

No. 75977-4

SUPREME COURT OF THE STATE OF WASHINGTON

File No. 48662-4-I consolidated with File Nos. 50830-0-I and No. 50135-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

PAUL TRUMMEL
Petitioner,

vs.

STEPHEN MITCHELL AND COUNCIL HOUSE, INC.
Respondents.

**STEPHEN MITCHELL AND COUNCIL HOUSE, INC.'S ANSWER
TO *SEATTLE WEEKLY'S* MEMORANDUM IN SUPPORT OF PAUL
TRUMMEL'S PETITION FOR REVIEW**

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I. INTRODUCTION

Respondents Stephen Mitchell ("Mitchell") and Council House, Inc. ("Council House") (collectively at times "Council House") file this Answer to the memorandum of amicus curiae *Seattle Weekly* ("Seattle Weekly Amicus Memorandum") filed in support of Paul Trummel's Petition for Review ("Petition").

II. BACKGROUND

On August 24, 2004, Trummel filed a Petition seeking review of the underlying decision in this case, *Trummel v. Mitchell*, No. 48662-4-I (consolidated with No. 50830-0-I and No. 50135-6-I) (Wn. App. Div. 1 June 14, 2004) and the July 26, 2004, Court of Appeals, Division I, Order Denying Motion For Reconsideration (collectively "*Trummel Decision*"). On October 25, 2004, Council filed its Answer to the Petition. On October 25, 2004, *Seattle Weekly* filed the Seattle Weekly Amicus Memorandum. On November 12, 2004, this Court granted *Seattle Weekly's* motion to file the Seattle Weekly Amicus Memorandum and subsequently set December 20, 2004, as the deadline for answers to the Seattle Weekly Amicus Memorandum.

In the interest of judicial economy and to avoid unnecessary and redundant briefing, Council House incorporates herein its previous Answer to the Petition so that it is not necessary to repeat the facts or

arguments set forth in that pleading. Council House's position in response to most of the issues raised in the Seattle Weekly Amicus Memorandum is clearly and accurately conveyed in its Answer to Petition. Nevertheless, Council House responds below to the specific points made in the Seattle Weekly Amicus Memorandum.

III. SUMMARY OF ARGUMENT

Seattle Weekly's claims are the very same claims already argued in Trummel's Petition. Council House's Answer to the Petition fully addresses those claims. Beyond that, *Seattle Weekly's* allegations are not supported by the facts in this case, and its contentions regarding Trummel's speech have been previously rejected by well-established Washington law.

As a matter of law, Trummel's speech constituted harassment and is therefore unprotected by the First Amendment. As articulated in Council House's Answer to the Petition, the unanimous opinion of the Court of Appeals, based upon well-established Washington law, correctly held that the civil antiharassment statute protects the Council House residents from having to endure Trummel's harassing conduct while in the privacy of their homes, and correctly upheld the lower court's orders of contempt for the public posting of personal information in violation of the no-surveillance provision of the Antiharassment Order.

IV. ARGUMENT

A. The Court of Appeals Correctly Held That The Trial Court's Finding of Unlawful Harassment and Contempt Were Not Based On Constitutionally Protected Activities, But Based On Violations Of the Antiharassment Provisions Of RCW Chapter 10.14.

The overriding theme of the Seattle Weekly Amicus Brief is that the Antiharassment and Contempt Orders were directed at the content of Trummel's speech and are therefore unconstitutional content-based restrictions. *Seattle Weekly's* assertions ignore the factual record in this case and rejects well-established Washington law holding that harassing conduct is not protected speech. The introduction to the Court of Appeals decision in the Trummel Decision accurately articulates the issues in this case:

A trial court issued an order restraining Paul Trummel from harassing his neighbors in a high rise apartment building for senior citizens and then jailed him for contempt of court when he persistently posted their names and addresses on the Internet. Although Trummel vigorously puts forth the First Amendment as a shield, the trial court focused on Trummel's conduct rather than his speech. The court appropriately used the civil antiharassment statute to protect the residents from having to endure aggressive and hostile personal confrontations and surveillance while in the privacy of home; and appropriately concluded that the public posting of personal information violated the no-surveillance provision of the order.

Slip Op. 1-2. This case is about repeated, harassing conduct that appropriately resulted in an Antiharassment Order and subsequent orders of contempt for violations of that Order.

