant's right to counsel is not moot where appellant has the right to have an erroneous and prejudicial finding of contempt vacated, and where the validity of appellant's incarceration should be decided as a matter of public interest even if the issue is technically moot.

4. The trial court erred in imposing fines, fees, and in ordering appellant's incarceration. CP 326, 408-14, 418; CP (2d) 326.

5. The trial court erred in failing to grant appellant's motion to vacate the findings of contempt. CP 569-70; RP (6/21/02) 14.

Issues: The issues are set forth in numbers 1-3, supra.

6. The trial court erred in awarding respondent attorney's fees and costs. CP 408-12.

Issue: Whether the trial court erred in awarding attorney's fees and costs where the finding of contempt upon which such award was based was erroneous and void.

7. The trial judge erred in failing to recuse himself from this case.

Issue: Whether a reasonable person would question the trial court's impartiality where the trial court repeatedly violated appellant's rights, insulted the appellant, and made irrelevant and prejudicial remarks about the content of the appellant's constitutionally-protected publications.

8. Appellant adopts and hereby incorporates the assignments of error and issue statements in the Brief of Appellant (Brief No. 1 - Civil Issues).

9. The trial court erred in entering its contempt findings and orders because the antiharassment orders upon which those findings are based are void.

B. STATEMENT OF THE CASE

Trummel's consolidated appeals involve antiharassment orders and the trial court's subsequent finding of contempt. This factual statement continues the Statement of the Case in the "Brief of Appellant - (Brief No. 1 - Civil Issues)."

1. Contempt Proceedings - October 2001

In September of 2001, Mitchell brought a motion for contempt against Trummel based on the content of Trummel's web site. CP 278-87. On October 1, 2001, the trial court found that the publications on Trummel's web site violated the "surveillance" provision of the April 19, 2001 order. RP (10/1/01) at 22-23. The trial court ordered that to comply with the April 19th Order, Trummel had to "at a minimum" delete the "names, addresses and any other personal information regarding past and present Council House staff, residents, employees,

board members or agents, including their lawyers." RP (10/1/01) at 25-26. The trial court also found Trummel in contempt, and imposed fines of $100 per day. CP 325-26.

On October 5, 2001, trial court found that Trummel was in contempt of the October 1, 2001 order. The trial court ordered Trummel to appear on October 26, 2001. CP (2d) 4.

On October 26, 2001, the trial court found that Trummel was still in contempt. CP (2d) 6. The court issued a new antiharassment order that explicitly required Trummel to remove "personal identifying information" from his web site. CP (2d) 5-8. Trummel appealed from the entry of this new order. CP 571-79.

2. Trummel Jailed - February 2002

In February of 2002, Mitchell brought a second motion for contempt based on Trummel's web site. CP (2d) 31-41. Attorney Siegel withdrew from further representation of Trummel in the trial court. CP 580. Trummel appeared without an attorney at the motion hearing on February 27, 2002. CP 582; RP (2/27/02) at 2. Despite the well-established constitutional right to assistance of counsel in a contempt proceeding, see Tetro v. Tetro, 86 Wn.2d 252, 255, 544 P.2d 17 (1975), Judge Doerty failed to appoint counsel to represent Trummel.

Trummel argued, *pro se*, that the trial court had no jurisdiction over his web site and that his speech was protected in any event. RP (2/27/02) at 9-11. The trial court disagreed, found Trummel in contempt, and threw Trummel in jail. RP (2/27/02) at 17, CP

413-14. Paul Trummel, then age 68, began serving his time on February 27, 2002. CP 243; CP (2d) 42-43, attached as appendix A. Trummel also appealed this ruling CP (2d) 44-48.

By the Spring of 2002, Trummel's wrongful incarceration had captured the attention of the national and international media. Copies of articles about the Trummel case are attached in Appendix B.

After Trummel had been in jail for more than two months, the trial court, acting *sua sponte,* appointed attorney Brad Meryhew of the Society of Counsel Representing Accused Persons (SCRAP) to represent Trummel in the contempt proceedings. CP 415. Meryhew filed a motion to vacate the trial court's finding of contempt. CP 421-31.

Judge Doerty launched the June 17, 2002 review hearing by commenting:

> Factually, the case is about a mean, old man who becomes vicious and threatening[2] when he doesn't get his own way in the chronic disputes he has with his employers, landlords, building managers, and neighbors. Legally it is about balancing speech and the right to privacy. RP (6/17/02) at 2.

The Court then conditionally released Trummel pending a hearing on June 21, 2002, to give Trummel an opportunity to purge his contempt by removing "private information" from his publications. CP 432; RP (6/17/02) at 12-15. Strangely, the court also claimed that Trummel was "not ordered to quit writing or to quit publishing in any way," RP (6/17/02) at 5-6, even though Trummel had just served three and a half months in jail -- including

---

[2] The trial court never made findings indicating any threat had been made by Trummel, and there is no record that would support such a finding.

several weeks in solitary confinement -- for publishing the names of certain third parties who were not even petitioners. RP (6/17/02) at 10.

