

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

PAUL TRUMMEL,

Appellant,

v.

STEPHEN MITCHELL and COUNSEL  
HOUSE, INC.,

Respondents.

No. 48662-4-I

MOTION FOR  
RECONSIDERATION

**I. IDENTITY OF MOVING PARTY**

This motion is presented by appellant Paul Trummel.

**II. STATEMENT OF RELIEF SOUGHT**

Pursuant to RAP 12.4, appellant moves the Court to reconsider its unpublished opinion issued in this matter on June 14, 2004.

**III. GROUNDS FOR RELIEF SOUGHT**

Trummel respectfully seeks reconsideration because the current Opinion overlooks and misapprehends several important points of fact and

law. RAP 12.4(c). Most importantly, however, the current Opinion neglects to decide several issues that require resolution, even if the Court's decision relative to the merits does not change.

**A. The trial court's content-based restrictions on Trummel's speech and publications are unconstitutional. Those portions of the antiharassment order(s) should be vacated regardless of whether this Court affirms the findings of contempt.**

The trial court imposed content-based restrictions on Trummel's publications, including his Internet website. These restrictions, which are still in effect, prohibit Trummel from publishing any "personal identifying information" on his web site, including names. CP (2d) 5-8; CP 467.

These restrictions are directly contrary to settled law. See App. Br. (Civil) at 19-27, 46; App. Br. (Contempt) at 18-20; Reply Br. (Civil) at 6-15. Mitchell has not even briefed this issue, effectively conceding that Trummel's speech *outside* Council house is constitutionally-protected and that the trial court is not permitted to censor the content of Trummel's publications. See Reply Br. (Civil) at 2, 6-15. **It is undisputed that the content-based restrictions on Trummel's publications are unconstitutional and must be vacated.** This Court should grant such relief even if the Court declines to vacate the findings of contempt that were based on these unconstitutional restrictions.

This Court has overlooked this issue, and addressed only the related question of whether the unconstitutional restrictions imposed by the trial court are “prior restraint” for purposes of the collateral bar rule. Opinion at 24-25. Trummel respectfully disagrees with this Court’s interpretation of Bering v. SHARE, 106 Wn.2d 212, 234, 721 P.2d 918 (1986). But even if the collateral bar rule applies and the findings of contempt are upheld, the content-based restrictions in the antiharassment order(s) are unconstitutional.

This Court should address this important federal constitutional claim and vacate the content-based restrictions imposed by the trial court.

**B. The trial court had no jurisdiction to issue an order for the benefit of anyone other than petitioner Mitchell. Those portions of the antiharassment order(s) must be vacated regardless of whether this Court affirms the findings of contempt.**

Mitchell’s claim of “representative capacity” of the tenants of Council House was a fiction. Mitchell has provided no legal or factual basis for his assertion in the trial court that he has the legal right to “represent” the tenants of Council House in this case. It is undisputed that the attorneys representing Mitchell do not represent those persons. And it is undisputed that those tenants are not parties.<sup>1</sup> Accordingly, those

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<sup>1</sup> The caption on this Court’s opinion erroneously refers to “Stephen Mitchell, *et al.*, and Council House, Inc.” There are no such “et al.”

provisions of the trial court's order(s) which restrict Trummel's contact with those nonparties are *absolutely void*. Pearce v. Pearce, 37 Wn.2d 918, 923, 226 P.2d 895 (1951). This court should vacate those provisions *and* any contempt findings based on those provisions. Id.

Once again, this Court has addressed only the related issue of whether the collateral bar rule applies to Trummel's appeal of the contempt findings. This Courts' analysis of that issue is erroneous under Pearce, supra.<sup>2</sup> Nothing in either RCW Chap. 10.14 or Hough v. Stockbridge, 150 Wn.2d 234, 76 P.3d 216 (2003) modifies Pearce or allows a court to issue an antiharassment order that restricts contact with third parties. "[C]ourts may issue mutual protection orders . . . as the facts of the relationship *between the parties* may warrant." Hough, 150 Wn.2d 217. Even if the collateral bar rule applies and the findings of contempt

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parties in this case. As the captions on the respondents' brief clearly state, the only respondents in this case are Stephen Mitchell and Council House, Inc. To illustrate the point, one might ask whether anyone would hold the unnamed tenants liable for Trummel's attorneys' fees were he to prevail in this Court, the Washington Supreme Court, or federal court. The simple answer: of course not.

