

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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PAUL TRUMMEL, *Appellant*,

v.

STEPHEN MITCHELL AND COUNCIL HOUSE, INC.,  
*Respondents*,

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BRIEF OF APPELLANT  
(BRIEF NO. 1 - CIVIL ISSUES)

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NOTE TO THE READER:

Pursuant to an order of the Clerk of the Court, appellant Paul Trummel has filed two opening briefs. This brief, which addresses the underlying civil issues, should be read first. The other brief, which addresses the contempt issues, should be read second.

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## **I. ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1**

The trial court erred in determining that the appellant engaged in “unlawful harassment” as defined by RCW 10.14.020(1).

### **Issues Pertaining to Assignment of Error No 1**

Whether the trial court failed to find that a course of conduct was directed at a specific person, as required by RCW 10.14.020(1).

Whether the trial court failed to find that a course of conduct, excluding constitutionally protected activities, caused the petitioner to suffer substantial emotional distress or that such distress was reasonable.,

Whether the trial court failed to consider and make proper findings on the “course of conduct” factors required by RCW 10.14.030.

Whether the trial court’s failure to make findings on all ultimate facts and material issues requires reversal.

Whether the trial court failed to exclude the appellant’s constitutionally protected activities from its determination of whether the appellant had engaged in harassment, as required by RCW 10.14.020(2).

Whether the trial court violated the appellant’s First Amendment rights by relying on the content of appellant’s publications in determining that the appellant had engaged in unlawful harassment.

Whether the mere “important governmental objective” in preventing harassment allows content-based restrictions on pure speech.

Whether the trial court erroneously concluded that appellant’s publications could be restricted in the name of “privacy.”

Whether the trial court improperly balanced a state-created right to privacy against the appellant’s First Amendment rights.

Whether RCW Chap. 63.60, which restricts the commercial use of a person’s name, may be applied to constitutionally-protected speech.

Whether unproven allegations of defamation cannot establish unlawful harassment under RCW Chap. 10.14 as a matter of law.

Whether RCW Chap. 10.14, is unconstitutionally overbroad.

**Assignment of Error No. 2**

The trial court erred in denying appellant’s motion for a continuance to obtain counsel.

**Issue Pertaining to Assignment of Error No 2**

Whether the trial court abused its discretion in denying a continuance where the appellant had the right to counsel and the trial court gave no reason why a continuance should not have been granted.

**Assignment of Error No. 3**

The trial court erred in failing to hold an adversarial hearing based on admissible evidence.

**Issues Pertaining to Assignment of Error No 3**

Whether the trial court had authority to hold a trial by affidavit.

Whether the trial court violated appellant's right to due process.

Whether the evidence relied on by the trial court consisted of inadmissible hearsay, lay opinion and conclusion testimony.

**Assignment of Error No. 4**

The trial court erred in failing to dismiss the respondent's antiharassment petition.

**Issue Pertaining to Assignment of Error No 4**

Whether an antiharassment petition that is entirely based on constitutionally protected activities must be dismissed.

**Assignment of Error No. 5**

The trial court erred in entering antiharassment orders against the appellant on April 19, 2001, October 26, 2001, and June 21, 2002.

**Issues Pertaining to Assignment of Error No 5**

Whether the trial court lacked jurisdiction to enter antiharassment orders for the benefit of persons other than Mitchell.

Whether the trial court lacked jurisdiction to determine that appellant had harassed anyone other than Mitchell.

Whether respondent Mitchell's claim of "representative capacity" is without legal or factual basis.

In the alternative, whether there is any evidence to support a determination that appellant harassed any person other than Mitchell.

Whether the remedies imposed for the benefit of persons other than respondent Mitchell are void for lack of jurisdiction.

Whether the restrictions on appellant's speech and publications constitute unlawful prior restraint.

Whether the distance restrictions in the antiharassment orders are excessive and unnecessary.

Whether the trial court erred in making the order(s) permanent.

**Assignment of Error No. 6**

The trial court erred in failing to award appellant attorney's fees and costs for defending against respondent's unconstitutional claims.

**Issues Pertaining to Assignment of Error No 6**

Whether appellant is entitled to attorney's fees under the anti-SLAPP statute, RCW 4.24.510.

Whether appellant is entitled to attorney's fees in equity for resisting the wrongful injunctions obtained by respondent.

**II. INTRODUCTION**

This case arises out of a dispute between appellant Paul Trummel, a retired freelance journalist, and respondent Stephen Mitchell, the administrator of a federally-subsidized housing project in which Trummel

formerly resided. Trummel contends that Mitchell is a tyrant who abused his authority and violated various laws and regulations. Trummel investigated Mitchell and events at Council House, and reported his findings in newsletters and web sites. Mitchell may dispute the accuracy of Trummel's allegations, but Trummel's right to conduct investigations and publish his articles is protected by the First Amendment.

Nevertheless, Mitchell persuaded the King County Superior Court that Trummel's activities constituted "harassment" under RCW Chap. 10.14. After a brief hearing in which both the First Amendment and the statutory elements of harassment were ignored, and Trummel's rights to counsel and due process were violated, Judge Jim Doerty summarily determined that Trummel was not really a journalist and had no First Amendment rights. The trial court imposed an order of anti-harassment against Trummel. The trial court's unconstitutional orders led, in rapid progression, to Trummel's constructive eviction from Council House, to the imposition of punitive fines, and finally to Trummel's incarceration, at the age of 68, in the King County Jail for almost four months.

Trummel now asks this Court to restore his constitutional rights by reversing virtually every aspect of the trial court's rulings.

### III. STATEMENT OF THE CASE

Mitchell is the administrator of Council House, Inc., a low-income housing project for senior citizens in the Capitol Hill neighborhood of Seattle. CP 2.<sup>1</sup> Council House is subsidized by the Department of Housing and Urban Development (HUD). CP 170. Until April of 2001, Trummel was a tenant of Council House. CP 170.

Trummel is a retired professor and freelance journalist. CP 170. While residing at Council House, Trummel investigated various abuses and violations by Mitchell, including censorship, violations of privacy, and wrongful evictions of tenants. Trummel published his findings in a newsletter entitled “Disconnected” and on internet web sites, [www.contracabal.org](http://www.contracabal.org) and [www.contracabal.net](http://www.contracabal.net). CP 170-193, 214-231; CP (2d) 16-28.<sup>2</sup> In March of 2001, Trummel unsuccessfully sought an antiharassment order to prevent retaliation by Mitchell. CP 194-96.

Mitchell would like this Court to believe that Trummel is a crank, and that his allegations against Mitchell are imaginary and malicious. But Trummel is not alone in his concern about Mitchell’s misuse of power. Numerous tenants of Council House have supported Trummel in his

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<sup>1</sup> “CP” refers to the three volumes of Clerk’s Papers transmitted under Appeal No. 48662-4-I (570 pages).

<sup>2</sup> “CP (2d)” refers to the one volume of Clerk’s Papers transmitted under Appeal No. 50135-6-I (48 pages).

ongoing struggle against Mitchell, and have filed declarations supporting Trummel notwithstanding intimidation by Mitchell. CP 203-213, 508-15, 534-35, 544-48. Even if Trummel were the “mean old man” that Judge Doerty castigated, that view is utterly irrelevant to the legal issues presented, and merely highlights the trial court’s prejudice.

**A. Mitchell’s Petition for Antiharassment**

In April of 2001, Mitchell hired private counsel and filed a petition for antiharassment against Trummel. CP 1. Mitchell submitted more than 40 declarations against Trummel by various tenants. CP 21-125. Mitchell claimed to act in a “representative capacity” for the staff and tenants of Council House, CP 2, but this was false. CP 508-15, 519, 534-35, 544-48.

Virtually all of Mitchell’s declarants were primarily upset by Trummel’s newsletter, which they attacked in purely conclusory terms. Few of the declarations described any actual conduct which, if proven, would amount to unlawful harassment as defined in RCW 10.14.020. CP 21-125. Most of the declarations are facially insufficient, including one Stalinist gem that denounces Trummel as a “dissident.” CP 88-89.