3. New Antiharassment Order - June 2002

On June 21, 2002, the trial court denied Trummel's motion to vacate the finding of contempt, RP (6/21/02) at 14, but declined to return Trummel to jail. CP 470. The court entered a new antiharassment order dated June 21, 2002 with altered geographical restrictions. CP 465-69. The new order additionally required Trummel to stay away from hundreds of people who never petitioned the court for relief, and from posting, on his web site, any "identifying information," including the names of any current, former or future staff member, tenant or attorney of Council House. CP 467.

Meryhew filed a motion for reconsideration of the denial of the motion to vacate the finding of contempt. CP 485-88. A new private attorney, Elena Garella, appeared for Trummel and filed a motion for reconsideration of the underlying antiharassment order. CP 472-84. Both motions were denied. CP 569-70. Trummel appealed. CP 562-63; 584-620.

The Clerk of this Court consolidated all of Trummel's appeals into a single appeal, but directed counsel for Trummel to file two briefs addressing the civil and contempt issues separately. Clerk's Ruling (9/3/02); Clerk's Ruling (10/4/02).

C. ARGUMENT

1. TRUMMEL DID NOT VIOLATE THE "SURVEILLANCE" PROVISION OF THE APRIL 19th ORDER.

The April 19, 2001 order placed no restrictions on Trummel's publications whatsoever. The pre-printed language of the order merely provided that Trummel was "restrained from . . . making any attempts to keep the petitioner under surveillance." CP 126-27, attached as appendix C. Nevertheless, Mitchell concocted a legal theory that Trummel's publications constituted "surveillance" of Council House, and urged the trial court to hold Trummel in contempt. CP 278-87. Mitchell's motion was entirely based on the appearance of certain articles on Trummel's web site. CP 258.

On October 1, 2001, the trial court found Trummel in contempt based on a tortured oral finding that Mitchell "could most certainly reasonably have been surveilled" by Trummel's web site. RP (10/1/01) at 22-23. The trial court's written finding states that Trummel's web site "causes the victims to reasonably feel under surveillance by Mr. Trummel." CP 325. The court's contempt order is erroneous because these findings are not supported by admissible evidence nor are they based on a correct, narrow interpretation of "surveillance."

A trial court's finding of contempt must be based on admissible evidence. ER 1101(a), (c) (rules of evidence apply to contempt proceedings except where the court may act summarily under RCW 7.21.50); see Mead School Dist. No. 354 v. Mead Ed. Ass'n, 85 Wn.2d 278, 284-85, 534 P.2d 561 (1975); see also State ex rel. Erhardt v. MacGillivray, 52 Wn.2d 485, 489, 326 P.2d 738 (1958) (under former statute, contempt must be shown by affidavit of person with testimonial knowledge of facts constituting the contempt). To find Trummel in contempt, the trial court was required to find that Trummel actually engaged in

surveillance of Mitchell and Council House. But Mitchell's motion for contempt was not supported by any admissible evidence that Trummel had actually kept a close watch on the comings and goings at Council House. See State v. Noah, 103 Wn. App. 29, 44, 9 P.3d 858 (2000) ("surveillance" means keeping a "close watch" over persons, and includes photographing and videotaping, quoting Webster's Third New Int'l Dictionary 2302 (1993)).

Mitchell's motion was entirely based on supposition that Trummel must have violated the order because he had somehow acquired information about events at Council House. CP 282. Such supposition does not constitute admissible evidence of contempt because the declarant, Mitchell's attorney, had no personal knowledge of how Trummel acquired the information on his web site. CP 257-58. In the absence of any admissible evidence that Trummel actually engaged in acts of "surveillance," the trial court's finding of contempt must be reversed.

The trial court erroneously concluded that the April 19, 2001 order prohibited surveillance through third parties. CP 324. In fact, the order only prohibited Trummel from *contacting* Mitchell and the tenants through third parties. CP 126; appendix C. Even if there were any admissible evidence that Trummel committed "surveillance" through third parties, such conduct was not actually prohibited by a narrow interpretation of the order. Furthermore, under Pierce v. Pierce, 37 Wn.2d 918, 923, 226 P.2d 895 (1951), the trial court had no authority or jurisdiction to prevent anyone from collecting information about Mitchell and/or events at Council House and providing that information to Trummel.

The only admissible evidence presented by Mitchell establishes that Trummel published certain articles about Mitchell and events at Council House on his web site. CP 258. Before this evidence could sustain a finding of contempt, the April 19, 2001 order must have clearly prohibited Trummel's publication of such information regardless of its source. Straining to find Trummel in contempt, the trial court concluded "that 'surveillance' or 'keeping watch' *could mean* keeping track [of events at Council House] through received information." CP 324. But such a broad interpretation of an undefined term is erroneous as a matter of law.

