

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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REPLY BRIEF OF APPELLANT

(BRIEF NO. 1 - CIVIL ISSUES)

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NOTE REGARDING CROSS-REFERENCES:

The Brief of Appellant (Civil Issues) contains several cross-references to various sections of the Brief of Appellant (Contempt Issues). After the Civil Brief was filed, the Contempt Brief was reformatted to use Nielsen Broman & Koch section numbering conventions. This had the effect of making the cross-references in the Civil Brief incorrect. The sections of the Contempt Brief that the Civil Brief intended to cross-reference should be apparent from the headings and context.

## I. REPLY TO STATEMENT OF THE CASE

In his Statement of the Case, Mitchell complains that Professor Paul Trummel “wrote offensive ‘newsletters’” that “demeaned” people, uttered “indecent remarks” such as “disgusting runt,” and “pandering pygmy,” “verbally attack[ed]” people, causing them to be “annoy[ed],” even “fear[ful],” because they did not know “what he [was] going to do [next].” Resp. Br. (Civil) at 1-4. From these complaints of “verbal assaults,” Mitchell jumps to the legal conclusion that Trummel “harassed” him – a neat end-run around the primary issue in this appeal: Whether, as a matter of law, Trummel harassed Mitchell as that term is defined in RCW 10.14.020, -030. Rather than establish the elements of harassment, Mitchell implies that Trummel is so antipathetic as to be undeserving of the protections set forth in either the Constitution or RCW Chap. 10.14.

Assuming that the declarations relied upon by Mitchell are truthful,<sup>1</sup> Mitchell could have brought eviction proceedings against Trummel. But he carelessly chose the “speedy and inexpensive method of obtaining [a] civil anti-harassment protection order,” resulting in a long series of legal errors that culminated in Trummel’s imprisonment, for over 100 days, for the publication of constitutionally protected materials on the

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<sup>1</sup> This we can only assume. Trummel was unrepresented during the hearing on April 19, 2001, and was denied his right to have counsel cross-examine the declarants.

Internet. Mitchell excuses this outrage against human rights — which became the subject of astonished national and international news reportage — on the grounds that Paul Trummel was rude to old people.

Appellant Trummel urges this Court to carefully review each of the declarations cited by Mitchell for evidentiary and legal sufficiency, and to not be swayed by the mass of emotional and conclusory statements. A careful and fair reading of the record leads inescapably to the conclusion that Mitchell's allegations, even if true, do not establish that Trummel has actually harassed Mitchell or anyone else.

## II. CONCESSIONS BY RESPONDENT

Failure to argue an issue may be interpreted as a concession of error. Greenwalt v. Ricketts, 943 F.2d 1020, 1027 (1991). Mitchell's total lack of response to many of Trummel's arguments concedes that *serious errors were committed with respect to each of the following points*:

Mitchell concedes that the trial court did not make the statutory findings that are required to ensure that the anti-harassment statute does not violate constitutional rights. See section III.A.1.

Mitchell concedes that an anti-harassment petition cannot be based on lawsuits or complaints to HUD. See section III.A.2.

Mitchell concedes that the content-based restrictions on Trummel's website were unconstitutional. See section III.A.5

Mitchell concedes that the trial court's analysis of Const. art I, §7, and RCW Chapter 63.60 was erroneous. See section III.A.6.

Mitchell concedes that Trummel's publications were not defamatory. See section III.B.

Mitchell concedes that the declarations submitted by Mitchell at the April 19, 2001 hearing were not admissible. See section III.E.

Mitchell concedes that he was not the target of any course of harassing conduct. See section III.F.

Mitchell concedes that he is not a "fiduciary" of tenants of Council House, that he does not have the legal authority to bring this action on tenants' behalf, and that the tenants of Council House are not parties to this action. See Reply Br. (Contempt) section B.1.