In his own declaration, Mitchell complained that Trummel was “yelling at and trying to intimidate,” and “upsetting” a few tenants, instigating government investigations and legal actions, filing lawsuits, and “writing, publishing and distributing defamatory and inflammatory

comments.” CP 9-11. Mitchell asserted that he suffered “emotional distress” only because of state, federal and local governmental investigations. CP 230. But Mitchell made no claim that such distress was substantial, objectively reasonable, or that it was caused by any conduct that is not constitutionally or statutorily protected. Instead, Mitchell moved the Court for relief based on Trummel’s publications, use of the court system, reports to governmental agencies, and alleged offensive behavior directed at other people. CP 1-7. Not one Council House tenant sought an antiharassment order on his or her own behalf.

**B. The April 19, 2001 Hearing**

Trummel was served with Mitchell’s petition and over 40 declarations on April 12, 2001, giving him only one week to respond. CP 139. Trummel filed a *pro se* response to the petition as well as a written motion for a continuance to obtain counsel. CP 128-138; 139-41.

On April 19, 2001, the court held a hearing. Trummel advised the court that he had obtained an attorney, Robert Siegel, but that Siegel was not yet available. Even though Mitchell did not oppose the request for a continuance, Judge Doerty immediately denied the request without explanation, forcing Trummel to defend himself *pro se*. RP (4/19/01) at 2.

At Mitchell's attorney's suggestion, no witnesses testified at the hearing.<sup>3</sup> Instead, the trial court read some of the Mitchell's declarations into the record. RP (4/19/01) at 7-15. Judge Doerty summarily determined that the elements of harassment had been proven. Yet he made *no findings* as to what Trummel actually said or why his publications are not protected by the First Amendment. RP (4/19/01) at 15. The trial court made no specific findings on any of the statutory elements set forth in RCW 10.14.020; -030. Apart from a statement in the record that "Mr. Trummel[']s claim as a Journalist is bogus," CP 143, the trial court made *no written findings* whatsoever, and no oral findings with respect to Mitchell's claims that Mitchell himself was harassed.

The trial court, *sua sponte*, found that Trummel was "litigious" and "contemptuous," and that Trummel would violate any narrowly tailored injunction. CP 16-17. Based on this oral finding, Judge Doerty evicted Trummel from Council House, and even refused to allow Trummel to return to pick up his belongings. RP (4/19/01) at 17-18. The court ordered Trummel to stay 500 feet away from Council House and prohibited him from having any contact with any Council House tenants

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<sup>3</sup> Spurning Trummel's right to cross-examine adverse witnesses, Mitchell's attorney stated "[W]e don't believe it's appropriate at this particular time for live testimony in that it will perpetuate the course of conduct that the respondent has been perpetrating against Mr. Mitchell as well as Council House." RP (4/19/01) at 4-5.

or staff. CP 126-27. Mitchell supported and approved of the Court's decision. RP (4/19/01) at 19.

Only *after* the trial court had evicted Trummel from his home did Judge Doerty finally address Trummel's request for a continuance to obtain counsel. The court's only explanation for forcing Trummel to proceed without a lawyer and without adequate time to prepare a defense was its opinion that Trummel has sufficient "expertise in these procedures," and therefore did not need either a continuance or a lawyer. RP (4/19/01) at 20. Trummel has no legal training. CP 140.

Shortly after the hearing, attorney Siegel appeared for Trummel and explained the trial court's numerous constitutional and statutory errors in a motion for reconsideration. CP 145-55. The trial court denied the motion without comment. CP 159-60. Trummel appealed. CP 161-66.

(This Statement of the Case continues in the Brief of Appellant – Contempt Issues).

#### **IV. ARGUMENT**

This appeal presents questions of law regarding the statutory and constitutional requirements for an antiharassment proceeding under RCW Chap. 10.14. Such questions of law are reviewed *de novo*. State v. Prestegard, 108 Wn. App. 14, 21, 28 P.3d 817 (2001).

If the trial court had held an adversarial hearing and made specific findings of fact based on admissible evidence, this Court would review those findings under the substantial evidence test. See State v. Noah, 103 Wn. App. 29, 39, 9 P.3d 858 (2000). However, no admissible evidence was introduced in a hearing, and no proper findings were made. Therefore, this Court’s review of the errors in the trial court is *de novo*.

**A. The anti-harassment statute, RCW Chap. 10.14, cannot be used to restrict constitutional rights.**

The government has an interest in preventing serious personal harassment in the form of threats, violence, vandalism and stalking. Nevertheless, legislative efforts to regulate speech and behavior characterized as “harassment” present serious constitutional issues. “While antiharassment ordinances are constitutional, . . . they must be carefully drawn not to burden protected speech.” City of Bellevue v. Lorang, 140 Wn.2d 19, 23, 992 P.2d 496 (2000).

**1. The trial court failed to make the statutory findings required to ensure that the antiharassment statute does not violate Constitutional rights.**

To avoid infringing on constitutional rights, the anti-harassment statute, RCW Chapter 10.14, was drafted to prohibit only “serious, personal harassment.” RCW 10.14.010. “The statute is not designed to penalize people who are overbearing, obnoxious or rude.” Burchell v. Thibault, 74 Wn. App. 517, 522, 874 P.2d 196 (1994). Several clearly-

defined elements must be established in order for an anti-harassment order to pass constitutional muster. See Hough v. Stockbridge, 113 Wn. App. 532, 538, 54 P.2d 192 (2002) (citing Burchell, 74 Wn. App. at 521) (setting forth statutory elements under RCW 10.14.020(1). To obtain an anti-harassment order, the party bringing the petition must prove that the responding party has engaged in a “course of conduct” that amounts to “unlawful harassment.” RCW 10.14.020; RCW 10.14.040(1); RCW 10.14.080(3). Those terms are carefully defined in RCW 10.14.020.

The trial court must find that the course of conduct “serves no legitimate or lawful purpose.” RCW 10.14.020(1). Standing alone, this element would be unconstitutionally vague because the average person would not be able to determine what conduct was proscribed, and because the statute would be subject to arbitrary and discriminatory application. Lorang, 140 Wn.2d at 30. Consequently, in determining whether a course of conduct “serves any legitimate or lawful purpose,” the court must consider specific factors set forth in RCW 10.14.030. Under Lorang, 140 Wn.2d at 30, application of these criteria is *constitutionally* required before a court may find that a person has committed harassment.

In this case, the trial court *completely failed to make the specific findings* on “course of conduct” as required by Noah, 103 Wn. App. at 39, Lorang, 140 Wn.2d at 30, and RCW 10.14.030. Without meaningful

findings as to what conduct the trial court may have relied on, this Court has no basis upon which to determine whether Trummel's conduct constituted harassment as a matter of law. Consequently, the trial court's determination that Trummel engaged in harassment must be reversed.

An antiharassment petition must also establish that the alleged harassing conduct is "directed at a specific person." RCW 10.14.020(1). A person who is not himself the target of the harassment cannot seek an anti-harassment order. Burchell, 74 Wn. App. at 522. An anti-harassment petition must be brought by the specific person who is being harassed. See RCW 10.14.040. And a court has no authority to issue an anti-harassment order for the protection of anyone other than the petitioner. Burchell, 74 Wn. App. at 522; Hough, 113 Wn. App. at 540.

Here, the trial court *made no finding* as to who the target of the harassment might be. Instead, Judge Doerty made a hopelessly conclusory finding that Trummel's conduct was "directed at specific persons within Counsel House, both staff and residents." RP (4/19/01) at 15.

Importantly, the trial court *made no finding* that Trummel's harassing conduct was directed at Mitchell, who was the actual—and *only*—petitioner. In fact, the trial court did not cite or read from the Declaration of Stephen Mitchell in its oral ruling. See RP (4/19/01) at 7-15. In the absence of a finding that Trummel's alleged harassing conduct

was directed at Mitchell, and evidence to support such a finding, the trial court's decision must be reversed. Burchell, 74 Wn. App. at 522.

