RECEIVED FOR FILING
KITSAP COUNTY CLERK
FEB - 5 2018
ALISON H. SONNTAG

1
2
3
4
5
6
7
8 **SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **FOR KITSAP COUNTY**
10

11 CLARENCE MORIWAKI, 12 Petitioner-Appellee, 13 v. 14 RICHARD RYNEARSON, 15 16 Respondent-Appellant.	No. 17-2-01463-1 **ORDER ON RECONSIDERATION** **** CLERK'S ACTION REQUIRED ****

17
18 **THIS MATTER** comes before the Court on Petitioner Moriwaki's Motion for
19 Reconsideration ("Motion")[1]. Moriwaki seeks reconsideration of this Court's Decision on RALJ
20 Appeal ("Decision"), issued on January 10, 2018. In considering this Motion, the Court has reviewed
21 the file and records therein.
22 Moriwaki's Motion asks the Court to reconsider its Decision for both findings of fact and its
23 interpretation of *State v. Noah*[2] and *Trummel v. Mitchell*[3]. For purposes of clarification, it is clear that
24 Moriwaki is not a publically elected official. The Court also acknowledges the correction that
25
26
27
28
29
30

[1] The Motion was received on January 22, 2018 and is timely based. KCLCR 59(b); CR 6.
[2] *State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000), as amended on reconsideration (Oct. 30, 2000).
[3] *Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006).

JUDGE KEVIN D. HULL
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

Moriwaki posted on his Facebook page, but did not author, the letter to editor in the Seattle Times referenced in the Decision.[4]

Moriwaki correctly notes that the court in *Noah* "ultimately prohibited picketing in front of Calof's Office." This is true, but not because of Noah's message whilst picketing. A protective order which prohibited picketing within 300 feet of Calof's office was permissible in *Noah* due to Noah's overall course of conduct, which included the following:

- Trespassing onto Calof's property and contacting a patient in person;
- Blocking patients from easily entering Calof's place of business;
- Photographing individuals as they entered and left Calof's office;
- A threatening phone call to Calof;
- Contacting Calof's landlord during lease renewal negotiations; and
- Attempting to locate Calof's ill father who had recently undergone surgery.[5]

There is no evidence that Rynearson engaged in conduct similar to that in *Noah.* The lawful exercise of speech cannot serve as a "course of conduct" to form a basis to issue a protective order. In *Noah*, the protective order survived scrutiny because of the numerous acts of the respondent listed above and not because of Noah's picketing or the messages on his placards.

Moriwaki cites *Trummel*, in support of the proposition that conduct, and not the content of the speech, may support a restraint of speech in a protective order. While this is true, the conduct of the respondent in *Trummel* included:

- Yelling and screaming profanities at staff and residents;
- Disrupting meetings;
- Placing residents under surveillance; and
- Threating residents with criminal consequences if they failed to meet with him.[6]

---

[4] This does not, however, change the Court's analysis as to Moriwaki's status as a "public figure for a limited purpose" as indicated in the Decision relying on *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29 (1986). Moriwaki has voluntarily sought to influence a public issue (the issue of internment and the forcible removal of Japanese-Americans from Bainbridge Island). Rynearson challenges Moriwaki's involvement in the Memorial Association by posting expressions of opinion on a Facebook page he created. Regardless, a private citizen is not immune from disparaging remarks or criticism under the First Amendment because the First Amendment prohibits government, including the judicial branch, from limiting one person's protected speech at the request of another. The court in *Noah* did not prohibit picketing due to Calof not being a publically elected official. The court in *Trummel* did not prohibit the distribution of leaflets due to the landlord not being a publically elected official. The court in *Cassidy* did not prohibit the Tweets due to the members of the Buddhist sect not being publically elected officials.

[5] See *State v. Noah*, 103 Wn. App. at 35.

[6] See *Trummel v. Mitchell*, 156 Wn.2d at 666.

JUDGE KEVIN D. HULL
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

Again, there is no evidence that Rynearson engaged in this type of conduct. The conduct in the present cases consists of internet postings and texting. Rynearson's conduct is speech.