The arguments that Mitchell makes are largely circular, running along the lines of: Trummel harassed people; harassment is not protected by the Constitution; therefore Trummel has no cause to complain. Serious errors are glossed over in a haze of reminders that Trummel was rude.

### **III. REPLY ARGUMENT**

The parties agree that the legal issues are reviewed *de novo*. But this Court cannot review factual issues *de novo*, as Mitchell suggests. Resp. Br. (Civil) at 7. Trummel presents constitutional, statutory, and evidentiary objections to the record created by Mitchell. Those issues

must be resolved before the Court may consider whether there is a factual basis for the few findings that Judge Doerty actually made.

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

**1. The trial court failed to make the statutory findings required to ensure that the anti-harassment statute does not violate constitutional rights.**

RCW 10.14.020, -030 requires the trial court to consider a variety of factors and to make findings on specific elements of harassment. This procedure is necessary to avoid unconstitutional infringement of speech. App. Br. (Civil) at 11-16. Mitchell does not argue otherwise.

The trial court did not make the required findings. Mitchell admits that Judge Doerty made only a conclusory finding “that Trummel’s activities constituted unlawful harassment.” Resp. Br. (Civil) at 23-24. To recover from the trial court’s failure to make findings, Mitchell suggests that this Court should independently examine the record below. Resp. Br. (Civil) at 20-22. This argument is erroneous for several reasons.

In a case tried to the court, it is the trial judge — not this Court — that must make the findings of ultimate fact concerning all of the material issues. This enables the appellate court to review the questions raised on appeal. The findings must make it clear what questions were decided by the trial court and the manner in which they were decided. CR 52; Bowman v. Webster, 42 Wn.2d 129, 133, 253 P.2d 934 (1953); Ford v.

Bd. of Health, 16 Wn. App. 709, 718, 558 P.2d 821 (1977). The trial court's conclusory finding of harassment does not indicate how—or whether—the trial court applied each of the factors set forth in RCW 10.14.020, -030. Unlike the appellate court in State v. Noah, 103 Wn. App. 29, 39, 9 P.3d 858 (2003), this Court has no guideposts by which to judge the decisions made by the trial court.

More importantly, Mitchell's request that this Court adduce the facts ignores the problem that the record is largely inadmissible, and was created after the trial court capriciously denied Paul Trummel's request for a continuance to obtain counsel. App. Br. (Civil) at 39-42. Trummel — unrepresented while his opponent was represented by a prestigious law firm — had no opportunity to cross-examine the witnesses against him or present his side of the case. The record that Mitchell asks this Court to review is the product of deprivations of substantive rights and procedural due process, and is replete with inadmissible and prejudicial evidence.<sup>2</sup>

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<sup>2</sup> Contrary to Mitchell's argument, this court cannot conduct *de novo* review of self-serving declarations by biased witnesses who have never been cross examined. Jenkins v. Snohomish Cy., 105 Wn.2d 99, 102, 713 P.2d 79 (1986), cited by Mitchell, involved appellate review of a *deposition*, not a self-serving declaration. Both Estate of Cook, 40 Wn. App. 326, 698 P.2d 1076 (1985), and Faucher v. Burlington Northern, Inc., 24 Wn. App. 711, 603 P.2d 844 (1979), involve *documentary* evidence, and there is no suggestion in either case that any party objected to the use of such a record or that any party was denied the assistance of counsel in creating the record.

This Court should decline Mitchell's request to hold an anti-harassment hearing in an appellate court. This Court should only review the declarations submitted by Mitchell for the purpose of determining whether his action should be dismissed. Unless Mitchell's petition is dismissed, this matter must be remanded to the trial court.

**2. The trial court relied on constitutionally protected activities in finding "harassment" by Trummel.**

Under Noah, 103 Wn. App. 38-39, and the plain language of RCW 10.14.020(2), all constitutionally protected activities must be *excluded* from a trial court's determination of whether harassment has occurred. Mitchell's main argument — that harassment is not protected by the First Amendment, Resp. Br. (Civil) at 8-9 — is circular, because it begs the question of whether or not Judge Doerty relied upon protected activities and the content of Trummel's speech to find harassment in the first place.