The statute also unambiguously requires that the petitioner prove that the harassing conduct has actually caused the petitioner (not some other person) substantial emotional distress *and* that such emotional distress is reasonable. RCW 10.14.020(1). The statute thus requires the petitioner's emotional distress to be evaluated both subjectively and objectively. Again, this process is necessary to avoid constitutional infringements. Burchell, 74 Wn. App. 521.

The trial court *did not find* that any particular person actually suffered substantial emotional distress or that any such emotional distress was reasonable. Instead, Judge Doerty reversed the burden of proof, stating that Trummel could not rebut the subjective claims of fear and annoyance contained in the hearsay declarations submitted by Mitchell. RP (4/19/01) at 8. With respect to the actual petitioner, Mitchell, the trial court made *no findings* on emotional distress whatsoever. The trial court did not even cite or read from Mitchell's declaration in its oral ruling.

Furthermore, the trial court specifically relied on the constitutionally protected content of Trummel's publications as the *cause* of any such emotional distress. As discussed below, in subsection A(3) of this brief, the "substantial emotional distress" element must arise out of

the “course of conduct,” which *excludes* protected activities. RCW 10.14.020(1). In the absence of any sustainable finding that the petitioner actually suffered substantial emotional distress caused by non-protected conduct, the trial court’s order must be reversed.

Finally, the trial court *made no findings* on any of the factors required by RCW 10.14.030, and made only a conclusory determination that Trummel’s conduct served “no legitimate or lawful purpose.” RP (4/19/01) at 15. In the absence of a meaningful analysis of the factors in RCW 10.14.030, any finding that Trummel has engaged in harassment is unconstitutional and must be reversed. Lorang, 140 Wn.2d at 30.

Without proper findings on the elements of “unlawful harassment” and “course of conduct” — findings that exclude constitutionally protected activity — it is not possible to determine whether Trummel’s conduct in fact violated RCW 10.14.020(1), or whether his activities were protected by the state and federal constitutions. See Noah, 103 Wn. App. at 39 (findings in an action under RCW Chap. 10.14 must exclude protected activities); State v. Williams, 144 Wn.2d 197, 213, 26 P.3d 890 (2002) (any uncertainty as to whether the trier of fact made a finding of harassment based on protected conduct requires reversal); CR 52 (findings of fact are required in all cases tried without a jury). As a general rule, the lack of proper findings precludes appellate review and requires reversal.

Where a trial court fails to make findings on all ultimate facts and material issues, the trial court's decision must be reversed. State v. Mewes, 84 Wn. App. 620, 622-23, 929 P.2d 505 (1997). "It is improper for an appellate court to ferret out a material or ultimate finding of fact from the evidence presented." Wold v. Wold, 7 Wn. App. 872, 876, 503 P.2d 118 (1972). An appellate court will neither retry factual issues nor substitute its judgment for the trial court. Mewes, 84 Wn. App. at 623.

In this case, the trial court's failure to make proper findings on the statutory elements of harassment precludes appellate review. This Court simply must reverse the trial court's decisions.

**2. The trial court failed to exclude constitutionally protected activities in determining that Trummel had committed harassment.**

Although proof of each of the statutory elements is *required* in an anti-harassment proceeding, these elements alone are not *sufficient* where constitutionally-protected activities are at issue. Federal constitutional rights, including but not limited to First Amendment freedoms, take precedence over any rights created by state law. Wash. Const. art. I, § 2. The legislature explicitly recognized the supremacy of the federal Constitution in two separate sections of the anti-harassment statute:

Constitutionally protected activity is not included within the meaning of "course of conduct."

RCW 10.14.020(2).

Nothing in this chapter shall be construed to infringe upon any constitutionally protected rights including, but not limited to, freedom of speech and freedom of assembly.

RCW 10.14.190.

Pursuant to RCW 10.14.020(2), the trial court cannot consider any constitutionally protected activity in determining whether a person has engaged in harassment. Noah, 103 Wn. App. at 39. Leafleting, publishing, speaking, using the internet, using the telephone, complaining to government agencies, and using the court system are all constitutionally protected activities.<sup>4</sup> Therefore, Trummel’s exercise of these rights cannot be considered a “course of conduct” for purposes of RCW 10.14.020(2). Rather, the trial court should only have considered unprotected conduct. See Noah, 103 Wn. App. at 39 (trespassing, interference with a lease, and threatening phone calls are not protected activities).

At the April 19, 2001 hearing, the trial court not only failed to *exclude* speech and protected activities as required by RCW 10.14.020(2) and Noah, but it expressly cited Trummel’s publications as a basis for its finding of harassment. RP (4/19/01) at 9-13. Like Noah’s picket signs,

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<sup>4</sup> See U.S. v. Grace, 461 U.S. 171, 176, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983) (picketing and leafleting); New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (publishing); Watts v. U.S., 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (speaking); Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (internet); Lorang, 140 Wn.2d 119 (telephone); Richmond v. Thompson, 130 Wn.2d 368, 922 P.2d 1343 (1996) (complaints to government agencies); Seattle v. Megrey, 93 Wn. App. 391, 968 P.2d 900 (1998) (access to courts).

Trummel's newsletters and his websites are protected by the First Amendment. Noah, 103 Wn. App. at 38-39. The trial court's reliance on Trummel's writings as the alleged harassing conduct violates Noah, the plain language of RCW 10.14.020(2), and Trummel's free speech rights.<sup>5</sup>

The right of free expression not only includes the right to communicate but also the right to receive information. Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-23, 48 L.Ed.2d 346 (1976). To the extent the trial court's finding of harassment was based on Trummel's investigations of, and interviews with, the tenants of Council House, the trial court also violated Trummel's First Amendment right to receive information as well as the public's right to read Trummel's findings. See First Nat. Bank v. Bellotti, 435 U.S. 765, 775, 98 S.Ct. 1407, 1415, 55 L. Ed. 2d 707 (1978) (corporation's speech is protected whether or not a corporation has First Amendment rights).

Free speech is not the only constitutional right at issue. RCW 10.14.020(b) precludes consideration of *any form* of "constitutionally protected activity." Mitchell's petition focused on Trummel's complaints

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<sup>5</sup> The trial court's finding that Trummel's publications constituted harassment is inconsistent with the court's later rulings. At hearings on October 5, 2001, and June 17, 2002, the trial court conceded that Trummel's publications were protected speech. RP (10/5/01) at 14, RP (6/17/02) at 10. Nevertheless, the trial court never withdrew its initial finding that these publications constituted harassment, and contrived to limit Trummel's freedom to write and publish what he wished to.

to government agencies, including HUD, and on legal proceedings initiated by Trummel. CP 2-3. Trummel's complaints to government agencies are protected by the petition clauses of the federal and Washington constitutions. Richmond v. Thompson, 130 Wn.2d 368, 378, 922 P.2d 1343 (1996). Trummel's complaints are also protected by statute and under the common law, and his complaints to HUD are absolutely privileged. Story v. Shelter Bay Co., 52 Wn. App. 334, 341, 760 P.2d 368 (1988); RCW 4.24.510. Accordingly, Trummel's complaints to HUD, even if willfully false, cannot be the basis for an anti-harassment order.

The trial court also relied on Trummel's alleged litigiousness as the basis for its remedial order. RP (4/19/01) at 17. But Trummel also has a constitutional right to access the court system. Trummel's small claims actions and his unsuccessful effort to obtain an anti-harassment order against Mitchell must be excluded from any "course of conduct" under RCW 10.14.020(2). Seattle v. Megrey, 93 Wn. App. 391, 394-96, 968 P.2d 900 (1998). Judge Doerty's reliance on Trummel's alleged "litigiousness" was erroneous as a matter of law.