<sup>2</sup> The suggestion that Trummel has "confused" the distinction between error and jurisdiction is without merit. Opinion at 24. Pearce, which this Court has inexplicably ignored, clearly states that restrictions on contact with nonparties are "in excess of the jurisdiction of the court." Pearce, 37 Wn.2d at 923. But even if the provisions relating to nonparty tenants were merely "error" under State v. Noah, 103 Wn. App. 29, 9 P.3d 858 (2000),

are upheld, the restrictions on Trummel's contact with third parties are unconstitutional.

This Court should grant reconsideration and issue an opinion vacating those portions of the trial court's order that relate to nonparties.

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

In order to affirm the trial court's orders this Court must identify a course of harassing conduct "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 v. Thibault, 74 Wn. App. 517, 522, 874 P.2d 196 (1994). Therefore, this Court must identify a course of harassing conduct direct at Mitchell which satisfies all the elements of harassment. Trummel respectfully asserts that this Court's current decision does not do so.

Trummel pointed out in his opening brief that the allegations of harassment directed at Mitchell were entirely based on constitutionally-protected activities: publications, legal action, and complaints to government agencies. App. Br. (Civil) at 16-19. Mitchell effectively conceded that these activities cannot be the basis for an antiharassment order. Reply Br. (Civil) at 2-3. This Court also correctly recognized that

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this Court is still required to vacate those provisions which the trial court

these activities are constitutionally-protected and cannot be the basis for a finding of harassment. Opinion at 10.

Once Trummel's constitutionally-protected activities are excluded, as required by Noah and the plain language of the statute, there is no factual basis for a course of conduct directed at Mitchell. Mitchell concedes this as well. Reply Br. (Civil) at 3, 20. This Court's Opinion fails to identify any particular person as the target of Trummel's alleged harassment, and the Opinion does not disclose any factual basis for a finding that Trummel harassed Mitchell himself.

To make matters worse, this Court's Opinion expressly relies on constitutionally-protected activities in finding the required element of substantial emotional distress. Mitchell must show that he has suffered "substantial emotional distress" caused by a "course of conduct," *excluding* protected activities. RCW 10.14.020(1). Trummel pointed out in his opening brief that Mitchell's alleged emotional distress (if any) was caused by various government investigations, CP 230. App. Br. (Civil) at 43. This Court recognizes that such investigations cannot be part of a course of conduct under RCW 10.14.020(2). Opinion at 10. But on page

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had no jurisdiction to impose. Pearce, 37 Wn.2d at 923.

3 of the Opinion, this Court inconsistently relies on such investigations as the only basis for Mitchell's alleged emotional distress.

Like the trial court, the current Opinion relies on Trummel's alleged harassment of nonparties. The Opinion totally fails to establish a course of harassing conduct direct at Mitchell himself. Under Burchell and the plain language of the statute, the trial court's finding of harassment should be reversed.

This Court should grant reconsideration and issue an opinion reversing the trial court's finding of harassment and directing the trial court to dismiss Mitchell's petition.

**D. Like the trial court, this Court has failed to exclude constitutionally protected activities, and has impermissibly relied on Trummel's constitutionally-protected publications in finding harassment.**

This Court's assertion, on page 11, that the basis for the antiharassment order was "harassing conduct" is simply false. Mitchell's petition was explicitly based on Trummel's publications. CP 2. Virtually all of the nonparty declarants were primarily upset about Trummel's newsletters, which they attacked in purely conclusory terms. CP 21-125. Mitchell did not ask the trial court to evict Trummel, but he did ask the trial court to impose patently unconstitutional restrictions on Trummel's newsletter. CP 6. The transcript of the April 19, 2001, hearing clearly

shows that the trial court relied on the content of Trummel's newsletter in finding harassment. Judge Doerty stated "[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.

