

NO. 48662-4-I
(Consolidated with No. 50830-0-I and No. 50135-6-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RECEIVED
JUL 02 2004
E. GARELLA

In re PAUL TRUMMEL,
Appellant,

v.

STEPHEN MITCHELL, et al., and COUNCIL HOUSE, INC.,
Respondents.

STEPHEN MITCHELL, et al., and COUNCIL HOUSE, INC.,
Cross-Petitioners,

v.

PAUL TRUMMEL,
Respondent.

**MOTION OF STEPHAN MITCHELL AND
COUNCIL HOUSE, INC. TO PUBLISH DECISION**

Richard A. Du Bey, WSBA No. 8109
SHORT CRESSMAN & BURGESS PLLC
Attorneys for Stephan Mitchell and Council
House, Inc.
999 Third Avenue, Suite 3000
Seattle, Washington 98104-4088
Phone: 206.682.3333
Telefax: 206.340.8856

I. Identity of Moving Party

This motion is brought by Stephan Mitchell and Council House, Inc., Respondents and Cross-Petitioners in this case.

II. Statement of Relief Sought

Stephan Mitchell and Council House, Inc. seek publication of this Court's opinion filed June 14, 2004, in this case ("Council House Opinion"). A copy of the Council House Opinion is attached to the Declaration of Richard A. Du Bey, filed contemporaneously with this motion.

III. Facts Relevant to Motion

In this case, the Court affirmed a King County trial court order to restrain a resident of an apartment building for senior citizens from harassing his neighbors. Furthermore, the Court upheld the trial court's subsequent contempt orders against the resident for violating the antiharassment order.

The Council House Opinion deals with important First Amendment issues relating to the distinction between conduct and constitutionally protected speech under the State's civil antiharassment statute (RCW Chapter 10.14). Additional facts are incorporated from the Declaration of Richard A. Du Bey, filed contemporaneously with this motion.

IV. Legal Standards

RCW 2.06.040 provides that judicial opinions having precedential value shall be published. In determining whether a case has precedential value, *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), identified the following five-part test:

1. Where the decision determines an unsettled or new question of law or constitutional principle.
2. Where the decision modifies, clarifies or reverses an established principle of law.
3. Where the decision is of general public interest or importance.
4. Where the case is in conflict with a prior opinion of the Court of Appeals.
5. Where the decision is not unanimous.

V. Argument

If published, the Council House Opinion will provide precedential value and significant guidance to Washington's citizens on the distinction between unlawful conduct and constitutionally protected activity under the State's antiharassment statute, RCW Chapter 10.14. The Council House Opinion satisfies the second and third parts of the *Fitzpatrick* test: it clarifies an established principle of law and it is of general public interest and importance.

A. The Council House Opinion clarifies an established principle of law.

The Council House Opinion clarifies an established principle of law. Specifically, the Council House Opinion clarifies what is excluded from "constitutionally protected speech" under the State's civil antiharassment statute, RCW Chapter 10.14. The statute provides relief from a "course of conduct" that results in the unlawful harassment of another. RCW 10.14.040 (2004). "Course of conduct" is defined as

"[A] pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Course of conduct includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."

RCW 10.14.020(2) (2004).

In *State v. Noah*, the Court of Appeals also distinguished between constitutionally protected speech and conduct rising to the level of harassment. *See generally: State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000). The Council House Opinion provides additional clarification beyond the analysis in the *Noah* decision. In *Noah*, the Court addressed activities that more clearly fell into the category of harassing conduct: phone calls and efforts to obtain the whereabouts of the harassment victim's ill family member. *Noah*, 103 Wn. App. at 39. However, in the

Council House Opinion, the Court affirmed the trial court's holding that activities that would otherwise be considered protected speech (speaking orally, leafleting, publishing newsletters, filing small claims lawsuits, and complaining to government agencies) are not constitutionally protected when they are used as threats in personal confrontations. Council House Opinion at 4-5.

Taken together with the *Noah* decision, the Council House Opinion provides a valuable clarification of the distinction between protected speech and unlawful harassing conduct as it relates to the State's civil antiharassment statute.

B. The Council House Opinion is of general public interest and importance.

In addition to the clarification of an established principle of law, the Council House Opinion is of general public interest and importance. The underlying facts relate to the actions of a resident of an apartment building exclusively housing senior citizens. Council House Opinion at 2. Although the Council House Opinion notes that courts often require individuals to take steps to avoid unwelcome speech, it holds that there is a different standard when the listener is at home. Council House Opinion at 11. This principle is vitally important for senior citizens who may be

less able to leave their homes than other citizens. The Council House Opinion provides significant legal precedent that should be available for other senior citizens who may experience similar harassing conduct in the future. Therefore, the Council House Opinion should be published so that future similarly-situated victims of harassing conduct may cite back to it as legal precedent.


VI. Conclusion

Publication of the Council House Opinion will provide clarification of an established principle of law and make available legal precedent that is of general public interest and importance. The Council House Opinion is an important interpretation of the distinction between unlawful conduct and constitutionally protected activity under the State's antiharassment statute, RCW Chapter 10.14.

For these reasons, Stephan Mitchell and Council House, Inc. respectfully request that the Council House Opinion be published.

RESPECTFULLY SUBMITTED this 2nd day of July, 2004.

SHORT CRESSMAN & BURGESS PLLC

By 
Richard A. Du Bey, WSBA No. 8109
Attorneys for Stephan Mitchell and
Council House, Inc.