**3. The trial court's finding of "harassment" was impermissibly based on the content of Trummel's constitutionally protected publications.**

Nor may the court consider the protected *content* of a person's speech or publication. Noah, 103 Wn. App. at 42 (anti-harassment order

cannot be based on picket signs). A court may regulate pure speech *only* where a statement falls into a recognized category of unprotected speech, such as “true threats,” fighting words, or obscenity. See Williams, 144 Wn.2d at 207 (“true threats”); Planned Parenthood v. American Coalition, 290 F.3d 1058 (2002) (“true threats”); State v. Lansdowne, 111 Wn. App. 882, 46 P.3d 836 (2002) (obscenity and threats).

The trial court specifically cited the content of Trummel’s writings and web sites as constituting harassing conduct, holding that “[t]he Court believes there would be adequate cause to enter the Antiharassment Order just based on Trummel’s own papers.” RP (4/19/01) at 12-13. Under Noah, the trial court was not permitted to consider the content of Trummel’s publications unless the speech falls into a recognized category of unprotected speech, such as “true threats,” obscenity or fighting words. Williams, 144 Wn.2d at 208. But *not one* unprotected word was uttered by Trummel; none appear in the record, and none were cited by Judge Doerty, who simply relied on his own disapproval to silence Trummel.

At the April 19, 2001 hearing, the trial court erroneously assumed that Trummel’s speech was not protected by the First Amendment because Trummel’s publications upset some of his co-tenants. But the First Amendment protects insulting, inflammatory, and even hate-filled speech. In National Socialist Party v. Village of Skokie, 432 U.S. 43, 97 S.Ct.

2205, 53 L.Ed.2d 96 (1977), the Supreme Court upheld the rights of neo-Nazis to march through a predominantly Jewish suburb with swastika banners flying. In R.A.V. v. City of St. Paul, 505 U.S. 377, 387, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the Court overturned a conviction under the St. Paul Bias-Motivated Crime Ordinance where a juvenile burned a cross in the front yard of an African-American family. In Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), the Court held that statements advocating violence against blacks and Jews are protected by the First Amendment.

Under these precedents, the trial court's conclusion that Trummel's writings are not protected by the First Amendment is dead wrong, even if, as Judge Doerty opined, they were "anti-Semitic, misogynistic, homophobic lies." RP (6/17/02) at 10.<sup>6</sup> Indeed, Judge Doerty later conceded that the same speech upon which he relied in finding harassment was in fact protected speech. Id.

The trial court also identified the protected content of Trummel's publications as the cause of any emotional distress. But RCW 10.14.020(1) clearly states that the "substantial emotional distress" must be caused by the "course of conduct," which, as discussed supra, *must*

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<sup>6</sup> The record does not support Judge Doerty's hysterical characterization of Trummel's publications.

*exclude* constitutionally protected activity. RCW 10.14.020(2). Therefore, the petitioner must prove, and the trial court must find, that the required “substantial emotional distress” was not caused by Trummel’s constitutionally protected conduct. There was neither such proof nor such a finding. Accordingly, the trial court’s determination that Trummel engaged in harassment is unconstitutional, and must be reversed.

**4. The trial court’s legal analysis is unsupported by, and contrary to, well-established Constitutional law.**

Judge Doerty’s initial determination that Trummel’s publications are not protected by the First Amendment was entirely based on the conclusory determination that Trummel is not really a journalist. RP (4/19/01) at 6; CP 143. The trial court assumed, but cited no authority for, the proposition that journalists enjoy greater rights of free expression than do other people. In fact, the First Amendment does not afford any greater protection to journalists than anyone else. Pell v. Procunier, 417 U.S. 817, 833, 94 S.Ct. 2800, 2809-2810, 41 L.Ed.2d 495 (1974).

After the trial court’s peculiar rulings and Trummel’s jailing became the subject of international criticism (see Appendix; RP 6/21/02 at 20-21), Judge Doerty attempted to justify his initial anti-harassment order

with various after-the-fact legal theories.<sup>7</sup> All of the trial court's later legal theories are contrary to settled principles of constitutional law.

First, the trial court backed away from its original determination that Trummel had no First Amendment rights because his journalist credentials are "bogus." CP 143. In later hearings, the court opined that Trummel's publications would not be protected by the First Amendment even if Trummel were employed by a "world-class newspaper." RP (6/17/02) at 4. However, the trial court still failed to provide any legal analysis to support its prior determination that Trummel's writings are not protected by the First Amendment, world-class newspaper or not.

Second, the trial court cited the legislative intent behind the harassment statute as support for its ruling. CP 325; RP (10/1/01) at 24; RP (6/17/02) at 2-3. But under the supremacy clause, the legislative intent behind this state-created right cannot trump Trummel's federal constitutional rights. See Alverado v. WPPSS, 111 Wn.2d 424, 430-31, 759 P.2d 427 (1988). The statute itself expressly recognizes this limitation. RCW 10.14.190. Furthermore, the "important governmental

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<sup>7</sup> It is worth noting that Mitchell's attorneys *never* briefed the obvious First Amendment issues in the trial court. See CP 1-7. Adequate briefing may have prevented the trial court's errors and saved Trummel from four months of imprisonment.

objective” in preventing harassment is *facially insufficient* to support any restriction on free speech. Williams, 144 Wn.2d at 211.<sup>8</sup>

Third, the trial court concluded—with no supporting authority—that Trummel’s publications violate the “privacy” rights of Mitchell and the other tenants. RP (6/17/02) at 10.<sup>9</sup> However, any restriction on Trummel’s publications in the name of “privacy” must be narrowly tailored to a “state interest of the highest order.” 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). Under Williams, 144 Wn.2d at 211, the “important governmental objective” in preventing harassment is *facially insufficient* under the Florida Star test. Judge Doerty also assumed that the right to publish information about specific persons only applies to public officials. RP (6/17/02) at 11. But under Florida Star, the same rule applies to private persons.

Florida Star requires a state to apply any “privacy” restriction “evenhandedly, to the smalltime disseminator as well as the media giant.” Florida Star, 491 U.S. at 540, 109 S.Ct. at 2613. But there is no general

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<sup>8</sup> The unsupported assertion in Noah, 103 Wn. App. at 41, that preventing harassment is a “compelling state interest” is simply wrong.

<sup>9</sup> The trial court erroneously asserted that Trummel had published social security numbers. RP (6/17/02) at 10. In fact, there is no allegation or evidence that Trummel has ever published such information. See CP (2d) 33.

prohibition on the publication of personal information under Washington law. On the contrary, the names, addresses, phone numbers, and even social security numbers of ordinary people are bought, sold, and splattered all over the Internet every day.<sup>10</sup> Until Washington law provides a general prohibition on publishing information about private persons, no restriction on Trummel's publications can satisfy the Florida Star test.

Fourth, the trial court attempted to balance Trummel's free speech rights against Mitchell's alleged right to privacy under Washington law. RP (10/1/01) at 23-24; CP 324. At the June 17, 2002 hearing, Judge Doerty offered a curious interpretation of American federalism:

Legally [this] is a case about balancing speech and the right to privacy. . . RP (6/17/02) at 2.

This is a state court and a proceeding under a state statute governed by the state constitution. Not being an American, perhaps Mr. Trummel has difficulty in understanding this basic principle of a federal republic. . . . States are permitted to provide rights to their citizens that the U.S. Constitution does not. The U.S. Constitution does not have a privacy clause, for example. In this state our legislature has chosen to implement our constitutional right to privacy with the antiharassment statute. . . RP (6/17/02) at 7-8.

But the only "balancing" permitted by the First Amendment is already established by the existing case law: any restriction on speech must be

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<sup>10</sup> For example, private addresses are easily located for free at the King County Recorder's Office web site. See "<http://www.metrokc.gov/recelec/records/>." Records available at this site include social security numbers and other "private" information.

“narrowly tailored to promote a compelling Government interest.” Williams, 144 Wn.2d at 211. The merely “important” interest in preventing harassment is not sufficient to prohibit pure speech other than certain recognized categories of unprotected speech, such as “true threats.” Williams, 144 at 209-11. Furthermore, any “privacy”-based restriction on speech must meet an even higher burden under Florida Star, 491 U.S. 524.