The suggestion that Trummel's alleged harassment consisted of unpleasant interactions with tenants in the hallways of Council House is an after-the-fact rationalization. This theory was concocted by Mitchell in his response brief after Trummel pointed out the Court could not rely on Trummel's publications, lawsuits or complaints to HUD in finding harassment. The trickle of unproven allegations, recited on page 9-10 of the Opinion, do not establish a course of harassing conduct directed at Mitchell or anyone else.

Like the trial court's order, this Court's opinion is impermissibly based on Trummel's constitutionally-protected newsletter. This Court concedes, as it must, that leafletting and publishing are constitutionally-protected activities. Opinion at 10. But then the Court explicitly relies on Trummel's newsletter in finding harassment. "Trummel used his newsletters as an extension of his vitriolic and threatening personal confrontations with [nonparties]." Opinion at 11. This assertion is not supported by any recognizable First Amendment analysis. On the contrary, the Court's Opinion directly violates Noah, 103 Wn. App. at 38-

39 (inflammatory picket signs were protected speech and could not be considered harassment). The Court's citation to State v. Alexander, 76 Wn. App. 830, 888 P.2d 175 (1995) for the proposition that "Harassment is not protected speech," Opinion at 11, suffers from circular reasoning.

By characterizing Trummel's newsletters as "vitriolic" the Court has improperly relied on the *content* of these publications. The First Amendment protects insulting, inflammatory, and even hate-filled speech. See National Socialist Party v. Village of Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (granting the Nazi part permission to parade through a predominantly Jewish suburb). This 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 State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2002) ("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). Because this Court has not shown that the content of Trummel's speech is unprotected, this Court's Opinion sanctions unconstitutional censorship by the trial court and this Court.

The Court could have used this case to give trial courts meaningful guidance for distinguishing between speech protected by the First Amendment and "harassment." Instead, the court has affirmed a series of

erroneous rulings that have outraged journalists and scholars across the country. The current Opinion suggests a belief that unpleasant or controversial people in Washington have no First Amendment rights.

Nor is there any authority to support the current Opinion's erroneous assumption that unwanted distribution of a newsletter inside Council House constitutes harassment. There is no restriction on distribution of newsletters inside Council House, and Trummel never actually entered tenants' homes without permission. Consequently, this Court's reliance on Frisby v. Shultz, 487 U.S. 474, 108 S.Ct. 2495, 108 L.Ed.2d 2495 (1988) has no legal or factual basis. Both the Seattle code and applicable federal regulations allow Trummel to distribute his newsletter inside Council House, including placing the newsletter at or under tenants' doors. SMC § 22.206.180; 24 C.F.R. § 245.115. Trummel even has the right to give his newsletter to tenants who do not want to receive it. See Martin v. Struthers, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L. Ed 2d 1313 (1943). And even if there were valid time, place or manner restrictions on distributing newsletters in Council House, the Court could not rely on such rules to censor the content of Trummel's publications.

The current Opinion attempts to sidestep the required First Amendment analysis by characterizing Trummel's conduct as "keeping

watch over tenants inside their own homes.” Opinion at 11. The Opinion makes no attempt to explain how such alleged conduct amounts to harassment of Mitchell or how such alleged conduct justifies censorship of Trummel’s publications. ***The current Opinion overlooks the fact that Trummel was found in contempt and spent four months in jail, not for listening to a door, but because of unconstitutional content-based restrictions on his website.***

The Court fails to cite any factual basis for its characterization of Trummel’s publications as invading tenants’ homes. And there is no factual basis other than a single alleged incident in which Trummel was attempting to determine the source of bothersome noise at 3:00 a.m. Opinion at 10. Anyone who has ever lived in an apartment or college dormitory has done this. To the extent this conduct was even proved, it cannot satisfy the narrow definition of “harassment.”

Both the trial court and this Court have impermissibly relied on Trummel’s constitutionally-protected activities as the basis for the antiharassment order(s). This Court must grant reconsideration and issue an opinion reversing the trial court’s erroneous finding of harassment and all subsequent orders issued by the trial court.