Trummel has shown that his lawsuits and complaints to HUD are constitutionally protected and cannot constitute harassment. App. Br. (Civil) at 19. Mitchell concedes this point by failing to address the issue.

Judge Doerty relied on complaints that Trummel distributed leaflets in Council House, and contacted public officials. But these are *protected activities* under such cases as U.S. v. Grace, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), and Richmond v. Thompson, 130

Wn.2d 368, 922 P.2d 1343 (1996). The trial court further relied on characterizations of Trummel’s writings as “mean,” “demeaning,” “insulting,” “annoy[ing],” and “denigr[ating]. RP (4/19/01) at 9-10. But this is *protected expression* under such cases as Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), and National Socialist Party v. Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977).

Mitchell suggests that this case is “virtually identical” to Noah. Resp. Br. (Civil) at 11-21. However, the trial court in Noah specifically excluded Noah’s protected activities before it found that the remaining conduct constituted harassment. Noah, 103 Wn. App. at 39. In contrast, Judge Doerty expressly relied upon Trummel’s protected speech as the primary basis for the finding of harassment. RP (4/19/01) at 8–15.

**3. Trummel’s speech did not “invade” the homes of tenants of Council House.**

Throughout his brief, Mitchell argues that Trummel’s speech constituted harassment because Trummel addressed “captive” tenants within the building and attached writings to their doors. This is a new spin on Mitchell’s case. In the trial court it was the *content* of Trummel’s writings that angered Mitchell and Judge Doerty. RP (4/19/01) at 8–15. Had Trummel’s newsletters announced milk-and-cookie time, anti-harassment orders would neither have been sought nor issued.

Mitchell attempts to avoid the First Amendment’s prohibition on censorship by arguing that the Constitution does not protect speech that takes place within an apartment building. In an effort to place this case under the penumbra of content-neutral cases such as Frisby v. Shultz, 487 U.S. 474, 108 S.Ct. 2495, 108 L.Ed.2d 2495 (1988) (upholding a ban on picketing in front of a residence) and Rowan v. U.S. Post Office, 397 U.S. 728, 734-35, 90 S.Ct. 1484, 1489, 25 L.Ed.2d 736 (1970) (upholding postal regulation permitting rejection of junk mail), Mitchell repeatedly asserts that Trummel has “invade[d] the private home of another person.” See, e.g., Resp. Br. (Civil) at 15. *But the record reveals no instance in which Trummel entered into another tenant’s apartment.*<sup>3</sup> On the contrary, *all* of Trummel’s speech occurred in the public areas of the building, or by delivering newsletters to tenants.

Communications within the public areas of an apartment building are protected by the First Amendment. Local and federal laws establish that the hallways of apartment buildings are a protected forum for discussions among tenants. Seattle Municipal Code, §22.206.180 states:

A. . . it is unlawful for any owner [landlord] to: . . .

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<sup>3</sup> Paul Trummel never “‘inse[r] a foot in the door [of a home] and insist on a hearing,’” an action that may not be protected under the First Amendment. Frisby, 487 U.S. at 485.

7. Prohibit a tenant . . . from engaging in the following activities when related to building affairs or tenant organizations:

- a. Distributing leaflets in a lobby and other common areas and at or under tenants' doors;
- b. Posting information on bulletin boards . . . ; [and]
- c. Initiating contact with tenants;

Similarly, HUD regulations state that HUD-funded housing facilities (such as Council House) *must* allow tenants to distribute leaflets in common areas, to place newsletters at or under tenants' doors, to initiate contact with other tenants, and to engage in a host of other constitutionally-protected activities. 24 C.F.R. § 245.115.