The trial court’s application of the state constitution is mistaken for several additional reasons. The free speech clause of the Washington constitution affords Trummel *greater* protection than the First Amendment, not less. See Ino Ino, Inc. v. Bellevue, 132 Wn.2d 103, 121, 937 P.2d 154 (1997). And the right of privacy under Wash. Const. Art. 1, § 7 has no application whatsoever because Trummel’s writings do not constitute “state action.” Personal Restraint of Maxfield, 133 Wn.2d 332, 337, 945 P.2d 196 (1997). Even if the Washington right to privacy applied to Trummel, neither Mitchell nor the trial court has conducted a Gunwall analysis of Const. Art. 1, § 7, which is *required* before a court will consider whether a provision of the state constitution provides any greater protection than its federal counterpart. State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986); Personal Restraint of Dyer, 143 Wn.2d 384, 393-94, 20 P.3d 907 (2001).

Fifth, the trial court cited RCW Chapter 63.60 for the proposition that Mitchell and the tenants of Counsel House have a property interest in their names, which Trummel allegedly violated. RP (6/21/02) at 23-24. There is absolutely no authority to support the ludicrous proposition that such a statutory property interest supercedes the First Amendment. Indeed, the statute states that it does not apply to news reporting “including, without limitation, comment, criticism, satire, and parody relating thereto.” RCW 63.60.070(1).

Because there is no legal basis for the trial court’s determination that Trummel’s publications were not protected by the First Amendment, the finding of unlawful harassment must be reversed.

**B. Mitchell’s allegations of defamation cannot establish unlawful harassment as a matter of law.**

Mitchell’s petition was based, in part, on the unfounded assertion that Trummel’s publications were “defamatory.” CP 2. But unproven allegations of mere defamation cannot establish “unlawful harassment” as a matter of law. Furthermore, the trial court never actually found that any of Trummel’s statements were defamatory, and the record would not support such findings had they been made.

The anti-harassment statute provides a remedy for unwanted personal contact, not defamation. Its purpose is to offer speedy and

effective relief for “serious, personal harassment” by preventing unwanted contact between the victim and the perpetrator. RCW 10.14.010. The statute requires the court to examine whether “any current contact between the parties was initiated by the respondent only or was initiated by both parties,” whether “the respondent has been given clear notice that all further contact with the petitioner is unwanted,” and whether “contact by the respondent with the petitioner or the petitioner's family has been limited in any manner by any previous court order.” RCW 10.14.030(1),(2),(6). Unlike harassment, which must be directed at the complainant, defamation requires that the defamatory matter be communicated to a person other than the person defamed. Restatement (Second) of Torts § 577, comment b.

Nothing in RCW 10.14.020, -030 suggests that the statute was intended to apply to allegedly defamatory statements to third parties. Pure speech that is alleged to be merely defamatory must be treated as “constitutionally protected activity” for purposes of RCW 10.14.020(2) and excluded from consideration under Noah., 103 Wn. App. 29.

Speech that is alleged to be defamatory is heavily protected by the First Amendment. The truism that ‘defamatory speech is not protected speech’ is misleading because the protections of the First Amendment are afforded in the process of adjudicating whether a statement is actually

defamatory. All of these protections for speech that is alleged to be defamatory must be afforded before a trial court could find that any particular statement is not “constitutionally protected activity.”

The First Amendment protects opinion or hyperbole no matter how demeaning such speech might be. In Robel v. Roundup Corp., 148 Wn. App. 35, 59 P.3d 611 (2002), a unanimous court dismissed a claim of defamation by an employee who had been variously referred to as “a fucking bitch,” a “cunt,” a “snitch,” a “squealer,” a “liar,” and an “idiot.” Robel, 59 P.3d at 614. Such statements are nonactionable opinions under the First Amendment. Id. Similarly, neither Trummel’s opinions nor his inflammatory rhetoric may be held to be defamatory.<sup>11</sup>

Even speech that has been *adjudicated* to be defamatory is still protected by the First Amendment prohibition on prior restraint. Prior restraints of speech are presumptively unconstitutional. Vance v.

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<sup>11</sup> Trummel’s allegedly defamatory statements are protected by other privileges as well. His articles about mismanagement and corruption at a publicly funded housing facility are matters of public concern and fall under the New York Times standard, requiring proof of “actual malice” (knowledge that a statement was false or reckless disregard for truth or falsity). New York Times, 376 U.S. at 279-80, 84 S.Ct. at 726. Trummel’s complaints to government agencies are afforded the same protection under the petition clause. Richmond, 130 Wn.2d 368.

In addition, Trummel’s speech is protected from claims of defamation by Story, 52 Wn. App. at 341 (absolute privilege for complaints to HUD); RCW 4.24.510 (absolute privilege for complaints to any government agency; Demopolis v. Peoples Nat. Bank, 59 Wn. App. 105, 796 P.2d 426 (1990) (absolute privilege for statements in legal proceedings). Even if these privileges are not strictly constitutional protections, there is

Universal Amusement Co., Inc., 445 U.S. 308, 316 n.13, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); New York Times v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971). “It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.” Vance, 445 U.S. at 316 n.13. The Washington constitution is even more protective, providing an absolute prohibition on prior restraint. State v. Coe, 101 Wn.2d 364, 374-75, 679 P.2d 353 (1984).

Prior restraint is not available as a remedy for defamation; *the only available remedy is an action for damages*. Near v. Minnesota, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed.2d 1357 (1931); State ex rel. Lumber v. Superior Court, 24 Wn.2d 314, 164 P.2d 662 (1945). Injunctions are not permitted no matter how pointedly offensive the content of the defendant’s speech might be. See Dworkin v. Hustler Magazine, 634 F. Supp 727, 730 (D.Wyo. 1986) (court would not enjoin publisher of pornographic magazine from using name or likeness of members of National Organization of Women).

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no indication that the legislature intended the anti-harassment statute to supercede these well-established and important rights.

In contrast, the only remedy available under RCW 10.14.080(6) is injunctive relief against future conduct. “The statute is not intended to provide redress for past injury.” Burchell, 74 Wn. App. at 522. Because the only allowable remedy for defamation is an award of damages after the fact, which cannot be granted in an anti-harassment proceeding, an allegation of defamation in an anti-harassment petition is a claim for which no relief can be granted.

The prohibition on prior restraint creates gives rise to yet another constitutional hurdle — because there are no equitable remedies for defamation, a person accused of defamation has the right to a jury trial. See Ross v. Bernhard, 396 U.S. 531, 533, 90 S.Ct. 733, 735, 24 L.Ed.2d 729 (1970). But there is no jury in an anti-harassment hearing. See RCW 10.14.080(3). Allowing a trial court to adjudicate a claim of defamation in such a proceeding would violate the defendant’s right to jury trial.

There are practical limitations as well. The anti-harassment statute is intended to provide a speedy remedy for serious harassment, but the proper adjudication of all the constitutional and common law elements of defamation is a time-consuming process.<sup>12</sup> Adjudication of defamation

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<sup>12</sup> At a minimum, a claim for defamation requires proof that a statement was (i) factual, (ii) false, (iii) unprivileged, (iv) made with at least some degree of fault, and (v) caused damages. Robel, 59 P.3d at 622 (statements must facts, not opinions); Clardy v. Cowles Publishing Co., 81 Wn. App. 53, 57, 912 P.2d 1078 (1996) (elements of defamation).

claims requires civil discovery followed by a full jury trial. In contrast, the anti-harassment statute does not allow discovery and requires a hearing in only 14 days. RCW 10.14.070. To allow a trial court to adjudicate claims of defamation in such a proceeding would destroy these well-established constitutional protections for allegedly defamatory speech.