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

It is no exaggeration to state that Trummel was “railroaded” into a hearing in which he was unprepared and unrepresented. The current Opinion reaches a different result only by overlooking important facts and applicable law. The Court cites Balandzich v. Demeroto, 10 Wn. App. 718, 720, 519 P.2d 994 (1974), but then fails to analyze any of factors set forth in that case. Opinion at 14-15.

Like Mitchell and the trial court, the current Opinion offers no explanation why a temporary order could not have been granted. And the Opinion simply ignores the obvious and enormous prejudice suffered by Trummel as a result of the denial of the requested continuance. Indeed, the Opinion explicitly justifies its refusal to seriously address the trial court's glaring evidentiary and due process errors because Trummel lacked the ability to represent himself competently pro se. Opinion at 16-17. The fact that the hearing was continued from March 20, 2001 is totally irrelevant. This continuance did not give Trummel any meaningful opportunity to prepare a response to Mitchell's petition. The more than 40 declarations upon which the trial court's decision is based were submitted on April 12, 2001, only one week before the hearing. The petition did not even request the draconian remedy (eviction) imposed by the trial court,

CP 6, and Trummel had no notice whatsoever that such an order might be entered. Judge Doerty even refused to allow Trummel to return to pick up his belongings after the hearing. RP (4/19/01) at 17-18.

In finding a “tenable basis” for the trial court’s ruling, this Court has simply ignored the actual basis for the ruling. The record clearly shows that Judge Doerty’s ruling was based on an erroneous (and unconstitutional) conclusion that Trummel did not need an attorney. RP (4/19/01) at 20.

Instead, this Court’s legal analysis is entirely based on the fact that RCW 10.14.070 provides for a hearing within 14 days. Like Mitchell, this Court has no authority for the proposition that this is a statute of limitation that the trial court cannot extend even where justice requires it. On the contrary, this Court cites Hough v. Stockbridge, 150 Wn.2d 234, 236, 76 P.3d 216 (2003) for proposition that a court has equitable authority to issue a protection order on its own motion even in the absence of a petition requesting one. Opinion at 14. If the trial court had the authority to dispense with the statutory requirement that a party file a petition, then it certainly had half that authority to grant a simple continuance.

The current Opinion appears to employ a double standard, interpreting the statute either loosely or strictly depending on which interpretation supports affirmance. Would this Court overturn an

antiharassment order obtained by a battered and terrorized woman simply because she had requested and obtained a short continuance of the hearing? If this Court seriously contends that the 14-day requirement in RCW 10.14.070 is mandatory—regardless of the deprivation of liberty at stake or the prejudice to the defendant—it should issue a published opinion to that effect.

This Court should grant reconsideration and issue an opinion reversing the trial court's denial of Trummel's request for a continuance and all subsequent orders issued by the trial court.

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

The Opinion recognizes that the trial court's orders were not narrowly tailored—as required by well-established law—and relies entirely on Trummel's alleged contemptuous behavior. Opinion at 14. But there is no factual basis for these allegations. The record does not reveal any inappropriate behavior by Trummel. And Judge Doerty never actually found Trummel in contempt for any behavior in court. Judge Doerty had no right to throw Trummel out of his home just because he did not like Trummel's attitude.

In an apparent effort to construct the missing evidentiary basis for the trial court's ruling, the current Opinion faults Trummel for not

transcribing the hearing from March 20, 2001. The Opinion attempts to shift the burden of proof to Trummel, assuming that Trummel tactically declined to provide a record of the proceedings on March 20th. Opinion at 6, n. 13. This illustrates the problem where a reviewing Court sua sponte departs not only from the record, but from the parties' briefing. As shown in the attached declaration, undersigned counsel (Broman) diligently tried to obtain a transcript of the March 20th hearing, but eventually concluded that no such transcript could be produced. See Declaration of Eric Broman re: Efforts to Transcribe Hearing on 3/20/01, attached as Appendix 1. The respondents neither objected to the absence of this record, nor made any effort to produce a record of the hearing themselves. RAP 9.2(c), 9.5(c).