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**DECLARATION OF RICHARD A. DU BEY IN SUPPORT OF
MOTION TO PUBLISH DECISION**

Richard A. Du Bey, WSBA No. 8109
SHORT CRESSMAN & BURGESS PLLC
Attorneys for Respondents and Cross-
Petitioners Stephan Mitchell and Council
House, Inc.
999 Third Avenue, Suite 3000
Seattle, Washington 98104-4088
Phone: 206.682.3333
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Richard A. Du Bey states and declares as follows:

1. I am the attorney for Stephan Mitchell and Council House, Inc. in this matter, have personal knowledge of the facts stated herein, and am otherwise qualified and competent to make this declaration.

2. I have represented Stephan Mitchell and Council House, Inc. since 2001 in all aspects relating to the appeal of the trial court's decision to issue an antiharassment order and the trial court's subsequent contempt orders for violations of the antiharassment order.

3. The opinion of the Court of Appeals in this case is attached as **Exhibit A** ("Council House Opinion").

4. The Council House Opinion clarifies the important legal principle distinguishing harassing conduct from constitutionally protected speech in the context of the State's civil antiharassment statute, RCW Chapter 10.14.

5. A prior decision, *State v. Noah*, addressed similar issues relating to the civil antiharassment statute. *See State v Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000). However, the Council House Opinion extends the analysis and, thus, provides a new clarification of the law.

6. The Council House Opinion also clarifies that there is a distinction between the level of unwelcome speech that one should endure at home and away from home. Council House Opinion at 11. The

Council House Opinion contains an important statement that while the courts often expect citizens to actively avoid unwelcome speech, they view the situation differently when citizens are subjected to the unwelcome speech in their homes. Council House Opinion at 11.

7. In addition, the underlying factual situation concerned the harassment of senior citizens. Therefore, the Council House Opinion is important legal precedent for any elderly person who may become similarly-situated in the future. Therefore, the ability to cite to the Council House Opinion serves a significant public interest.

8. Publication would also assist the victims of Mr. Trummel's past behavior from his continuing violations of the law. Since the filing of the Council House Opinion on June 14, 2004, I have been informed by Council House that Mr. Trummel has violated the antiharassment order approximately five times by coming within 300 feet of the Council House. As a result of these continuing violations, I have been further advised that Council House staff has had to call the police on several occasions to escort Mr. Trummel away from Council House. Publication of the Council House Opinion would allow a prosecutor to cite to the Court of Appeals' decision in the event of another contempt proceeding against Mr. Trummel.

9. Publication of the Council House Opinion will provide valuable and important guidance to Washington's citizens concerning the State's civil antiharassment statute, RCW Chapter 10.14. The precedential value of the Council House Opinion on the distinction between harassing conduct and constitutionally protected speech will be helpful and could reduce unnecessary litigation and congestion in the Court system.

I submit under penalty of perjury under the laws of the State of Washington that the facts stated within this declaration are true and correct.

Signed at Seattle, Washington this 2nd day of July, 2004.

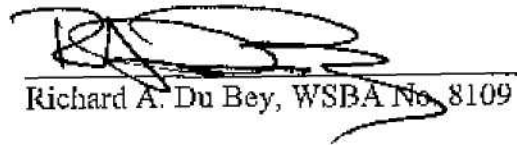

Richard A. Du Bey, WSBA No. 8109

Exhibit A

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CERTIFICATE OF SERVICE

Richard A. Du Bey, WSBA No. 8109
SHORT CRESSMAN & BURGESS
PLLC
Attorneys for Stephen Mitchell and
Council House, Inc.
999 Third Avenue, Suite 3000
Seattle, Washington 98104-4088
Phone: 206.682.3333
Telefax: 206.340.8856

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July 2, 2004, I had served via ABC Messenger and U.S. Mail, a true and correct copy of the following documents on the parties below:

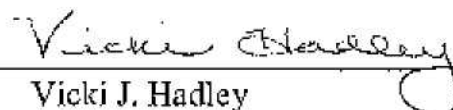
Documents Served:

1. Motion of Stephen Mitchell and Councilhouse to Publish Decision;
2. Declaration of Richard Du Bey; and
3. Certificate of Service.

Robert Siegel Merkel Siegel & Fredrichsen 1325 4 th Avenue, Suite 940 Seattle, WA 98101 <input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via air courier <input type="checkbox"/> via facsimile	Eric Broman Nielsen, Broman & Koch 1908 E Madison Street Seattle, WA 98122 <input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via air courier <input type="checkbox"/> via facsimile
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<p>Elena Luisa Garella 927 N. Northlake Way, Ste. 301 Seattle, WA 98103 <input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via air courier <input type="checkbox"/> via facsimile</p>	<p>William John Crittenden 927 N. Northlake Way, Ste. 301 Seattle, WA 98103 <input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via air courier <input type="checkbox"/> via facsimile</p>
<p>Aaron Hugh Caplan ACLU of Washington 705 2nd Ave., Suite 300 Seattle, WA 98104 <input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via air courier <input type="checkbox"/> via facsimile</p>	<p>Lafcaadio H. Darling Gordon Thomas Honeywell 600 University Street, Suite 2100 Seattle, WA 98101 <input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via air courier <input type="checkbox"/> via facsimile</p>
<p>Patrick D. Brown 6112 24th Ave., NE Seattle, WA 98115 <input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via air courier <input type="checkbox"/> via facsimile</p>	<p>Michelle Lynn Earl-Hubbard Todd Wyatt Davis Wright Tremaine 1501 4th Ave., Suite 2600 Seattle, WA 98101 <input type="checkbox"/> via U.S. Mail <input checked="" type="checkbox"/> via Legal Messenger <input type="checkbox"/> via hand delivery <input type="checkbox"/> via facsimile</p>

DATED this 2nd day of July, 2004 at Seattle, Washington.


Vicki J. Hadley