Accordingly, this Court must recognize that there are constitutional, statutory and practical reasons why allegations of defamation cannot constitute “harassment” under RCW 10.14.020. Under Burchell, Near, and the plain language of the statute itself, the anti-harassment statute does not and cannot provide a remedy for allegations of mere defamation. Speech that is alleged to be merely defamatory is “constitutionally protected activity” for purposes of RCW 10.14.020(2) and cannot be considered. The trial court cannot adjudicate claims of defamation in an anti-harassment proceeding.<sup>13</sup>

Even if a trial court had the authority to adjudicate claims of defamation in an anti-harassment proceeding, the issue is academic in this

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<sup>13</sup> Mitchell may respond to these arguments by citing a curious dictum in Noah. In a footnote, the Court recited the truism that libelous speech is not protected, implying that such speech could be the basis for an anti-harassment order. Noah, 103 Wn. App. 39 n.1. This assertion, unsupported by any authority or analysis, is dicta and wrong. It is clearly dicta because the Noah court expressly excluded the alleged defamatory speech from its consideration. The footnote flatly contradicts the body of the Noah opinion which clearly states that the content of the picket signs, which were alleged to be defamatory, was protected speech that could not be the basis for an anti-harassment order. Noah, 103 Wn.

case. Trummel was given none of the constitutional protections to which a person charged with defamation is entitled.<sup>14</sup> In fact, Trummel was given no meaningful opportunity to respond to Mitchell’s allegations, and was forced to defend his publications without the assistance of counsel. See section D (below). Judge Doerty did not make any findings on any of the constitutional or common law elements of defamation, nor is there any admissible evidence in the record that would sustain such findings.<sup>15</sup>

Indeed, the trial court’s gross mishandling of Mitchell’s allegations proves the point — a trial court cannot properly adjudicate or provide a remedy for claims of defamation in an anti-harassment proceeding under RCW Chap. 10.14. If Mitchell or the tenants of Counsel House believe Trummel has defamed them, their remedy is an action for defamation.

**C. In the alternative, RCW Chap. 10.14 is unconstitutionally overbroad.**

A statute that proscribes a “substantial amount of constitutionally protected conduct” may be challenged as unconstitutionally overbroad.

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App. 42. And it is worth noting that the inflammatory picket signs at issue in Noah were clearly protected statements of opinion under Robel, 59 P.3d at 622.

<sup>14</sup> There has been no determination of what specific statements are alleged to be defamatory. There has been no determination of whether any such statements were privileged. There was no jury trial.

<sup>15</sup> There is no evidence, analysis or finding as to whether any particular statement was merely an expression of opinion. There is no evidence or finding as to whether any particular statement was false or caused any actual harm. There is no evidence or finding as to whether Trummel made any particular statement with any particular degree of fault.

Williams, 144 Wn.2d at 206. As discussed in subsection A(1), the antiharassment statute was drafted in an effort to avoid the problem of overbreadth. This Court has narrowly construed “course of conduct” to exclude offensive but protected speech. See Noah, 103 Wn. App. at 39 (excluding allegedly defamatory picket signs from “course of conduct”).

Nevertheless, the question of whether RCW Chap. 10.14 is overbroad has not been squarely addressed. See Burchell, 74 Wn. App. at 517, 523 (declining to reach defendant’s overbreadth challenge). If, as Mitchell suggests, the antiharassment statute permits a court to restrict websites or newsletters regardless of whether the content of such publications is constitutionally protected, then the statute proscribes “a substantial amount of protected speech.” Under Williams, the “important government objective” in preventing harassment is facially insufficient to uphold such an overbroad restriction on pure speech. Williams, 144 Wn.2d at 211. Therefore, unless the antiharassment statute is construed to exclude all protected speech, including Trummel’s controversial publications, the entire statute is facially unconstitutional.

The antiharassment statute must be either narrowly construed or struck down as overbroad. This Court is required to construe the statute to be constitutional where possible. Wash. State Republican Party v. Public Disclosure Com'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000). To that end,

this Court should hold that the statute was erroneously *applied* to Trummel. But if the statute is indeed as broad as Mitchell and the trial court have suggested, then the statute is unconstitutional on its face. Either way, the trial court's application of the statute to Trummel's speech was unconstitutional, and the antiharassment orders issued by the trial court must be vacated.

**D. The trial court abused its discretion in denying Trummel's request for a continuance to obtain counsel.**

Trummel had only one week in which to prepare for a hearing in which he was forced to defend his free speech rights and to respond to more than 40 declarations against him. CP 139. Trummel requested a short continuance so that the attorney he had found would be able to appear. RP (4/19/01) at 4. There was no exigency justifying denial of Trummel's motion. Neither Mitchell nor Judge Doerty offered any reason why the court could not have issued a temporary order and continued the hearing to allow Trummel to obtain counsel.

Nevertheless, the trial court railroaded Trummel into a hearing in which he was unprepared and unrepresented, a hearing that stripped him of his First Amendment rights and threw him out of his home. All of the legal errors committed by the trial court could have been avoided if Trummel's counsel had appeared and briefed the court on the

constitutional and statutory requirements for an anti-harassment order. In addition, Trummel maintains that many of the declarations filed by Mitchell were obtained by manipulation and coercion of the elderly tenants who signed them. But Trummel was given no opportunity to conduct discovery, or examine the witnesses against him in a proper evidentiary hearing.<sup>16</sup> See Goldberg v. Kelly, 397 U.S. 254, 270, 90 S.Ct. 1011, 1021-22, 25 L.Ed.2d 287 (1970) (due process includes the right to have counsel cross-examine adverse witnesses).

A trial court's ruling on a motion for a continuance is reviewed for a manifest abuse of discretion. Balandzich v. Demeroto, 10 Wn. App. 718, 720, 519 P.2d 994 (1974). In exercising its discretion, the court may properly consider:

the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Balandzich, 10 Wn. App. at 720. Under this standard, the trial court's denial of a continuance was a manifest abuse of discretion because none of these factors warranted denial of the motion. There were *no prior*

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<sup>16</sup> The trial court's erroneous denial of an evidentiary hearing is addressed in section E.

*continuances, no showing of prejudice to Mitchell, and no reason why a temporary order would not suffice. This case bears no resemblance to cases in which continuances were properly denied. Balandzich, 10 Wn. App. at 721 (case had previously been continued six times over five years); Martonik v. Durkan, 23 Wn. App. 47, 51, 596 P.2d 1054 (1979) (case had been pending for three years and was continued several times); Willipa Trading Co., Inc., v. Muscanto, Inc., 45 Wn. App. 779, 786, 727 P.2d 687 (1986) (court granted prior continuance on condition that no additional continuance would be granted).*

The trial court's ruling was not merely an abuse of discretion, but a capricious exercise of judicial power. The record demonstrates that Judge Doerty was angry at Trummel, RP (4/19/02) at 20, and never gave Trummel's motion any serious consideration. RP (4/19/02) at 2. The fact that the judge explained his ruling on the motion only after deciding the merits shows that the trial court's stated reason for denying the motion was only an after-the-fact rationalization.

In any event, Judge Doerty's assertion that Trummel did not require an attorney is wrong as a matter of law. Although Trummel may not have had a right to appointed counsel in the initial hearing, see Seventh Elect Church v. Rogers, 34 Wn. App. 105, 120, 660 P.2d 280 (1983), Trummel had a due process right to be represented by private

counsel. Goldberg, 397 U.S. at 270, 90 S.Ct. at 1022. The statute itself expressly recognizes this right. RCW 10.14.090(1). The trial court's ruling that Trummel was not entitled to the assistance of private counsel was a clear violation of due process.

The trial court's denial of a continuance must be reversed. This Court must vacate the trial court's determination that Trummel was engaged in harassment, and vacate all the succeeding trial court orders.

