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Court of Appeals
Division III
State of Washington
7/24/2020 4:12 PM

No. 36912-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Mary Jane Eaton, Respondent,

v.

Tracy Dean Eaton, Appellant.

Amended
REPLY BRIEF OF APPELLANT

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A. REPLY TO COUNTER- ASSIGNMENT OF ERROR

Because Ms. Eaton's counter assignments of error appear to be her argument on certain issues, and her "Statement of the Case" includes argument that is not organized by issue, then argument is set forth below in response to her "Assignment of Error."

1. (Ms. Eaton did not address the first assignment of error -- which was that the Superior Court violated Wash. Const, art. IV, § 23 by applying an "abuse of discretion" standard on revision instead of de novo review.)
2. "Mr. Eaton had opportunity to respond. He did not show up for any court dates and had his council represent him."

Responses are in writing. Benton County Superior Court Civil Rule 94.07W governs the procedures for domestic case motions. There is no provision for oral testimony. He did clearly and thoroughly respond to what was before the Court as of the due date of his response. His personal presence would have added nothing to his response.

3. “The Superior Court found sufficient revision to permit the restraining order.”

The Superior Court per its written order, CP 136-37, did not conduct de novo review. There has been no constitutional revision as argued in the Brief of Appellant and which has not been addressed by Respondent. So there cannot have been “sufficient revision,” to use Ms. Eaton’s terminology.

4. “The Superior Court did not err on the revision of the restraining order.”

Clearly the Superior Court did err, having never afforded to Mr. Eaton his constitutional right to revision, which is required to be de novo, as argued in the Brief of Appellant and which has not been addressed by Respondent.

5. “The Superior Court found substantial evidence for the restraining order. Mr. Eaton threatened Ken Taylor when he was served with divorce papers.”

a) The Superior court did not find substantial evidence based on de novo review, because none was conducted. The Superior Court did not say it was finding substantial evidence other than the window or

other facts first brought up in reply. The only thing the Superior Court said in this regard:

“However, it is clear that Comm. Stam based her decision on the entirety of the facts before her and not the one offending fact as claimed by the Respondent.” CP 137. (That is not what Commissioner Stam herself said at the time. CP 127, lines 7-16.)

No mention at all of the Superior Court judge independently finding “substantial evidence.” Nothing to change the standard of review employed: “The Respondent fails to establish that Comm. Stam abused her discretion.” CP 137. The proper standard of review having not been applied, then finding “substantial evidence” could have been only from the perspective that the Commissioner did so, and the Superior Court found no “abuse of discretion,” when that is not the standard. So this is an invalid contention. b) The only evidence the Superior Court could have conceivably referenced in stating the Commissioner based her decision on “the entirety of the facts” (without specifying a single example) was also presented for the first time in Reply – including the hearsay assertion that Mr. Eaton “threatened Ken Taylor.” Ms. Eaton cannot point to anything in her motion and original supporting materials that establishes a “credible

threat.” Nor can she point to anything in her “reply” that properly was in fact a “strict reply” to Mr. Eaton’s response that establishes a “credible threat.” The allegation is made for the first time in a declaration replying to Mr. Eaton’s declaration. CP 30. His last declaration was dated April 2nd, 2019, the declaration by Ms. Eaton setting forth the hearsay allegation about Ken Taylor was in her April 4th, 2019 reply declaration. So Mr. Eaton has had no chance to respond to the Taylor allegation that Ms. Eaton relies upon as other evidence of a threat to support a restraining order. ***Once again, Ms. Eaton asks a Court to justify a restraining order based on accusations first made in a reply document.*** And which are not even admissible. ER 602 requires a witness to only testify as to matters within their personal knowledge. There is no showing as to how the Taylor allegation can be anything other than hearsay excluded by ER 802. Further, since a court making findings without a jury, when there is no showing to the contrary, is presumed to not consider matters which were inadmissible when making her findings, *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955), the Commissioner could not have properly done so, nor could the Superior Court have done so. So neither bothered to make specific

written findings, then there is no basis to say what the Commissioner went on, except her oral pronouncement it was the broken window.

