

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 BRIEF OF AMICUS CURIAE AMERICAN SOCIETY OF
JOURNALISTS AND AUTHORS NATIONAL UNION OF
JOURNALISTS/LONDON FREELANCE BRANCH**

Richard A. Du Bey, WSBA No. 8109
Beth Prieve Gordie, WSBA No. 34020
SHORT CRESSMAN & BURGESS PLLC
Attorneys for Respondents Stephen Mitchell
and Council House, Inc.
999 Third Avenue, Suite 3000
Seattle, Washington 98104-4088
Phone: (206) 682-3333
FAX: (206) 340-8856

I. INTRODUCTION

Respondents Stephen Mitchell ("Mitchell") and Council House, Inc. ("Council House") (collectively at times "Council House") file this Answer to the brief of amicus curiae the American Society of Journalists and Authors and National Union of Journalists/London Freelance Branch ("Society Amicus Brief") 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, the Society filed the Society Amicus Brief. On November 10, 2004, this Court granted the Society's motion to file the Society Amicus Brief and subsequently set December 20, 2004, as the deadline for answers to the Society Amicus Brief.

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 Society Amicus Brief is clearly and accurately conveyed in its Answer to Petition. Nevertheless, Council House responds below to the specific points made in the Society Amicus Brief.

III. SUMMARY OF ARGUMENT

The Society'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, the Society'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 Society's allegation that the Court of Appeals' analysis of harassment is logically flawed both ignores the factual record in this case and rejects well-established Washington law holding that harassing conduct is not protected speech. The Court of Appeals did not put the proverbial cart before the horse, as argued by the Society, when it held that the trial court appropriately used the civil antiharassment statute to protect the Council House residents. To the contrary, the clear and compelling evidence in the record supports that the Court of Appeals thoroughly considered Trummel's First Amendment rights and then appropriately concluded that they were not implicated. The Society's argument to the contrary is wholly unconvincing, and the assertion that the Court of Appeals improperly analyzed Washington First Amendment jurisprudence and then improperly considered Trummel's First Amendment rights is unsupported.

This case is about repeated, harassing conduct that appropriately resulted in an Antiharassment Order and subsequent orders of contempt for violations of that Order:

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.

Trummel's conduct was not merely "alarming." Trummel's conduct was harassment. 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.

It is well-established Washington law that harassing conduct is not protected speech. *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 assertions that the trial court issued its Antiharassment Order entirely based on Trummel's constitutionally-protected publications, the

Antiharassment Orders were in fact based on Trummel's harassing conduct. And even to the extent that Trummel's harassing conduct does involve speech — and entirely consistent with the First Amendment jurisprudence in this state — Trummel's 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. Neither RCW Chapter 10.14 Nor Constitutional Due Process Require A Court To Conduct A Trial-Like Hearing Prior To Entry Of An Antiharassment Order.

The factual record evidences that Trummel received notice of the charges against him and had an opportunity to present argument to a judicial tribunal. CP 128 - 138. Therefore, Trummel's due process rights were not violated. Washington's antiharassment statute, RCW Chapter 10.14, is intended to provide victims of harassment with a "speedy and inexpensive method of obtaining civil antiharassment protection orders." RCW 10.14.010. Before a permanent order may be entered, RCW Chapter 10.14 requires notice to the respondent and a "full hearing." RCW 10.14.080(2). This hearing provides the respondent with the opportunity to appear before the court and rebut the alleged charges before a permanent order is entered.

Nothing in RCW Chapter 10.14 indicates what the "full hearing" must entail or that the respondent is entitled to a trial with live testimony prior to entry of the restraining order. Under Washington law, a "full hearing" occurs

Where a person receives notice of the charge against him, has an opportunity to appear and be heard before a competent tribunal, and where judicial findings, conclusions, and a decision upon the merits . . . are entered, then he has received a 'full hearing' as required by due process.

State v. Malone, 9 Wn. App. 122, 127-128, 511 P.2d 67 (1973). See also *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 898 (1976) (the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it).

The Society's argument that the lower court violated Trummel's due process rights is undermined by the decision of the Court of Appeals and the facts of this case. The record clearly establishes that Trummel received a "full hearing" in this case.

Moreover, as the Court of Appeals correctly held, Judge Doerty did not abuse his discretion in denying a continuance to Trummel. The trial court was entitled to consider the necessity of reasonably prompt disposition of the litigation in making its determination on the continuance. *Balandzich v. Demeroto*, 10 Wn. App. 718, 720, 519 P.2d

994 (1974). A primary purpose of RCW 10.14 is to provide a speedy remedy for the victims of harassment. RCW 10.14.010. In this case, the hearing on the Council House antiharassment petition was held exactly 14 days after filing the petition and serving it on Trummel in compliance with the statute. CP 1; CP 126. Judge Doerty acted consistent with the requirements of RCW 10.14 in denying the continuance.

C. The Contempt Orders Are Not Prior Restraints.

Contrary to the Society's argument that the orders are 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.

D. The Findings of Contempt Are Not Subject to Collateral Attack.

The Society's argument that the collateral bar rule does not apply to findings of contempt based on unconstitutional prior restraint is unfounded. Trummel has no basis to attack the contempt findings in this

case because the underlying orders are not prior restraints and are not otherwise void.

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

The Society emphasizes that “a journalist must never be found in contempt for violating an unconstitutional prior restraint” and claims that the Court of Appeals manifested a “profound and troubling disregard for Mr. Trummel’s freedom of speech.” Society Amicus Brief, 9. The Society clearly misinterprets the *Trummel* Decision. This 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 Court of Appeals considered Trummel’s First Amendment rights consistent with the State’s First Amendment jurisprudence, and then appropriately rejected the issue, 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 Society Amicus Brief is that the *Trummel* Decision is a real and direct threat to freedom of speech. The Court of Appeals' proper analysis of Washington law and the factual record in this case demonstrate 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 Beth Prieve Gordie
Richard A. Du Bey, WSBA No. 8109
Beth Prieve Gordie, WSBA No. 34020
Attorneys for Respondents Stephen
Mitchell and Council House, Inc.

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 Brief of Amicus Curiae American Society of Journalists and Authors National Union of Journalists/London Freelance Branch upon the following in the manner described below:

Patrick D. Brown PhD
Sullivan Hall, Room 415
Seattle University School of Law
900 Broadway
Seattle, WA 98122-4338
Via Facsimile and U. S. Mail

Aaron Hugh Caplan
ACLU of Washington
705 Second Avenue, Suite #300
Seattle, WA 98104-1799
Via Facsimile and U. S. Mail

William Crittenden
Elena Luisa Garella
927 N. Northlake Way, Suite 301
Seattle, WA 98103
Via Facsimile and U. S. Mail

Lafcadio H. Darling
Gordon Thomas Honeywell
600 University ST., Suite 2100
Seattle, WA 98110
Via Facsimile and U. S. Mail

Robert J. Seigel
Merkle Seigel Friedrichsen
1325 Fourth Avenue, Suite 940
Seattle, WA 98101
Via Facsimile and U. S. Mail

Michele L. Earl-Hubbard
Davis Wright Tremaine LLP
1501 Fourth Avenue
Seattle, WA 98101-1688
Via Facsimile and U. S. Mail

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