**E. The trial court violated Trummel's right to an adversarial hearing based on admissible evidence.**

The trial court's determination that Trummel committed harassment was entirely based on hearsay declarations submitted by Mitchell. RP (4/19/01) at 6-15. No live witnesses were ever called, and Trummel was never given an opportunity to cross-examine the various declarants. Although the trial court asked Trummel if he wished to present any testimony, RP (4/19/01) at 5, the court denied him the continuance that he needed to obtain the presence of witnesses. Trummel never waived his right to an adversarial hearing, and he never consented to allowing the trial court to decide the matter based on hearsay declarations. Trummel relied on his written response only because he was not prepared and did not have the assistance of an attorney. RP (4/19/01) at 4-5.

**1. The trial court had no authority to hold a trial by affidavits.**

Trummel had a due process right to an evidentiary hearing at which the witnesses against him could be confronted and cross examined. Goldberg, 397 U.S. at 269-70, 90 S.Ct. at 1021-22. A trial by affidavit is not permitted unless the statute or court rule provides for such a process or where the parties stipulate to trial by affidavit. See Marriage of James, 79 Wn. App. 436, 442, 903 P.2d 470 (1995); Estate of Stockman, 59 Wn. App. 711, 713, 800 P.2d 1141 (1990). RCW Chapter 10.14 allows only *temporary orders* to be granted on the basis of affidavits. RCW 10.14.080(1). The hearing on a final order must be a “full hearing.” RCW 10.14.080(2).

The trial court was required to hold a proper trial with live testimony. Estate of Stockman, 59 Wn. App. 713. The trial court’s failure to hold such a hearing is reversible error. Id.; Goldberg, 397 U.S. at 269-70, 90 S.Ct. at 1021-22. The outcome of the improper trial by affidavit is invalid, and all the orders based on that proceeding must be vacated.

**2. The evidence submitted by Mitchell was inadmissible.**

Assuming, *arguendo*, that the trial by affidavit was permitted, almost all of the content of the affidavits (declarations) submitted by Mitchell were inadmissible and should not have been considered. Where declarations are admitted as evidence, such declarations must contain

*facts*, not conclusory statements or opinions. Grimwood v. Univ. Puget Sound, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

Judge Doerty explicitly relied on inadmissible conclusions and opinions in finding that Trummel committed harassment. For example, he cited the following passage the declaration of a tenant:

I have asked Paul Trummel not to put his paper on my door, and he became irate. Personally, I am afraid of him. I see the potential for Paul Trummel to do something like going berserk and killing or injuring people because I believe he is mentally disturbed. I think he is crazy. He puts out a paper that I feel is just a way to be mean to some of the residents. They are demeaning and insulting.

RP (4/19/01) at 8-9. Only the assertion that Trummel was asked not to put his paper on her door is *factual* and admissible. The assertion that Trummel “became irate” is conclusory because there is no indication of what Trummel actually said or did. The suggestion that Trummel might go berserk and kill people is pure speculation. The remainder of the passage contains additional inadmissible, conclusory statements.

Virtually all of the declarations submitted by Mitchell consist of such inadmissible statements. CP 21-125. They are riddled with vagueness, prejudicial statements, hearsay, speculation, conclusory statements, opinion testimony, irrelevancies, “feelings” that are not supported by fact, generalities, and incompetent evidence of every sort:

[Oran and Mary Cooper (tenants)]: “Paul left a letter on my

door making derogatory comments against me (Oran) and Steve Mitchell.” “In resident meetings, Paul becomes irate and aggressive.” “Paul stresses the residents out.” CP 37.

[Felippe Jacques (tenant)]: Mr. Trummel’s “crusade [is] marked by a merciless spite and unending animosity. It seems to me that every moment of his days were consumed by an infernal pursuit of an imaginary enemy” “his favorite pass time [sic]: verbal black-mail” “[Trummel’s] mind [is] afflicted with acute paranoia.” “Trummel’s idiot vaporings has [sic] caused too much pain and the time has come to put an end to it” “[B]y his own admission Trummel was for most of his adult life an alcoholic who has sobered up fifteen or sixteen years ago. Like all chronic alcoholics Paul Trummel suffers from a disturbed sleeping pattern” “he is a man divorced from the reality of life, a man who lives inside a paranoic hell, etc. etc..” CP 72-77

[Adele Namm (tenant)]: “In a way he scares me. I find him frightening at times. I don’t know why he lives here if he is so unhappy here.” CP 66.

[Marguerite Portnoff (tenant)]: ”Paul has caused problems here that have never arisen in the 10 years I have been here. He is a trouble maker.” “The newsletters he leaves on my door make me unhappy that he lives here.” CP 120-21

[Maria Solis (tenant)]: “I feel that Trummel suffers from a superiority complex.” “I have noticed that Trummel has tried to help people in the past but he tends to disagree strongly if someone does not follow his way of thinking.” “[He] appears to me to be a dissident.” CP 88-89

The trial court relied on such inadmissible evidence, erroneously equating alleged unpleasant behavior with actionable harassment. RP (4/19/01) at 8-15.

Mitchell may argue that Trummel failed to object to the inadmissible evidence. The obvious response is that Trummel was not

represented by counsel who would have objected. See Goldberg, 397 U.S. at 269-70, 90 S.Ct. at 1021-22. The trial court's reliance on inadmissible evidence shows why evidentiary hearings are necessary, and why Trummel's motion for a continuance should have been granted.

An appellate court will reverse a judgment in a bench trial where all of the competent evidence is insufficient to support the judgment *or* where it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002). The trickle of competent evidence contained in Mitchell's declarations was insufficient to establish a course of harassing conduct under RCW 10.14.020(1). Because it affirmatively appears that the trial court's finding of harassment was induced by the inadmissible evidence submitted by Mitchell, the trial court's decision must be reversed for this reason as well.

**F. Mitchell's petition failed to establish the necessary elements of harassment and should have been dismissed.**

Mitchell's antiharassment petition is *entirely* based on Trummel's constitutionally protected activities: publications, complaints to government agencies and the use of the courts. CP 2-4. As discussed throughout this brief, these actions may not be considered as part of a

course of conduct under RCW 10.14.020(2). Once Trummel's protected activities are excluded under Noah, there is factual basis for Mitchell's petition. There is no course of conduct directed at Mitchell, and none of the statutory factors are shown.<sup>17</sup> Mitchell's alleged emotional distress was caused by various government investigations, CP 230, which cannot be part of a course of conduct under RCW 10.14.020(2). Under Noah, 103 Wn. App. at 39, and the plain language of the statute, Mitchell's allegations of harassment are insufficient as a matter of law.

**G. The trial court had no jurisdiction to issue an order for the benefit of anyone other than petitioner Mitchell.**

See Brief of Appellant – Contempt Issues, sections B(1),(2).

**H. There is no evidence to support a finding that Trummel had engaged in “harassment” against tenants of Counsel House.**

Assuming, *arguendo*, that the trial court had jurisdiction to consider an antiharassment order for protection of the tenants and staff, the necessary showing of a “course of conduct” under RCW 10.14.020(1) has not been made. Most, if not all, of the declarations submitted by Mitchell are primarily concerned with Trummel's publications and his underlying investigations. CP 21-125. As explained in section A, these activities are

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<sup>17</sup> There is no suggestion that Trummel initiated any contact between Trummel and Mitchell, or that Mitchell has given clear notice that such contact is unwanted. RCW 10.14.030(1),(2). There is no allegation that Trummel has invaded Mitchell's privacy or

protected by the First Amendment. Once Trummel's protected activities are excluded, virtually all of the declarations are left with no factual basis for a "course of conduct." Under Burchell, 74 Wn. App. at 522, the fact that some tenants find Trummel to be overbearing, obnoxious or rude is insufficient as a matter of law.

The declarations share an additional fatal flaw: the lack of substantial, objectively reasonable emotional distress *caused by* the "course of conduct." See Burchell, 74 Wn. App. 521; RCW 10.14.020(1). The declarations disclose that whatever emotional distress the tenants have suffered was caused by Trummel's publications, which must be excluded from any "course of conduct." Noah, 103 Wn. App. at 39.