The only evidence provided up through the time Mr. Eaton's timely written response was due would not have supported a restraining order based on a "credible threat" to safety. That evidence was that Mr. Eaton "threatened" to stop paying for cable, internet and an adult daughter's car insurance. So no "entirety of the facts" could properly support the restraining order.

6. "No fees should be awarded to the respondent. It was the decision of the commissioner to maintain the restraining order."

"Decision of the Commissioner"? Admittedly that is what the Superior Court judge, who was supposed to afford the constitutional right to revision, thought as well – hey, it was up to the Commissioner what are you complaining to me about? (Even under an "abuse of discretion" standard, the Commissioner's decision should not have been upheld.) But it was not supposed to be the "decision of the Commissioner" it was supposed to be de novo review by a Superior Court Judge. Respondent's counsel urged the Superior Court Judge to violate the standard of review in a response to the Motion for Revision, arguing: "The Commissioner having all the facts in front of

her, applied the appropriate statutory standard, did not abuse her discretion ... and this decision should not be revised.” CP 141. It was the willful decision of Ms. Eaton, represented by counsel at the time of her “reply” to deliberately raise new matters that to which Mr. Eaton could not respond to, and with improper “evidence.” Her counsel is supposed to know and understand due process and the court rules and even a lay person would know it is unfair to bring up a new allegation that the other party has no chance to explain. True, the Commissioner should stand as a check on such behavior, but did not and there has been no constitutional review of the Commissioner’s action, all at the urging of Ms. Eaton’s counsel, her authorized representative.

Respondent continues to engage in bad faith behavior in this court, suggesting financial matters justified the treatment of Mr. Eaton below by the Superior Court and herself and her counsel. She states Mr. Eaton drained a retirement account, contradicting her own sworn declaration, and the decree. (See discussion, below.) Even if relevant, she provided no records so that Mr. Eaton can show this is not true. There is nothing in the record to support that Mr. Eaton was fired from a job over a drug test. Which is a repeat of what occurred in the court below – engage in a character smear and figure the court

will substitute that for a “credible threat” in granting a groundless restraining order.

B. REPLY TO STATEMENT OF THE CASE/ARGUMENT

(Ms. Eaton’s “Statement of the Case” is mixed with argument and there is no separate section for argument therefore the following is also both a reply to her statement of the case and argument.)

Summary of Reply Statement of the Case/Argument

Ms. Eaton engages in the same strategy that she did in the Superior Court: paint Mr. Eaton as having generally poor character, to suggest there is no harm in entering a restraining order against him, despite no evidence of a credible threat to safety of another person. And falsely, since the record does not support that he drained a retirement account or was fired for substance abuse-related issues.

1. Lack of citation to the record or lack of any record

First, Appellant objects to the Court accepting as fact any assertions by Ms. Eaton to which there is no citation to the record or to which there is no support in the record which can be cited.

Second, Ms. Eaton engages in the same kind of general character-bashing that apparently the Benton County Superior Court accepts as justifying restraining orders keeping a person from his home and property.

However, to the extent supported by the record, Ms. Eaton's account only reveals the improper bases for seeking a restraining order. And her ill motives in obtaining a restraining order by whatever means were necessary.

2. Matters that do not relate to "credible threat"

"On February 27th, 2019, Mr. Eaton approached me stating he wanted a divorce." True, CP 6. Mr. Eaton does not deny that on that date, the same date he was locked out of the home, never to be allowed back in or on the property, he discussed that subject. Thus, in Ms. Eaton's mind, he did not deserve to be on the property, justifying her subsequent actions. Ms. Eaton apparently did not think there was a basis for a restraining order against Mr. Eaton prior to him informing her that the marriage was over.

There are no facts in the record about Mr. Eaton losing a job for faking a drug test and Appellant moves this be stricken. Again, Ms. Eaton offers a general character attack. Appellant moves to strike

this material from the record. (Ms. Eaton's declaration in support of the immediate restraining order stated: "He lost his last job in December of 2018 when he made outlandish allegations against his boss." CP 6, lines 2-24.)

While Ms. Eaton generally alleged poor treatment by Mr. Eaton, there were no specific facts as to "verbally" or "mentally" having abused Ms. Eaton and the children for 28 years. In fact, there is no indication that Ms. Eaton ever made such allegations until she was upset that Mr. Eaton now wanted a divorce.