Where a finding of contempt is based upon the violation of a court order, the order must be strictly construed in favor of the contemnor. Stella Sales, Inc. v. Johnson, 97 Wn. App. 11, 20, 985 P.2d 391 (1999) (citing In re Marriage of Humphreys, 79 Wn. App. 596, 903 P.2d 1012 (1995)); see Johnson v. Beneficial Management Corp., 96 Wn.2d 708, 713, 638 P.2d 1201 (1982). "Punishment for contempt can only rest on a clear, intentional violation of a specific, narrowly drawn order; specificity is an essential prerequisite of a contempt citation." 17 Am. Jur. 2d Contempt, § 157 at 511-12 (1990). When narrowly construed in Trummel's favor, the term "surveillance" means only a "close watch" kept over persons or events. Noah, 103 Wn. App. at 44. Narrowly construed, "surveillance" does not mean publishing articles about persons or events based on second-hand information of unknown origin, and it does not mean making people "feel under surveillance." There is no admissible evidence to show that Trummel engaged in any "surveillance" under the requisite narrow construction of that

term. The trial court's finding that Trummel violated the April 19, 2001 order must be reversed.

Even assuming, *arguendo*, that the April 19, 2001 order applied to prohibit Trummel's publication of information about Mitchell and Council House, that order is an unconstitutional prior restraint, for the reasons explained in the next section. Either way, the trial court's October 1, 2001 finding that Trummel violated the April 19, 2001 order must be reversed.

2. THE TRIAL COURT'S CONTEMPT FINDINGS ARE VOID.

The trial court repeatedly found Trummel in contempt for posting names and other information about various staff and tenants of Council House on his web site. CP (2d) 4, 6, 42. These contempt findings were the basis of the trial court's attempt to impose fines, its award of attorney's fees to Mitchell, and its decision to throw Trummel in jail. All of trial court's findings of contempt must be reversed because the underlying orders that Trummel allegedly violated are void.

Normally, a court order cannot be collaterally attacked in contempt proceedings arising from a violation of the order. Under the collateral bar rule, a judgment of contempt will normally stand even if the order violated was erroneous or was later ruled invalid. State v. Coe, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984); Noah, 103 Wn. App. at 46. However, the collateral bar rule has no application where the underlying order is void for lack of jurisdiction. Coe, 101 Wn.2d at 370 (citing Mead School Dist. v. Mead Educ. Ass'n, 85 Wn.2d

278, 280, 534 P.2d 561 (1975)). "'A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved.'" Coe, 101 Wn.2d at 370 (quoting Bresolin v. Morris, 86 Wn.2d 241, 245, 534 P.2d 325 (1975)). Each of the trial court's contempt findings must be set aside under Coe because the underlying orders are void.

a. The Provisions of the Antiharassment Orders Relating to All Persons Other than Mitchell Are Void for Lack of Jurisdiction.

Mitchell claimed to have brought this action "in his representative capacity" on behalf of the tenants, employees and directors of Council House. CP 2. In fact, Mitchell has no legal authority to bring such an action. The tenants, employees and directors of Council House are not parties to this case. The trial court had no authority to find that Trummel had harassed these third parties or to order any relief on their behalf.

A petition for antiharassment must be brought by the "specific person" who is being harassed. RCW 10.14.020(1). This language precludes granting relief to any person who is not the target of the harassment.[3] Burchell v. Thibault, 74 Wn. App. 517, 522-23, 874 P.2d 196 (1994).

Hough v. Stockbridge, 113 Wn. App. 532, 54 P.2d 192 (2002), confirms that an antiharassment order may only be entered for the protection of a specific person who has

---

[3] The only exception to this rule is that a parent may seek an antiharassment order on behalf of a child. RCW 10.14.040(6), (7). Under the rule of *expressio unis est exclusio alterius*, the specific provision for parents establishes that there are no other persons who may seek an antiharassment order on behalf of another person. See Seattle v. Parker, 2 Wn. App. 331, 335, 467 P.2d 858 (1970).

brought petition for antiharassment. In Hough, the trial court entered reciprocal orders against feuding neighbors even though only one side had actually brought a petition. The appellate court reversed, holding that a person who is alleging that he is being harassed must file an antiharassment petition. Hough, 113 Wn. App. at 538.

This limitation on the trial court's power is not merely a question of "standing," but a strict limit on the authority and jurisdiction of the trial court. Hough, 113 Wn. App. at 540. In Pierce v. Pierce, supra, the trial court in a dissolution action ordered the wife not to have contact with another man who was not a party to the action. The Supreme Court reversed, holding that the court had no authority to issue such an order, and that the order, being in excess of the court's jurisdiction, was "absolutely void." Pierce, 37 Wn.2d at 923.

Under Burchell, Hough, Pierce and the plain language of the statute, Mitchell could not seek an antiharassment order on behalf of third parties. The directors, staff or tenants have not filed petitions, and they are not parties. The trial court had no jurisdiction to determine whether Trummel had harassed those persons or to award them any relief. Consequently, the trial court had no jurisdiction to find Trummel in contempt for publishing information about those persons.

b. Mitchell Is Not a "Fiduciary" or Legal Representative of the Tenants of Council House.