Moriwaki asks the Court to consider the frequency of posting and the creation of a Facebook page as a course of conduct sufficient to support a protective order. But as stated in the Court's Decision, course of conduct "...does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of 'course of conduct.'"[7] The trial court did not find that Rynearson's postings were defamatory, true threats, fighting words, or any other form of speech designated as unprotected[8].

At various times Rynearson peppered Moriwaki's Facebook page with postings. In the realm of social media and the frequency of postings the Court relies heavily on *U.S. v. Cassidy*.[9] In *Cassidy* two members of a Buddhist sect received a barrage of almost 8,000 Tweets, many of which contained critical and disparaging comments. The Federal District Court in *Cassidy* is clear. When, in the context of social media, the speech does not fall within one of the enumerated categories of unprotected speech, the recipient of the unwanted speech has a remedy because the First Amendment does not compel one to listen or read another person's speech. The remedy is to "unfollow" the sender on Twitter. On Facebook, the equivalent remedy is to "block" the sender of the unwanted posts. Moriwaki properly exercised this remedy. Once Moriwaki blocked Rynearson from his Facebook page, Moriwaki no longer received unwanted postings and private messages from Rynearson. The First Amendment is satisfied.

Rynearson's creation of the Facebook page is the 21st century equivalent of permissible picketing as in *Noah* or leaflet distribution as in *Trummel*. There is no evidence that any of the content of Rynearson's postings fall within any of the enumerated categories of unprotected speech articulated in *Cassidy*. The First Amendment does not provide that protected speech may be limited in duration or quantity. In other words, the repetitive nature of the posts on Moriwaki's Facebook page does support the issuance of a protective order. In *Cassidy*, the court looked at almost 8,000 Tweets and found that the Tweets fell under the umbrella of protected speech. The Court did not state

---

[7] RCW 10.14.020(1).

[8] See *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215, 1219 (2004), as amended (Feb. 17, 2004).

[9] *United States v. Cassidy*, 814 F. Supp. 2d 574, 576 (D. Md. 2011).

JUDGE KEVIN D. HULL
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

that the massive quantity of the Tweets invalidated the speech. The court in *Cassidy* held that so long as the content of the messages fall under the umbrella of protected speech, the remedy for the recipient of the unwanted messages is to "unfollow" the sender on Twitter. In this case, the remedy is to "block" the sender on Facebook. An individual engaged in permissible picketing (i.e. protected speech) may do so for five minutes, five hours or five days because the First Amendment does not limit the quantity of one's protected speech. Rynearson continuously posted on Moriwaki's Facebook page. Moriwaki would sometimes delete the postings and sometimes respond to the postings. Ultimately, Moriwaki properly exercised his First Amendment remedy as stated in *Cassidy* by blocking Rynearson from his Facebook page.

Rynearson's speech, and the method he chose to express his speech, are protected by the First Amendment. A court lacks the constitutional authority to limit, in any way, protected speech. Accordingly, the protective order entered by the trial court must fail.

It is hereby **ORDERED** that Petitioner's Motion to Reconsider is **DENIED** and the hearing noted for Friday, March 2, 2018 is **STRICKEN**.

Dated this 5th day of February, 2018.

JUDGE KEVIN D. HULL

JUDGE KEVIN D. HULL
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

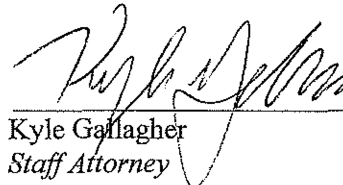
CERTIFICATE OF SERVICE

I, Kyle Gallagher, certify 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.

Today, I caused a copy of the foregoing document to be served in the manner noted on the following:

Clarence Moriwaki 155 Madison Avenue North Bainbridge Island, WA 98110	☒ Via U.S. Mail ☐ Via Fax: ☐ Via Hand Delivery ☐ Via Interdepartmental Mail
Alexander Savojni Eugene Volokh Rhodes Legal Group, PLLC 918 S Horton St. Suite 901 Seattle, WA 98134-1953	☒ Via U.S. Mail ☐ Via Fax: ☐ Via Hand Delivery ☐ Via Interdepartmental Mail

DATED this 5th day of February, 2018, at Port Orchard, Washington.



Kyle Gallagher
Staff Attorney

JUDGE KEVIN D. HULL
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140