Under Kitsap County v. Kev, Inc., 106 Wn.2d 135, 143, 720 P.2d 818 (1986), Bering v. SHARE, 106 Wn.2d 212, 234, 721 P.2d 918 (1986), and Noah, 103 Wn. App. at 41, the trial court is required to issue a properly tailored order. Neither the trial court nor the current Opinion offer authority for the novel proposition that the burden was upon the unrepresented defendant to propose a properly-tailored order. Opinion at 6, 14. Like the trial court, this Court has offered no explanation of why Trummel's allegedly contemptuous behavior in court might have justified throwing him out of his home.

This Court should grant reconsideration and issue an opinion vacating the distance restrictions in the trial court's order and directing the trial court to enter a properly tailored order.

**G. Trummel did not violate the "surveillance" provision of the April 19th order.**

Trummel's contempt brief explained the reasons why he could not be found to have violated the terms of the April 19<sup>th</sup> order, which prohibited him from keeping Mitchell, the petitioner, under "surveillance." The briefing cited settled authority explaining the constitutional reasons why the provisions of court order must be narrowly construed when contempt is alleged. App. Br. (Contempt), at 8-12; Reply Br. (Contempt) at 9-11 (citing, *inter alia*, Stella Sales, Inc., v. Johnson, 97 Wn. App. 11, 20, 985 P.2d 391 (1999)).

In contrast, the current Opinion quickly cites Noah, then concludes that Trummel's website publications violated an order that could only be construed to restrict his conduct, not the content of his speech. Opinion, at 23. Not surprisingly, no authority is cited for this novel analysis.

Trummel respectfully requests reconsideration of this important constitutional question. The current Opinion conflicts with Stella Sales, and the other authority cited in Trummel's briefs. RAP 13.4(b)(2), (3).

**H. The trial court violated Trummel's right to counsel at the February 27, 2002 contempt hearing.**

Trummel's briefs raised numerous challenges to the trial court's failure to advise Trummel of his right to counsel at the February 27<sup>th</sup> contempt hearing, and the trial court's denial of Trummel's due process and Sixth Amendment right to counsel. Trummel's briefs thoroughly disarmed the respondents' efforts to create post hoc reasons to excuse these manifest constitutional errors. App. Br. (Contempt) at 20-31; Reply Br. (Contempt) at 16-22.

Nonetheless, the current Opinion accepts the respondents' claims as if they were factually or legally grounded. Trummel's reply brief thoroughly showed why a trial court cannot simply assume that a person might not be indigent, and why a trial court necessarily errs in failing to determine indigency before refusing to appoint counsel. The reply brief further showed that Trummel was unrepresented, CP 580, why he was clearly indigent, and why the trial court had more than adequate information before it to know both facts. Reply Br. (Contempt), at 16-22. Were that not enough, the trial court's own remarks – as well as those of respondent's counsel – conclusively reveal that everyone was well aware that Trummel was unrepresented at the February 27<sup>th</sup> hearing. CP 635-38;

RP (2/27/02) 2; RP (4/3/02) 7. Many of the relevant documents were attached as appendices to Trummel's reply brief.

For a reason not yet explained, the current Opinion either misapprehends or ignores these facts. See Opinion, at 26-28. It should be reconsidered. RAP 12.4(c). Because the current Opinion affirms a clear violation of Trummel's constitutional rights to due process and to counsel, and because it conflicts with Tetro v. Tetro, 86 Wn.2d 252, 544 P.2d 17 (1975), Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984), and RCW 10.101.203, it should be reconsidered. RAP 13.4(b)(1), (2), (3).

**I. Trummel never argued that written findings were required in an antiharassment proceeding.**

Page 8 of the current Opinion states that "Trummel contends written findings are required under [Noah]." That is simply not correct, and the Court has misapprehended the issue presented. Trummel argued that a trial court is required to make specific findings on specific elements of harassment, see Br. App. (Civil) at 11-16, and Trummel maintains that is a correct statement of the law. Trummel **never** argued that such findings must be in writing. Trummel respectfully requests that the Court revise its Opinion so that it does not erroneously attribute such an argument to Trummel.

#### IV. CONCLUSION

For these reasons, the current Opinion overlooks important matters of fact and law. It should be reconsidered.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of June, 2004.

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