When Trummel pointed out, in a motion for reconsideration, that the trial court had no authority to issue an antiharassment order on behalf of third parties (CP 473-74), Mitchell argued that he is a "fiduciary" for the tenants of Council House. CP 501. But RCW 10.14.040

does not allow an alleged "fiduciary" to bring a petition for antiharassment on behalf of other independent adult persons.

More importantly, Mitchell's assertion that he is a "fiduciary" for the tenants is a condescending fiction, concocted by Mitchell in effort to justify a patently void order after the fact. Apart from citing Black's Law Dictionary in a footnote, Mitchell has never explained what type of fiduciary relationship he has with the tenants. CP 501. Nor is there any factual basis for the assertion that any fiduciary relationship was ever created. See Moon v. Phipps, 67 Wn.2d 948, 955-56, 411 P.2d 157 (1966) (fiduciary relationships are only created by the consent of the principal or by judicial process).

Mitchell's reliance on RCW 74.34.210, at CP 501, is frivolous. Nothing in the record suggests that any Council House tenant has been adjudicated to be a "vulnerable adult," or that Mitchell has been appointed the "guardian or legal fiduciary" for such a tenant. On the contrary, the record establishes that the tenants of Council House are independent adults with no legal disabilities and that Mitchell is merely the manager of their apartment building. CP 508-15, 534-35, 544-48.

Furthermore, none of the declarations filed by the tenants establish that Mitchell or his attorneys were ever given the legal authority to file a lawsuit on the tenants' behalf. In fact, Mitchell's attorneys freely admitted that they represent only Mitchell personally and the corporation, not the individual tenants. CP 7, 519.

> [W]e remind you that we represent Council House, the institution. *We do not represent Mr. Jacques [a tenant who signed a*

> *declaration for Mitchell] as an individual.* Every resident of Council House is entitled to and may retain counsel of his or her choosing.

CP 519. The tenants have never authorized Mitchell's attorneys to represent them. CP 508-15, 534-35, 544-48.

In sum, Mitchell is not a "fiduciary" -- he is merely an apartment manager with an inflated sense of self-importance. He has no more authority to bring this action as a "representative" of the tenants of Council House than he has the authority to make medical decisions for those tenants. His frivolous claim of "fiduciary" status is an improper attempt to usurp legal authority that he simply does not have. Indeed, Mitchell's improper assertion of authority over his independent adult tenants gives considerable credence to Trummel's complaints about Mitchell's mismanagement and abuse of power.

The trial court's determination that Trummel harassed the staff and tenants at Council House is void for lack of jurisdiction. Pierce, 37 Wn.2d at 923. Even if the order were valid with respect to Mitchell himself, the remainder of the trial court's order(s) must be vacated. The trial court's determination that Trummel was in contempt of these orders with respect to persons other than Mitchell must be vacated under Coe.

c. The Prohibitions on Publication of Information about Mitchell (or Anyone Else) Are Void as Unconstitutional Prior Restraints.

The antiharassment orders contain explicit content-based restrictions on speech. Specifically, these orders prohibit Trummel from publishing any "personal identifying information" on his web site. CP (2d) 7; CP 467. These restrictions constitute unlawful prior restraint. Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 n.13, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980). As discussed in the Brief of Appellant (Brief No. 1 - Civil Issues), sections (A)(3),(4), the publication of truthful information is highly protected and the state's interest in preventing harassment is insufficient to limit those protections. Florida Star v. B.J.F., 491 U.S. 524, 541, 109 S. Ct. 2603, 2613, 105 L. Ed. 2d 443 (1989) (upholding a newspaper's right to identify a rape victim by name); State v. Williams, 144 Wn.2d 197, 211, 26 P.3d 890 (2002) (holding that the state's interest in preventing harassment is "facially insufficient" to support a content-based restriction on speech).

The antiharassment statute does not allow a trial court to consider or impose restrictions on pure speech. RCW 10.14.080(6); Williams, 144 Wn.2d at 211. Because pure speech cannot be considered "harassment," Noah, 103 Wn. App. at 42 (allegedly defamatory picket signs cannot be considered "harassment"), it cannot be the subject of any remedy under RCW Chap. 10.14. The content-based restrictions on Trummel's publications are simply invalid prior restraints under Vance, Florida Star and Bering v. SHARE, 106 Wn.2d 212, 234, 721 P.2d 918 (1986).

The restrictions on Trummel's publications cannot be characterized as time, place or manner restrictions because such restrictions must be (i) content neutral, (ii) narrowly tailored to serve a ***compelling*** State interest, and (ii) leave open ample alternative channels of communication. Bering, 106 Wn.2d at 234. A total prohibition on publishing "personal identifying information" is void because such a restriction is not content neutral, nor does it leave open alternative channels of communicating the same information, nor is such a restriction supported by a compelling state interest. Florida Star, 491 U.S. at 541, 109 S. Ct. at 2613; Williams, 144 Wn.2d at 211. Even if this Court were to affirm the determination that Trummel had engaged in harassment, this Court must vacate the unconstitutional restrictions on Trummel's right to free speech.