Ms. Eaton acknowledges that she was aware Mr. Eaton had to go to California for a job interview. CP 06. The facts would indicate that she was far from helpful in terms of what is needed to go out-of-state seeking employment, for the person upon whom she would rely for help. The only evidence of actions motivated by animosity were on her part, making it hard on someone due in California the next day for a job interview, while complaining about lack of income.

3. Lack of credible threat

Ms. Eaton says the deadbolt was locked "as usual." (Then if the situation was "usual" then why a restraining order?) Clearly she does not allege that she allowed Mr. Eaton back in when she realized Mr.

Eaton “returned to the house.” It would not be “as usual” to refuse to allow a spouse to enter the home. At this point, she offers no evidence as to why she would need to lock him out of a community home. Knowing he returned to the home would suggest she would also know he did not necessarily have what he needed to go to his interview in California. Ms. Eaton was treating him as though he was under a “restraining order” prior to supposedly discovering the broken garage window the next day, which she never mentioned until her “reply.”

Ms. Eaton says she thought he was already gone for his trip, yet was aware his suitcase was in the “music room.” She implies he had access to the “music room.” She seems to agree with Mr. Eaton that he had access to the “garage/music studio/laundry room” as he said in his response declaration. CP 14.

Ms. Eaton says Mr. Eaton “chose to break the window of the garage door” to gain access. There is no reasonable inference Mr. Eaton broke the window. No facts indicate Ms. Eaton saw or heard Mr. Eaton do so, she claimed in her “reply” she found it the next morning. In fact if the music room was unlocked he would have had no motive to do so. Ms. Eaton, once again, relies on the very same

“fact” that was indisputably not brought up until her reply declaration. She indicated to the Superior Court in “reply” that she did not realize until the next day that a garage door window was broken. No photo(s) of a broken window were ever provided.

Ms. Eaton says that after Mr. Eaton took the items in the music room he then asked for a few other items, which she placed outside the door. In doing so, Ms. Eaton acknowledges that, although she did not discover the window until the following day, that she was not allowing Mr. Eaton in his own home, indicating animosity on her part, and control over what clothing he could have.

Ms. Eaton states Mr. Eaton perjured himself about how the window had been broken two years earlier. He never had a chance to explain in Superior Court prior to the restraining order being granted. He did so in response to a request to dismiss the appeal. Ms. Eaton states there were “multiple witnesses present that day August of 2017” No statements of such witnesses were provided. Ms. Eaton does not explain why she would recall multiple witnesses being present for an incident in which no window was broken.

Ms. Eaton states Mr. Eaton never returned home after his job interview in California. This would indicate he did not do anything

after February 27th at the home that would justify a restraining order. Following service of the restraining order, he could not lawfully go to his home.

Ms. Eaton states that on March 4th, 2019, she received emails from Mr. Eaton including that he would turn off “other utilities.” Ms. Eaton provided no documentation of such communications to the Superior Court, only Mr. Eaton did, in his response to the motion for a restraining order. There was no dispute that he provided all the relevant communications to the Court. After Ms. Eaton did not respond to his communication about financial matters, he did state he would turn off the cable tv, then the internet and finally cancel his adult daughter’s car insurance. He did not refer to “other utilities.” He did not carry out any of these proposed actions. CP 14-15, 20-22. The restraining order was not based on these “facts” it was based, according to the Commissioner’s oral decision, on the window. And in the written order, on a “credible threat” to “physical safety” with no specifics, and the Court Commissioner refusing to enter findings in accordance with her oral statements, so there were no written findings to support a “threat.”

Ms. Eaton then discusses financial matters – again, indicating an attempt to justify a restraining order based on a “credible threat” to “physical safety” by trying to convince others that Mr. Eaton was generally an inconsistent provider. Obviously, Mr. Eaton had been out of work for some time and was receiving \$687 a week in unemployment compensation so there was not a lot of income. CP 13. (The wisdom of branding someone with an unfounded “credible threat” restraining order when they are seeking employment in the nuclear physicist field, while complaining of lack of support, is best left to Ms. Eaton to explain.)