A few remaining declarations describe isolated incidents where tempers may have flared or where Trummel is alleged to have been rude in person.<sup>18</sup> CP 31-32, 47-50, 62-63, 117-19. Trummel maintains that these allegations are false or exaggerated. The veracity of these hearsay allegations has never been tested in an adversarial hearing. But even if these declarations were true, such isolated incidents do not rise to the level of a "course of conduct" directed at a particular tenant.

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effected his living environment. RCW 10.14.030(5). There is no allegation that Trummel ever violated a previous antiharassment order (RCW 10.14.030(6)).

<sup>18</sup> Importantly, *none* of the more than 40 declarations submitted by Mitchell allege that Trummel has engaged in or threatened violence.

It is impossible to respond to allegations scattered through more than 40 declarations in an appellate brief. The task is made more difficult because the trial court made no specific findings, as required by Noah, that any of the tenants' allegations are true. Rather than become mired in the details of allegations that were never properly adjudicated in the lower court, this Court should simply hold that the tenants' declarations do not sufficiently allege a "course of conduct" directed at any particular tenant. More simply, this Court should reaffirm Burchell, Hough, and Pierce v. Pierce, 37 Wn.2d 918, 226 P.2d 895 (1951), and hold that the trial court had no jurisdiction to consider allegations of harassment by non-parties. See Brief of Appellant – Contempt Issues, section B(1).

**I. The provisions relating to persons other than Mitchell are void for lack of jurisdiction.**

The trial court prohibited Trummel from having any contact with any current or former tenant of Council House except by specific invitation. CP 467. This order prevents Trummel from having contact or correspondence with hundreds of people, most of whom have not filed declarations in support of Mitchell. Many of these people are Trummel's friends and supporters. CP 203-213, 508-15; 534-35; 544-48. Because the tenants, directors, and staff of Council House are not parties to this case, all the provisions relating to those persons are "absolutely void" for

lack of jurisdiction. Pierce, 37 Wn.2d at 923. This Court has no jurisdiction to evaluate those provisions other than to vacate them.

**J. The trial court's restrictions on Trummel's speech and publications constitute unlawful prior restraint.**

See Brief of Appellant – Contempt Issues, section B(3).

**K. The distance restrictions were and are excessive and unnecessary.**

Injunctions must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law. Kitsap County v. Key, Inc., 106 Wn.2d 135, 143, 720 P.2d 818 (1986). Injunctions authorized by RCW 10.14.080 must be narrowly tailored to prevent unwanted contact with the victim. Noah, 103 Wn. App. at 41. The trial court constructively evicted Trummel from his home by prohibiting Trummel from coming within 500 feet of Council House. RP (4/19/01) at 17-18. With minor modifications, the trial court affirmed this relief in subsequent orders. CP 126, CP (2d) 7; CP 467-69. These orders were not properly tailored to the alleged harm to be prevented.

Trummel never engaged in or threatened violence toward Mitchell, and there is no suggestion in Mitchell's declaration that he is actually afraid of Trummel. CP 9-11. Rather, Mitchell is aggravated by Trummel's investigations, publications and complaints for which a distance-based restriction cannot provide a remedy. Trummel can publish

the same articles, conduct the same investigations, and file the same complaints from any place on Earth. Even if these actions could be considered “harassment,” a distance-based restriction is not properly tailored to provide a remedy for the conduct.

To the extent the trial court’s decision to evict Trummel was intended to keep Trummel away from the tenants of Council House, the trial court had *no jurisdiction* to grant such draconian relief. Pierce, 37 Wn.2d at 923; Hough, 113 Wn. App. at 540. Assuming, *arguendo*, that Trummel was harassing Mitchell, an order to avoid direct personal contact with Mitchell would have been sufficient.

The trial court’s order to stay away from Council House was manifestly unreasonable in light of the nature of the alleged harassment. The order not only evicted Trummel from his home, but severely limited Trummel’s ability to visit and contact his friends and associates at Council House. Furthermore, the geographic area proscribed by the order includes numerous governmental offices, services, stores, parks, and medical facilities used by Trummel. CP 454-55.

The record shows that the trial court made a deliberate choice to *not tailor* the relief afforded. Lambasting Trummel as “litigious” and “contemptuous,” the trial court presumed that Trummel would not obey a properly tailored order. RP (4/19/01) at 17-18. This curious decision is

unsupportable for two reasons. First, Trummel’s use of the court system is “constitutionally protected activity” and cannot be the basis for an antiharassment order. Megrey, 93 Wn. App. at 394-96. Second, there is no exception to the requirement of tailored relief for allegedly “litigious” defendants. If Trummel violates a court order, the appropriate remedy is contempt. The trial court’s lazy unwillingness to craft a properly tailored order is not sustainable under Kev, Inc., and Noah.

**L. The antiharassment order should not have been permanent.**

Under RCW 10.14.080(4), an antiharassment order may not extend for more than one year unless the court finds that the respondent is likely to resume unlawful harassment of the petitioner when the order expires. The current order contains no such finding. CP 466-68. There is nothing in the record to suggest that a permanent restriction on Trummel’s movement and contact with his friends at Council House is necessary. That portion of the order must be reversed.

**M. Mitchell is liable for Trummel’s attorneys’ fees and costs.**

Mitchell brought this action for the express purpose of preventing Trummel from complaining about Mitchell to various government agencies, including HUD. CP 2. Mitchell’s action is a classic “SLAPP” suit. See Right-Price Recreation v. Connells Prairie, 105 Wn. App. 813, 818, 21 P.3d 1157 (2001), (“Strategic Lawsuit Against Public

Participation”), remanded, 146 Wn.2d 370, 46 P.3d 789 (2002). By bringing this action, Mitchell violated both the plain language and underlying policy of Washington’s anti-SLAPP statute — RCW 4.24.510. That statute makes Trummel’s complaints *absolutely* privileged and *requires* Mitchell to pay Trummel’s attorneys’ fees and costs. See Dang v. Ehredt, 95 Wn. App. 670, 977 P.2d 29 (1999).

Mitchell is also liable for Trummel’s attorneys’ fees as a matter of equity. A party is entitled to recover attorneys’ fees reasonably incurred in dissolving a wrongfully issued injunction. Ino Ino v. Bellevue, 132 Wn.2d 103, 143, 937 P.2d 154 (1997). Under this rule Mitchell is liable for all of Trummel’s attorney’s fees because all of those were fees incurred in resisting Mitchell’s efforts to obtain unconstitutional injunctions against Trummel.<sup>19</sup>

**N. Trummel is entitled to attorneys’ fees and costs on appeal.**

Pursuant to RAP 18.1(b), Trummel respectfully requests that the Court award him attorneys’ fees on appeal for the reasons set forth above.

**V. CONCLUSION**

The issues raised in this brief are not novel — each assignment of error is entirely based on existing law. The statutory elements of

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<sup>19</sup> Trummel reserves the right to seek damages arising out of the wrongful injunction in the trial court.

harassment, the procedural requirements of Noah, the supremacy of the First Amendment over state-created rights, the due process rights to assistance of counsel and an adversarial hearing, and the limits on the authority of a court to restrain speech were all well-established when Mitchell brought his petition. Trummel was stripped of his First Amendment rights, evicted from his home, and thrown in jail because Mitchell and Judge Doerty ignored binding legal precedent. Indeed, when Mitchell files his response brief in this Court it will be the first time that Mitchell has briefed most of the issues presented.

While it is not necessary to reach all of the legal issues raised by Trummel, at a minimum this Court must fully reverse and vacate the decisions of the trial court in order to restore Trummel's constitutional rights. In addition, this Court must issue an opinion for the future guidance of lower courts, confirming what the statute plainly states:

*Nothing in this chapter shall be construed to infringe upon any constitutionally protected rights . . .*

RCW 10.14.190.

## VI. APPENDICES

Copies of various articles about this case are attached hereto.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of April, 2003.

By: \_\_\_\_\_  
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The undersigned certifies that on the date written below, a true and correct copy of this document was served on each of the parties below as follows:

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