SMC § 22.206.180 and 24 C.F.R. § 245.115 are in line with a proud history of U.S. Supreme Court precedent providing that the First Amendment “embraces the right to distribute literature, and necessarily protects the right to receive it” even where “novel and unconventional ideas might disturb the complacent.” Martin v. Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L. Ed 2d 1313 (1943). Martin specifically protects door-to-door leafleting:

While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. . . Door to door distribution of circulars is essential to the poorly financed causes of little people.

Martin, 319 U.S. at 145-46. Trummel had a constitutional right to express his opinion about the affairs of Council House by distributing his writings at tenants' doors and initiating contact with his fellow tenants. These activities should have been excluded from consideration of whether Trummel committed harassment as that term is defined in RCW 10.14.

**4. The cases relied upon by Mitchell are distinguishable.**

Mitchell relies on cases involving overbreadth challenges to viewpoint-neutral regulations on speech in nonpublic fora, including Seattle v. Huff, 111 Wn.2d 923, 767 P.2d 572 (1989); State v. Knowles, 91 Wn. App. 367, 957 P.2d 797 (1998); State v. Dyson, 74 Wn. App. 237, 872 P.2d 1115 (1994); State v. Alexander, 76 Wn. App. 830, 888 P.2d 175 (1995). Each of these cases involves telephone harassment or other forms of purely private communication.

Trummel's writings were widely disseminated both as newsletters and on the Internet. Mitchell offers no authority for his careless assumption that a 'nonpublic forum' analysis may be applied to the content publications. The New York Times is protected by the First Amendment even if someone receives a free copy that he did not request!

Furthermore, Huff, Knowles, Dyson and Alexander do *not* hold that speech in a nonpublic forum is unprotected. These cases hold that such speech *is protected speech*, but that it may be regulated under certain

conditions. “Speech over the telephone, *although constitutionally protected*, may be regulated if ‘the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.’ Huff, 111 Wn.2d at 927. Consequently, these cases stand for exactly the opposite of the proposition for which Mitchell cites them.<sup>4</sup>

Unlike the statutes at issue in Huff, Knowles, Dyson, and Alexander, the anti-harassment statute does not authorize any regulation of speech. RCW 10.14.020(2) excludes constitutionally protected speech from the definition of harassment. This Court has squarely held that the anti-harassment statute is content-neutral and that protected speech cannot be the basis for an anti-harassment order. Noah, 103 Wn. App. at 39-42.

The trial court’s fundamental error was its reliance on the protected content of Trummel’s publications in finding harassment. The cases cited by Mitchell establish the test to determine the constitutionality of *viewpoint-neutral* regulations on speech. ***These cases do not authorize a trial court to engage in arbitrary, content-based censorship.***

Mitchell also relies on Rowan, supra, which upheld a content-neutral statute that enabled a person to block junk mail. Rowan might

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<sup>4</sup> Bering v. Share, 106 Wash.2d 212, 721 P.2d 918 (1986), also cited by Mitchell, holds that picketing and opinion are protected under the First Amendment and that any restrictions of such speech must be narrowly tailored to a compelling state interest.

permit a content-neutral restriction on leafleting inside Council House, if such a law existed. But there is no such law. On the contrary, both federal regulations and the Seattle code specifically permit the distribution of leaflets inside buildings. 24 C.F.R. § 245.115; SMC 22.206.180.

More importantly, nothing in Rowan suggests that a court may engage in an arbitrary, content-based review of speech in finding harassment. Rowan explicitly noted that a regulation that allowed the Postmaster to scrutinize the content of the sender's mail would amount to censorship. Rowan, 397 U.S. at 735, S.Ct. at 1489.