Under Coe, court orders that amount to invalid prior restraints on speech are void for purposes of the collateral bar rule. Coe, 101 Wn.2d at 374. Because the provisions allegedly violated by Trummel are void prior restraints, the findings of contempt based on those provisions must be reversed. Coe, 101 Wn.2d at 385-86.

3. THE TRIAL COURT VIOLATED TRUMMEL'S RIGHT TO COUNSEL AT THE FEBRUARY 27, 2002 CONTEMPT HEARING.

On February 11, 2002, Mitchell filed another motion for contempt, again based on Trummel's web site. CP (2d) 31-41. By notice filed February 14, 2002, Robert Siegel, the

attorney who had represented Trummel up to that date, withdrew from further representation of Trummel in the trial court. CP 580-81.[4]

Siegel did not assist or represent Trummel in the trial court after filing his notice of withdrawal. Although Siegel continued to represent Trummel in his appeals, CP 430, Siegel did not file anything on Trummel's behalf after February 14, 2002 (other than appellate pleadings). Siegel did not provide assistance to Trummel in the new contempt proceedings. CP 489.

Trummel appeared *pro se* at the contempt hearing on February 27, 2002. Mitchell's attorneys expressly recognized that Siegel had withdrawn. RP (2/27/02) at 2-3. The trial court never advised Trummel that he could be jailed or that Trummel had the right to appointed counsel. Although Trummel did his best to represent himself at the hearing, it is undisputed that Trummel did not know that he had the right to appointed counsel at that time. CP 490.

The trial court rejected Trummel's pro se arguments, found Trummel in contempt, and sent him to jail. CP (2d) 42-43; RP (2/27/02) at 17. Trummel appeared *pro se* at a review hearing on April 3, 2002. The parties again discussed the fact that Siegel represented Trummel only in his appeals. The trial court expressly noted that Siegel did not represent Trummel in the contempt proceedings, and that Trummel continued to be unrepresented.

---

4 A copy of the notice of withdrawal is attached as appendix D.

RP (4/3/02) at 7. The trial court again failed to advise Trummel that he had the right to appointed counsel. Trummel was returned to jail. CP 413-14.

On May 1, 2002, the trial court apparently realized that Trummel had the right to appointed counsel. The trial court *sua sponte* appointed the Society of Counsel Representing Accused Persons (SCRAP) to represent Trummel. CP 415. Brad Meryhew appeared on behalf of Trummel. CP 416-17. Only then did Trummel learn that he had the right to appointed counsel. CP 490.

Meryhew filed a motion to vacate the February 27, 2002 finding of contempt based on the violation of Trummel's right to appointed counsel. CP 421-27. In response, Mitchell contended that Siegel had not properly withdrawn and that Siegel's continued representation of Trummel on appeal was sufficient. CP 437-39.[5] Mitchell also submitted a declaration regarding certain remarks allegedly made by Siegel after the February 27, 2002, hearing. CP 507.

At a hearing on June 21, 2002, the trial court denied Trummel's motion to vacate the finding of contempt. RP (6/21/02) at 14. The trial court noted that Trummel had not asked for appointed counsel. RP (6/21/02) at 7. But the court never found that Trummel was aware that he had the right to appointed counsel, and there is no record that would support such a finding. The trial court also accepted Mitchell's argument that Siegel's withdrawal was invalid under CR 71. RP (6/21/02) at 10.

---

[5] This contention was contrary to Mitchell's express recognition at the hearing that "Mr. Siegel is no longer representing Mr. Trummel." RP (2/27/02) 2.

Attorney Meryhew moved for reconsideration on behalf of Trummel. CP 485-88. Based on the declaration of Mitchell's attorney, the trial court again concluded that Siegel's withdrawal was "defective." CP 569.

a. Trummel Was Never Advised Of, and Did Not Waive, His Right to Appointed Counsel.

It is settled law that Trummel had the right to appointed counsel because he faced the possibility of incarceration. Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764, 1769-70, 152 L. Ed. 2d 888 (2002). This right to appointed counsel is specifically applicable to civil contempt proceedings. Tetro v. Tetro, 86 Wn.2d 252, 255, 544 P.2d 17 (1975). In the trial court Mitchell conceded that Trummel had the right to counsel in the contempt proceedings. CP 437.

It is undisputed that Trummel was not actually represented by counsel at the hearing on February 27, 2002, when the trial court threw him in jail. Siegel had already unambiguously withdrawn from representing Trummel in the trial court. CP 580-81. Siegel was not present in court, CP 582, and the record clearly shows that Siegel did not file any written materials on Trummel's behalf. Trummel's declaration that Siegel did not provide any legal assistance to Trummel is unrefuted. CP 489.

Trummel never waived his right to appointed counsel. A waiver of the right to counsel must be knowing, intelligent and voluntary. Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984) (citing Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972)). A person cannot waive a constitutional right unless the record shows that the person was demonstrably aware of the right being waived. Acrey, 103 Wn.2d at 208. Absent a valid waiver of the right to counsel, no person may be imprisoned unless he was

in fact represented by counsel at his trial. Shelton, 122 S. Ct. at 1770 (citing Argersinger, 92 S. Ct. at 2006).