She also says, which was a recurring theme in the case: “Mr. Eaton pulled out his 401K in February of 2019, and claims to have paid community bills with that money. To my knowledge he did not.” Ms. Eaton’s *own declaration* before the Court at that time generally said retirement funds were withdrawn and spent on bills. CP 31. The Decree indicates that Mr. Eaton’s property award included “Withdrawals he already received from the following accounts: Veolia/Safe Harbor \$806.” Supplemental CP ____, (Final Divorce Order, p. 3, part 9.) In any event, “credible threat”?

It is denied that Mr. Eaton ever was involved in “shutting off my cell phone.” Nothing in the records indicates it, he denied ever shutting anything off. CP 15. No records were ever provided indicating he ever turned anything off.

While these tactics are unfair and have no proper consideration in granting a restraining order, Appellant concedes these tactics were apparently successful with the Benton County Superior Court Commissioner who is willing to grant restraining orders without the required evidence and on general character smears – that happen to be false.

4. Fees for bad faith litigation

Ms. Eaton opposes being assessed fees which Mr. Eaton has requested on the basis of bad faith below. Her brief in this matter once again shows she will offer “facts” on the issue of a restraining order that are meant to generally portray Mr. Eaton as someone of less than worthy character. With no facts to show that he was ever a “credible threat” to the “physical safety” of anyone. But with plenty of facts to suggest that Ms. Eaton had animosity towards him from his stating he wanted a divorce, so she smeared him from that point on,

with any tactic available to her, with no one at Superior Court protecting Mr. Eaton from such unfair procedures.

In her “Conclusion” Ms. Eaton states the Superior Court made its ruling “on the facts before them.” But without hearing Mr. Eaton’s side of the story, the *sine qua non* of due process of law. She states “there was no err made in their findings.” The findings proposed in the written order, closely tracking the Commissioner’s oral ruling, were deleted from the written order, to hide the fact the findings were based on what Mr. Eaton never had a chance to respond to.

5. The restraining order remains a stigma

Ms. Eaton says “[t]he protection order is no longer in place.” With the appeal pending Mr. Eaton had no ability to change the restraining order under RAP 7.2 (e)(2) and it is still in the decree. Supp. CP _____. Final Divorce Order, p. 6, part 16. Further, after the decree was entered, and Mr. Eaton was supposed to be able to go to the home and pick up his remaining personal belongings, he was met with a small crowd hot to get him in trouble upon arrival. A supporter of Ms. Eaton called the sheriff’s department and said that Mr. Eaton has a “protection order” against him. (See Mr. Eaton’s response to request to dismiss appeal as moot.) Clearly Mr. Eaton, post-decree is under

a stigma, one placed upon him in violation of due process of law, and tactics that cry out for this Court to clear him of that stigma. *Hough v. Stockbridge*, 113 Wn. App. 532, 537, 54 P.3d 192 (2002), reversed on other grounds, 150 Wn.2d 234 (2003) refers to the "continuing stigma" of an anti-harassment protection order.

Regardless, the temporary order even being still in the record is a stigma upon Mr. Eaton that should not be there. It was entered in violation of due process and is void, so should be vacated and expunged. Judgments and orders issued in violation of due process are void. *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985).

C. CONCLUSION

This Court should reverse, declare void and vacate the offensive restraining order, both in its temporary version and as set forth in the final decree. Remand to the Superior Court, given the multiple and blatant constitutional violations below is likely a futile act. Alternatively, the Court should remand to the Superior Court for a hearing before a new, unbiased trier of fact, with the material in excess of a proper reply stricken and not part of the hearing. Or, with

Mr. Eaton allowed to tell his side of the story to the Superior Court for the first time.

And the Court should award fees for time spent below and on this appeal for a situation created by bad faith tactics (such as reference to inadmissible material) which were designed to, and did, deprive Mr. Eaton of his opportunity to be heard.

July 23, 2020

Respectfully submitted,

s/ William Edelblute

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Certificate of Service

I hereby certify that on the 24th day of July, 2020, I mailed a true and correct copy of the foregoing Reply Brief to Mary Jane Eaton, Respondent, at 6921 W. Arrowhead Avenue, Kennewick WA 99336, US Mail First Class, Postage Prepaid.

s/ William Edelblute

WILLIAM EDELBLUTE PLLC

July 24, 2020 - 4:12 PM

Transmittal Information

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Superior Court Case Number: 19-3-00237-0

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