Both City of Bellevue v. Lorang, 140 Wn.2d 19, 23, 992 P.2d 496 (2000), and State v. Williams, 144 Wn.2d 197, 213, 26 P.3d 890 (2002), establish that Mitchell's is wrong; the strict requirements for content-based regulation of speech also apply to in a nonpublic forum. Both cases involved speech in private forums, yet neither case relied on the "nonpublic forum" analysis suggested by Mitchell. In both cases, the court applied strict scrutiny and struck down content-based restrictions on speech. Lorang, 140 Wn.2d at 29-30; Williams, 144 Wn.2d at 211.

Trummel's writings are constitutionally protected and must be excluded from a "course of conduct" under RCW 10.14.020(2).

**5. The trial court improperly relied on free speech activities that took place outside of Council House.**

Mitchell's arguments are entirely based on the assumption that Trummel's publications were not protected by the First Amendment when distributed *inside* Council House. Even if this theory had merit, it has no application whatsoever to pure speech in a public forum *outside* Council House, such as the Internet. See Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997); Planned Parenthood v. American Coalition, 290 F.3d 1058 (2002), cert. denied, 123 S.Ct. 2637 (2003); Sheehan v. Gregoire, \_\_\_ F.Supp.2d \_\_\_, WL 21513121 (W.D.Wash., May 22, 2003). "Communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." Reno, 521 U.S. at 869, 117 S.Ct. at 2343.

Mitchell hasn't even attempted to explain why the trial court was permitted to rely on the content of Trummel's website(s) in finding harassment. Nor has Mitchell justified the trial court's censorship of Trummel's website. Mitchell has essentially conceded that Judge Doerty's restrictions on Trummel's website were unconstitutional.

**6. The trial court's legal analysis is unsupported by, and contrary to, well-established constitutional law.**

Over the course of several hearings, the trial court adopted a variety of shifting legal theories to justify its orders. App. Br. (Civil) at

22-27. With the exception of the “balancing” theory, Mitchell has not offered any argument in support of the trial court’s theories. Specifically, Mitchell silently concedes that the trial court’s reliance on Const. art I, § 7, (privacy rights) and on RCW Chap. 63.60 (right of publicity) was error.

Mitchell argues that the trial court had the authority to “balance” the First Amendment against other interests in determining whether Trummel’s speech constituted harassment. But the only “balancing” permitted by the First Amendment is well-established: restrictions on speech must be “narrowly tailored to promote a *compelling* Government interest.” Williams, 144 Wn.2d at 211. The merely “important” objective in preventing harassment is *facially insufficient* to allow any content-based regulation of speech under this test. Id.; see RCW 10.14.010.

Mitchell’s “balancing” argument is based on family law cases such as Dickson v. Dickson, 12 Wn. App. 183, 529 P.2d 476 (1974) and Spence v. Kaminski, 103 Wn. App. 325, 12 P.3d 1030 (2000), that have no application to free speech in general or to RCW 10.14.020 in particular. Those cases are totally inconsistent with, and have never been cited in, any of the subsequent harassment cases cited by either party. Those cases have no application to RCW Chap. 10.14 because that statute does not authorize balancing. Under RCW 10.14.020, protected speech is *excluded* from the definition of harassment. Noah, 103 Wn. App. at 42.

Mitchell also cites F.C.C. v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) in support of his “balancing” argument. But the Pacifica case is based on the atypical First Amendment analysis that only applies to federal regulation of broadcasting, not the traditional print media. Pacifica, 438 U.S. at 748-49. And the Supreme Court has squarely held that the “special justifications” for regulating speech in broadcasting do not apply to the Internet. Reno, 521 U.S. at 868-870, 117 S.Ct. 2343-44. Because Trummel’s publications consisted entirely of newsletters and web sites, Mitchell’s reliance on Pacifica fails.

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

In the opening brief, Trummel pointed out that alleged defamation cannot be the basis for an anti-harassment order, and that there is no evidence or findings to support a claim of defamation. App. Br. (Civil) at 27-33. Mitchell fails to address these arguments, conceding that Trummel’s writings were not defamatory. Greenwalt, 943 F.2d at 1027.