It is undisputed that Trummel was never told that he had the right to appointed counsel. CP 490. Trummel cannot have knowingly relinquished his right to appointed counsel without knowing that he had that right. Nothing in the record indicates that the possibility of appointed counsel was ever discussed before May 1, 2002 when SCRAP was appointed to represent Trummel. Therefore, contrary to the trial court's unsupported findings, the record clearly shows that Trummel was never advised of, and never knowingly waived, his right to appointed counsel. Trummel proceeded *pro se* only because he was never informed that he had any other option.

Under Tetro and Shelton, the trial court was required to advise Trummel of his right to counsel and to ensure that such counsel was provided before proceeding with the contempt hearing. The undisputed facts show that the trial court failed to do so. Consequently, the trial court's finding of contempt on February 27, 2002, as well as the trial court's decision to throw Trummel in jail, are invalid and must be reversed. Tetro, 86 Wn.2d at 255; Acrey, 103 Wn.2d at 212.

b. Attorney Siegel's Ongoing Representation of Trummel on Appeal Did Not Satisfy Trummel's Right to Counsel in the Trial Court Contempt Proceedings.

Mitchell argued in the trial court that Siegel's continued representation of Trummel in his appeals somehow "satisfied" Trummel's right to counsel. CP 437. This argument

remains frivolous. There is nor authority for the proposition that an appellate attorney's assistance on appeal "satisfies" the constitutional requirement of actual assistance of counsel at a trial or other hearing that leads to incarceration. The fact that Siegel continued to represent Trummel in his appeal of the underlying antiharassment order does not establish that Trummel was actually represented by counsel in the contempt proceedings. The undisputed facts show that Siegel was not present at the contempt hearing, did not file anything, and provided Trummel no legal assistance whatsoever.

The telephonic remarks allegedly made by Siegel to Mitchell's attorney after the February 27, 2002 hearing do not establish that Trummel was actually represented by Siegel after he withdrew on February 14, 2002. CP 507 (Mitchell's attorney alleged that Siegel telephoned her after Trummel was thrown in jail and said "This is what happens when I let my client go to court by themselves"). Based on this alleged remark, Mitchell erroneously asserted that Siegel was still representing Trummel in the trial court.

But even if Siegel actually made the remark, it merely confirms that Siegel had withdrawn from further representation of Trummel *in the trial court*. Trummel was still Siegel's "client" because Siegel was still handling the appeals. Siegel's alleged remarks do not rebut the uncontroverted evidence that Trummel was not actually represented by Siegel in the trial court proceedings after February 14, 2002. Although Siegel continued to prosecute Trummel's appeals, CP (2d) 44-48, Siegel never appeared in the trial court, took no steps to vacate the finding of contempt, and made no attempt to obtain Trummel's release.

Mitchell also argued that Trummel was trying to have "two bites at the apple" by appealing the antiharassment order while moving to vacate the contempt. CP 439. This argument was frivolous. No legal authority supports the suggestion that a person must choose between his right to appeal a court order and his right to trial counsel in subsequent contempt proceedings. Furthermore, there are important differences between appealing a court order and moving to vacate a finding of contempt. The vacation of a finding of contempt does not affect the underlying court order. Conversely, reversal of a court order does not necessarily affect a finding of contempt. See Coe, 101 Wn.2d 364. Siegel's assistance on Trummel's appeal did not help Trummel resist or defend against a finding of contempt in any way.

c. Any Alleged Defects in Siegel's Withdrawal Are Irrelevant.

Mitchell also argued that Siegel did not properly withdraw from representation of Trummel because Siegel allegedly violated CR 71(c), which states that a notice of withdrawal should identify a date, at least ten days hence, when withdrawal will be effective. CP 438; 580-81. The argument is meritless.

Neither Mitchell nor the trial court ever objected to the manner in which Siegel withdrew. RP (2/27/02) at 2-3. At the contempt hearing on February 27, 2002, both Mitchell and the trial court were perfectly willing to throw Trummel in jail without providing the assistance of counsel to which he was constitutionally entitled. It was not until months later, when Meryhew pointed out that Trummel's right to appointed counsel had been violated at the contempt hearing, that Mitchell suggested Siegel's notice was defective because it did not

specificy a date at least 10 days' hence. This was raised purely as an after-the-fact rationalization.

There also is no showing that the alleged CR 71 violation prejudiced Mitchell or affected the proceedings in any way. Even if Siegel had complied with the 10-day rule, Siegel's notice of withdrawal, dated February 14, 2002, would have been effective February 24, 2002, *three days before* the hearing at which Trummel was tried without counsel and thrown in jail.

More importantly, neither Mitchell nor the trial court were able to cite authority for the bizarre proposition that a defendant whose attorney has in fact withdrawn may be denied the assistance of counsel if the withdrawal of counsel violates a court rule. Kingdom v. Jackson, 78 Wn. App. 154, 896 P.2d 101 (1995), cited by Mitchell and the trial court, addressed the issue of whether a retained attorney may withdraw in a civil case. Nothing in Kingdom even remotely addresses the issue presented here: whether a defendant facing incarceration has the right to appointed counsel where a prior attorney has in fact withdrawn and the defendant is in fact unrepresented. If Mitchell's argument were correct, a defendant facing trial in a capital murder case could be forced to proceed without counsel if his attorney of record failed to appear on the day of trial.