1. Trummel's Conduct was Harassment and Unworthy of Protection.

It is undisputed that the right to speak freely extends to every person under both the federal and state constitutions, and that the same free speech rights exist for speech on the Internet as oral speech or speech in paper form. *Seattle Weekly Amicus Memorandum* 1; 4. It is further undisputed, however, that the right to speak freely, whether on the Internet, as oral speech, or as speech in paper form does not extend to harassing conduct. *State v. Alexander*, 76 Wn. App. 830, 837, 888 P.2d 175 (1995); *State v. Dyson*, 74 Wn. App. 237, 244, 872 P.2d 1115 (1994).

Contrary to *Seattle Weekly's* assertion that the trial court issued its Contempt Orders based entirely on Trummel's constitutionally-protected publications, the Orders were in fact based on Trummel's harassing conduct. RCW 10.14.080(3) defines unlawful harassment. The Court of Appeals, upon review of the trial court's detailed oral opinion, concluded that the court was "mindful of the statutory elements and found all of them satisfied, based upon the written declarations of over 40 Council House residents, and other evidence in the record of the case." Slip Op. 8-9. The

factual evidence in the record supports that the statutory elements of unlawful harassment were satisfied.

Trummel's conduct was more than merely offensive and unpopular with his neighbors. Trummel's conduct was harassment. And even to the extent that Trummel's harassing conduct does involve speech, his right to speak is superseded by the rights of Council House residents to be free from harassing conduct and unwanted communications in their homes. *Frinsby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 2502 (1988); *Alexander*, 76 Wn. App. at 837.

B. The Contempt Orders Are Not Prior Restraints.

Contrary to *Seattle Weekly's* argument that the Contempt Order is a prior restraint, a restriction or sanction is only a prior restraint if it is imposed in advance of actual publication. *State v. Noah*, 103 Wn. App. 29, 41, 9 P.3d 858 (2002). The restrictions imposed on Trummel in these Orders are not prior restraints as the restrictions were imposed only after Trummel published the offending material and only after he was found in contempt of court. *Bering v. SHARE*, 106 Wn.2d 212, 721 P.2d 918 (1986). Post-publication restrictions on speech, imposed after a showing of abuse of the right to speak, are not prior restraints and can be imposed consistent with the First Amendment. *Id.* at 243.

C. The Trummel Decision Does Not Have Broad First Amendment Implications.

Seattle Weekly alleges that if the *Trummel* Decision is not overturned, “[n]ews organizations, their reporters and independent web site operators alike could be subject to anti-harassment orders based entirely on their speech on the Internet” fundamentally mischaracterizes the Decision. The case not about censorship. This case is about Trummel’s harassing conduct that violates the civil antiharassment statute. This case is about protecting the Council House residents from having to endure Trummel’s harassing conduct while in the privacy of their homes.

The clear and compelling evidence in the record supports the conclusion that Trummel’s First Amendment rights, while thoroughly considered, were not implicated. *Seattle Weekly’s* argument to the contrary is wholly unconvincing, and the assertion that the Court of Appeals improperly considered Trummel’s First Amendment rights is unsupported. The Court of Appeals considered the issue, and then appropriately rejected it, correctly determining that the statutory elements of unlawful harassment were satisfied warranting the Antiharassment Order; that the harassing course of conduct was not constitutionally protected; and that Trummel violated the lawful Antiharassment Order

warranting contempt. The issue of whether Trummel's constitutional rights were violated cannot realistically be argued.


V. CONCLUSION

The theme of the Seattle Weekly Amicus Memorandum is that Trummel's speech was censored merely for being unpopular. The evidence in the case clearly demonstrates otherwise. Trummel's conduct constituted harassment and is therefore unprotected by the First Amendment. The unanimous opinion of the Court of Appeals, based upon well-established Washington law, correctly held that the civil antiharassment statute protects the Council House residents from having to endure Trummel's harassing conduct while in the privacy of their homes, and correctly upheld the lower court's orders of contempt for the public posting of personal information in violation of the no-surveillance provision of the Antiharassment Order.

For the reasons set forth above and in Council House's Answer to Petition, Council House respectfully requests that this Court deny Trummel's Petition.

RESPECTFULLY SUBMITTED this 20th day of December,
2004.

SHORT CRESSMAN & BURGESS PLLC

By 
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CERTIFICATE OF SERVICE

I, Cathy L. Riccobuono, hereby certify and declare:

1. I am over the age of 18 years and am not a party to the within cause;
2. I am employed by the law firm of Short Cressman & Burgess. My business and mailing address are 999 Third Avenue, Suite 3000, Seattle, Washington 98101;
3. On the 20th day of December, 2004, I caused to be served, Stephen Mitchell and Council House, Inc.'s Answer to Seattle Weekly's Memorandum in Support of Paul Trummel's Petition for Review upon the following in the manner described below:

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I declare under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.


Cathy Riccobuono