Nonetheless, Mitchell still cries of defamation, declaring Trummel’s speech to be “inflammatory,” “venom[ous],” “offensive,” “derogatory,” and “assault[ive].” Such conclusory adjectives do not transmogrify protected speech into harassing conduct.

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

In his opening brief, Trummel explained that the anti-harassment statute would be overbroad if Mitchell's interpretation of that statute were accepted. Mitchell has failed to brief this issue in any meaningful way, and has garbled the distinction between an "as-applied challenge" and "overbreadth." See Holland v. City of Tacoma, 90 Wn. App. 533, 538-39, 954 P.2d 290 (1998) (recognizing distinction between the two doctrines). This Court must maintain the important distinction between these theories. It is Trummel's position that this Court should construe the statute to ensure that the statute is not void for overbreadth.

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

At the April 19th hearing, Judge Doerty refused Trummel's written and oral requests for a short continuance to obtain counsel. The trial court could have issued a *temporary* order under RCW 10.14.080 and granted a short continuance to allow Mr. Siegel to appear on behalf of Trummel. Mitchell has not even attempted to explain why this was not done.

Mitchell cites no authority for the proposition that 14-day requirement in RCW 10.14.070 is a statute of limitation that the trial court cannot extend. If Mitchell were correct, the trial court would be required to dismiss an anti-harassment petition where the *victim*, or the victim's

lawyer or witnesses, were unable to appear at the scheduled hearing. Furthermore, Mitchell made no objection to Trummel's request for a continuance, and he is barred from raising this new legal theory on appeal. Sneed v. Barna, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996).

Finally, Mitchell's assertion that Trummel "had counsel who failed to appear" is simply false. Resp. Br. at 46. The record shows that Mr. Siegel was in court on another matter, RP (4/19/01) at 4, and that Mr. Siegel did not appear in this action until after the hearing. CP 155.

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

Mitchell is determined to deny Trummel's right to counsel because he wishes to take advantage of a record that is replete with error and inadmissible evidence. Mitchell knows that an attorney would have objected to the 40 incompetent declarations offered by Mitchell.<sup>5</sup> By failing to brief the issue, see Resp. Br. (Civil) at 44, Mitchell concedes that the declarations were inadmissible, and therefore concedes that Trummel was seriously prejudiced by the denial of his request for a continuance.

Mitchell hopes to maximize the prejudicial effect of the denial of Trummel's right to counsel, arguing that Trummel must be held to the

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<sup>5</sup> Trummel objected to Mitchell's use of declarations, and invoked his right to have the declarants examined under oath. CP 140. This request gave both Mitchell and the trial court sufficient notice that Trummel objected to Mitchell's use of hearsay declarations.

standards of an attorney. Resp. Br. (Civil) at 45. But the rule cited by Mitchell does not apply where a litigant specifically invokes his right to be represented by counsel. “[T]he law does not distinguish between one who *elects* to conduct his or her own legal affairs and one who seeks assistance of counsel.” Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). Trummel did not *elect* to represent himself at the April 19th hearing. He was *forced* to do so.<sup>6</sup>

Trummel’s opening brief pointed out that the superior court is not permitted to hold a trial by affidavit unless a statute or rule authorizes such a procedure or the parties consent. App. Br. (Civil) at 39. In response, Mitchell ignores the applicable law, instead citing State v. Malone, 9 Wn. App. 122, 511 P.2d 67 (1973), which involved a vagueness challenge to a license revocation statute. Malone does not address the question of whether a “full hearing” requires admissible evidence or the examination of live witnesses, and it is not authority on that issue. In re Burton, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996).

Cross-examination is not merely a matter of statute or court rule; it is *required* by due process. “In almost every setting where important

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<sup>6</sup> Westberg v. All-Purpose Structures, 86 Wn. App. 405, 936 P.2d 1175 (1997), relied on by Mitchell, does not address the situation here where a litigant is compelled to represent himself.

decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970).