The constitutional right to assistance of counsel is not trumped by an attorney's violation of a mere court rule. If Siegel violated CR 71, and if his alleged violation had actually caused any prejudice or delayed the proceedings (which it did not), the remedy, if any, would

be a continuance and sanctions against Siegel. Under Shelton and Tetro, the trial court was required to provide appointed counsel for Trummel regardless of whether Siegel had violated CR 71.

Mitchell's argument is similar to one rejected in Lockhart v. Grieve, 66 Wn. App. 735, 834 P.2d 64 (1992), where an attorney withdrew from representation of a client shortly before the statute of limitations elapsed. In the subsequent action for legal malpractice, the client argued that the attorney was liable because he was still the attorney of record at the time the limitation period ran. It was undisputed that the attorney who withdrew had violated CR 71 and therefore remained the attorney of record. Lockhart, 66 Wn. App. at 741. Nevertheless, the court held that the attorney's failure to comply with CR 71 was not a contributing cause of the running of the statute of limitations because the client had already obtained new counsel. Lockhart, 66 Wn. App. at 742.

> The flaw in Lockhart's argument is that, at the time the statute ran, the circumstances were the same as they would have been had Murphy withdrawn in full compliance of CR 71. Greive and Serrin [the new attorneys] would be the attorneys actively representing Lockhart, and Murphy would have been taking no active part in the case. *The attorney-client relationship between Lockhart and Murphy had been effectively terminated prior to the running of the statute of limitations*. The failure to comply with CR 71 did not impede in any way the ability of Greive and Serrin to make timely service of process on one or more of the defendants.
>
> Strict compliance with CR 71 would have caused Lockhart to be notified that he had a right under CR 71 to file a written objection to the withdrawal. Had such a written objection been filed, withdrawal could then have been accomplished only by an order of the court. We hold that would not have made a difference in this case. Lockhart has given no

> indication that he would have objected, nor has he stated any ground of objection that would have justified a denial by the court of Murphy's requested withdrawal. The circumstances were such that there was no prejudice to Lockhart by permitting the withdrawal.

Lockhart, 66 Wn. App. at 741-42 (emphasis added).

Similarly, Siegel's alleged violation of CR 71 caused no prejudice to Mitchell, and Mitchell never objected to Siegel's withdrawal or to his alleged noncompliance with CR 71. Even if Siegel had strictly complied with CR 71, Mitchell and the trial court would have been alerted to the fact that Siegel intended to withdraw on February 24, 2002, three days before the contempt hearing at which Trummel was jailed. As in Lockhart, Siegel's representation of Trummel had in fact terminated before the hearing was held and all parties were aware of that fact. The manner in which Siegel withdrew had no effect on the trial court's ability to honor Trummel's right to appointed counsel. Trummel was unrepresented at the February 27, 2002 contempt hearing for the simple reason that the trial court failed to advise Trummel that he had a right to appointed counsel. Siegel's alleged failure to comply with CR 71 is totally irrelevant.

d. The Violation of Trummel's Right to Appointed Counsel Is Not Moot.

Mitchell also argued that the violation of Trummel's right to counsel is moot because Trummel has been released from jail and the court can no longer provide effective relief. CP 495-97. The trial court did not actually decide this issue. CP 569.

The constitutional violation is not moot because a ruling in Trummel's favor on that issue will affect other issues. If Trummel's right to counsel was violated, then the results of the hearing on February 27, 2002, including all findings made at that hearing, must be reversed. Trummel has the right to have such findings vacated because they may prejudice him in future proceedings. For example, a finding that Trummel had "harassed" Mitchell on his web site might affect a determination of whether the antiharassment order should remain in effect. RCW 10.14.080(4).

Furthermore, a determination that Trummel had the right to counsel will provide effective relief to Trummel in the future. Trummel has the right to appointed counsel at any and all contempt proceedings in this case until the antiharassment order is vacated or expires. Tetro, 86 Wn.2d at 255 (defendant has right to counsel in any contempt proceeding that "may result in incarceration"). A determination by this Court that Trummel has such a right will ensure that this error does not happen again. See Eugster v. City of Spokane, 115 Wn. App. 740, 63 P.3d 841 (2003) (appeal was not technically moot where plaintiff sought recognition of a constitutional and statutory right of a city officer to represent himself); see also, Hough, 113 Wn. App. at 536-37 (challenge to antiharassment order is not moot where court can cleanse the stigma by removing violation from party's record).

Furthermore, this issue should be decided, even if moot, because Trummel's incarceration by the trial court has become a matter of substantial public interest. In determining whether to consider a moot issue the Court considers three factors: (1) the public

or private nature of the issue; (2) whether an authoritative determination is desirable for the future guidance of public officers; and (3) whether the issue is likely to recur. Eugster, 63 P.3d at 847 (citing Hart v. Dep't of Soc. & Health Servs., 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)). All three of these factors are present.

First, this is a very public issue. This case has generated substantial interest in both the local and national media. See Appendix B. The trial court received hundreds of emails commenting on its handling of this case. As of April 30, 2003, the transcript of the June 21, 2002 hearing was posted on the home page of the King County Superior Court web site. Id. The second and third factors are established by the fact that numerous antiharassment orders are issued every day in this state. As a result, the issue of whether persons facing contempt proceedings based on such orders must be advised of their right to appointed counsel is virtually guaranteed to recur. An authoritative determination of rights of persons charged with civil contempt is highly desirable for the future guidance of Washington courts.

For all these reasons, the Court should hold that Trummel's right to appointed counsel was violated, and that the trial court's order of February 27, 2002 must be reversed.

4. MITCHELL IS NOT ENTITLED TO ATTORNEY'S FEES OR COSTS.

The trial court's award of fees to Mitchell was based on the findings of contempt made on October 1, 2001, and October 5, 2001. CP 410. For the reasons set forth in Arguments 1 and 2, supra, those findings were erroneous. Accordingly, the award of fees and costs to Mitchell must also be vacated.

5. JUDGE DOERTY SHOULD HAVE RECUSED HIMSELF.

> The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

State v. Dagenais, 47 Wn. App. 260, 261, 734 P.2d 539 (1987) (quoting State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). The test for determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts. Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

A reasonable person would question Judge Doerty's impartiality in this case. Judge Doerty repeated failed to respect Trummel's rights as a defendant, particularly his right to counsel. Judge Doerty gave no plausible reason for denying Trummel's request for a continuance to obtain counsel. RP (4/19/01) at 2. Judge Doerty made no attempt to determine whether Trummel knew that the had the right to appointed counsel before allowing Trummel to proceed *pro se* in a hearing that resulted in Trummel being thrown in jail. Judge Doerty allowed Trummel to languish in jail for over two months -- a period longer than the time allowed for trial in criminal cases; CrR 3.3(c)(1) -- before finally appointing a public defender to challenge Trummel's illegal incarceration. Based on these objective facts, a reasonable person would question Judge Doerty's ability to deal with Trummel fairly.

The requirement of an impartial judge is crucial in the First Amendment context where the applicable law clearly prohibits any consideration of the content of the defendant's statements except under narrowly defined circumstances. See Bering, 106 Wn.2d at 234 (injunctions on speech must be content neutral). In such cases, a judge must carefully apply the established First Amendment doctrines without bias, and without being swayed by the offensive or controversial content of the defendant's speech where such speech is protected.

The transcripts in this case clearly show that Judge Doerty reacted emotionally to content of Trummel's writings and failed to maintain appropriate judicial demeanor and impartiality. Judge Doerty attacked Trummel's credentials as a journalist, CP 143, even though he later admitted that it does not matter whether Trummel was a journalist or not. RP (6/17/02) at 4; see App. Br. (Civil). Judge Doerty attacked Trummel's writings as "anti-Semitic, misogynistic, homophobic lies" even though he reluctantly conceded that Trummel's speech was protected by the First Amendment. RP (6/17/02) at 10.[6] An experienced trial court judge should be expected to know that even racist and homophobic speech is protected speech, and that persons who utter such speech have the same legal rights as anyone else. There was no legal or factual issue before the trial court that would require, or even permit, the trial court to express an irrelevant personal opinion on the relative social value of Trummel's writings.

---

[6] Trummel denies that his speech is anti-Semitic, misogynistic, or homophobic, and maintains that his allegations against Mitchell are true.

Finally, Judge Doerty attacked Trummel personally, calling him a "mean old man" with "well developed talents to lie and distort." RP (6/17/02) at 2; RP (10/1/01) at 19. A judge charged with deciding a case involving First Amendment rights should be expected to render a reasoned decision without using his courtroom as a pulpit to insult the defendant. In this regard, Judge Doerty's conduct arguably violated the Code of Judicial Conduct:

> (2) Judges should maintain order and decorum in proceedings before them.
>
> (3) Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity . . .

CJC 3(A). Under these circumstances, a reasonable person would conclude that Judge Doerty was not impartial and was not capable of being impartial when dealing with Trummel.

Consequently, Judge Doerty should have recused himself from further involvement in this case. Upon remand, this Court should order that the case not be returned to Judge Doerty.

D. CONCLUSION

The trial court's numerous errors require reversal of the contempt orders and reversal of the award of costs and attorney's fees. Because the antiharassment orders were void and erroneous, the contempt proceedings should be dismissed with prejudice. If the orders are reversed or vacated and the matter is remanded for further proceedings, this Court should direct that the proceedings be heard before a different trial judge.

DATED this ______ day of May, 2003.

Respectfully submitted,

____

WILLIAM JOHN CRITTENDEN
WSBA No. 22033

NIELSEN, BROMAN & KOCH, PLLC

____

ERIC BROMAN
WSBA No. 18487
Office ID No. 91051

Attorneys for Appellant