Mitchell dances around Goldberg by citing cases that address the wrong issue.<sup>7</sup> Matthews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), relied on by Mitchell, addresses the question of what process must be afforded in a preliminary deprivation of some right or property interest *where a proper evidentiary hearing is provided at a later stage*. See also, Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (prejudgment seizure of chattels); Bell v. Burson, 402 U.S. 535, 540, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90 (1971) (the posting of bond pending an adjudication of liability); Memphis Light v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (public utility’s termination of electricity). At best, these cases would be relevant to the due process requirements for a *temporary* order under RCW 10.14.080(1).

Mitchell’s cases do not contradict the statement in Goldberg that due process requires a hearing with cross examination of witnesses before a deprivation of any important right becomes permanent. Correctly

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<sup>7</sup> Mitchell also argues, with no legal authority whatsoever, that cross-examination would allow Trummel to perpetuate his harassment of the tenants. Like many of Mitchell’s clever arguments, this argument simply assumes its own conclusion. With logic like this, virtually all trials could be avoided.

interpreted, the anti-harassment statute is consistent with Goldberg and the cases cited by Mitchell. The statute allows a temporary order to be issued upon affidavits, but the court must hold a proper evidentiary hearing with cross examination of witnesses before a permanent order may be issued.

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

RCW 10.14.020 requires that a petitioner to establish a “course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose.” Mitchell’s petition was based on Trummel’s constitutionally protected activities: publications, complaints to government agencies, and use of the court system. Once these activities are excluded, as required by Noah, there is no course of harassing conduct directed at Mitchell himself. Mitchell does not argue otherwise.

Mitchell inevitably falls back on claims that Trummel harassed non-parties. Resp. Br. (Civil) at 24-26. Even if these allegations were true, and even if they amounted to harassment, they do not satisfy the statutory requirement of a course of harassing conduct directed at Mitchell himself. Mitchell’s petition for anti-harassment must be dismissed for failure to establish any harassment of Mitchell. Burchell v. Thibault, 74 Wn. App. 517, 523, 874 P.2d 196 (1994).

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

See Reply Br. (Contempt), sections B(1) and B(3).

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

Trummel’s opening brief noted that there was insufficient evidence to show that Trummel had harassed any particular person. See App. Br. (Civil) at 42-45. Mitchell fails to squarely address this argument, repeating instead a long series of claims by numerous persons of various incidents. See Resp. Br. (Civil) at 24-26. However, the “specific person” requirement cannot be established by allegations that Trummel was unpleasant to a number of people in different incidents. “An incidental victim not the target of harassment does not require protection from further unwanted contact.” Burchell, 74 Wn. App at 523. Nor is the fact that a tenant or neighbor is “overbearing, obnoxious or rude” a basis for an antiharassment order. Burchell, 74 Wn. App. at 522. Otherwise, the statute could be used to banish the mentally ill from entire neighborhoods, or unpopular students from whole schools.

Nor has Mitchell shown that Trummel’s course of conduct would cause a reasonable person to suffer substantial emotional distress. This is an *objective standard*, not the subjective standard applied by Judge Doerty. See RP (4/19/01) at 8. Self-serving and conclusory statements by

non-parties that they suffered “fear” cannot justify eviction, censorship, and imprisonment.

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

See Reply Br. (Contempt), sections B(1) and B(3).

**J. The trial court’s restrictions on Trummel’s speech and publications are unconstitutional.**

See Reply Br. (Contempt), section B(3).

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

In his opening brief, Trummel pointed out that the trial court had imposed very broad restrictions on his movement and his speech, and had utterly failed to narrowly tailor the remedy to appropriate time, place and manner restrictions. App. Br. (Civil) at 46-48. Mitchell’s weak response is to assert that because the alleged harassment took place “within the victim’s homes,” a 500-foot restriction, a restriction on speech on the internet, and so forth was warranted. Resp. Br. (Civil) at 38-40. Mitchell’s position is undermined by his own argument that Trummel’s harassment consisted of “verbal abuse” and “posting unwanted publications.” Assuming, *arguendo*, that this was harassment, the appropriate remedy was to prohibit the posting and limit Trummel’s contact with those persons who sought relief from his alleged verbal abuse. Instead, Judge Doerty entered a series of order that prohibited—

and continue to prohibit—Trummel from speaking to hundreds of people and from entering a large area of central Seattle and from expressing his opinions on the Internet.

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

Mitchell concedes this error by failing to brief the issue.

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

As a threshold matter, Mitchell’s assertion that Trummel never requested fees in the trial court is not correct. Trummel requested fees both in equity and under RCW 4.24.510. CP 483.

Mitchell cites Port of Longview v. Int. Raw Materials, Ltd., 96 Wn. App. 431, 979 P.2d 917 (1999), for the proposition that RCW 4.24.510 only applies to claims for damages. Longview held that RCW 4.24.510 was inapplicable in an unlawful detainer proceeding. 96 Wn. App. at 446. The statement in Longview that RCW 4.24.510 only applies to claims for damages is dicta that should be rejected by this Court. The Longview court should have held that the port’s action for unlawful detainer was not “based on” communication to government within the meaning of RCW 4.24.510. While the port’s unlawful detainer action may have been brought in retaliation for the defendant’s statements, that action was not “based on” those statements. Longview, 96 Wn. App. at 438.

The purpose of RCW 4.24.510 is to protect the government's "vital" interest in the free flow of information from citizen's to the government. RCW 4.24.500. That goal is so important that the statute was amended in 2002 to provide an *absolute* defense to civil liability. Laws 2002, ch. 232, § 2. Therefore, it is absurd to suggest that the defense created by RCW 4.24.510 does not apply where a party seeks to directly block communications to government by obtaining an injunction.

Mitchell brought this action for the express purpose of preventing Trummel from making complaints to HUD. CP 2, 6. In enacting and amending RCW 4.24.510, the legislature obviously intended to preclude such causes of action. This Court should hold (contrary to the erroneous dicta in Longview) that RCW 4.24.510 applies to any cause of action that is "based on" communications to government.

Mitchell further argues that attorney's fees are not available to Trummel because Trummel is resisting a permanent injunction, not a temporary restraining order. Mitchell sidesteps the long-standing Washington rule that a litigant is entitled to "a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued." Cecil v. Dominy, 69 Wn.2d 289, 291, 418 P.2d 233 (1966); James v. Cannell, 135 Wash. 80, 237 P. 8 (1925). Where "injunctive relief is the sole purpose of the suit" the party who successfully

resists is entitled to damages, including the cost of defeating the action. Cecil, 69 Wn.2d at 293; Talbot v Gray, 11 Wash. App. 807, 525 P.2d 801 (1974); 42 Am.Jur.2d. Injunctions, § 354.

Mitchell expresses concern that the victims of harassment may be dissuaded from bringing anti-harassment actions lest they later be subject to attorneys' fees. This concern is misplaced where, as here, an apartment manager who was *not* a victim of harassment and who was represented by a major law firm, misuses a statute intended to protect victims of domestic abuse and stalking in order to silence a critic and to run roughshod over the critic's procedural, statutory, and constitutional rights.

The need for attorney's fees is most dire where injunctions are used to violate constitutional rights. Like many independent journalists, Trummel would have been unable to secure the undersigned representation if fees were not available. An award of fees is necessary in this case and in all cases where constitutional rights are at stake.

**N. Mitchell is not entitled to attorneys' fees or costs on appeal.**

Mitchell has requested an award of fees on appeal, but he has not provided any "applicable law" to support such an award. Mitchell's unsupported request for fees violates RAP 18.1 and must be denied.

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

By: \_\_\_\_\_  
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CERTIFICATE OF SERVICE

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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