

FILED
Court of Appeals
Division III
State of Washington
9/3/2019 8:00 AM

No. 36912-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Mary Jane Eaton, Respondent,

v.

Tracy Dean Eaton, Appellant,

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Assignment of Error

1. The Superior Court denied Appellant's constitutional right under Wash. Const, art. IV, § 23 to seek revision by applying an "abuse of discretion" standard in deciding Appellant's motion for revision of an order entered by a Superior Court Commissioner.
2. The Superior Court violated due process of law by "affirming" on revision a restraining order based on allegations first made by Respondent in a reply declaration to which Petitioner had no opportunity to respond.
3. The Superior Court erred by "affirming" on revision a restraining order that did not contain findings sufficient to permit meaningful review.
4. The Superior Court erred by "affirming" on revision a restraining order based on allegations which were not based on any personal knowledge.
5. The "findings" by the Superior Court that Appellant was a "credible threat" and that it was based on the "entirety of the facts" are not supported by substantial evidence.
6. Appellant should be awarded fees for having to bring this appeal because of Respondent's bad faith and intransigence.

Issues pertaining to Assignments of Error

1. Did the Superior Court violate Petitioner's constitutional right under Wash. Const, art. IV, § 23 to seek revision by applying an abuse of discretion standard of review on revision, rather than a de novo standard of review? (Assignment of Error No. 1.)
2. Did the Superior Court violate due process of law by entering a restraining order based on allegations first made by Respondent in a reply declaration to which Petitioner had no opportunity to respond? (Assignment of Error No. 2.)
3. Are the findings in the restraining order sufficient to permit meaningful review? (Assignment of Error No. 3.)
4. Did the Superior Court err by entering the restraining order based on allegations which were not based on any personal knowledge? (Assignment of Error No. 4.)
5. The "findings" by the Superior Court that Appellant was a "credible threat" and that it was based on the "entirety of the facts" are not supported by substantial evidence. (Assignment of Error No. 5.)
6. Appellant should be awarded fees for having to bring this appeal because of Respondent's bad faith and intransigence. (Assignment

of Error No. 6.)

B. STATEMENT OF THE CASE

Tracy Eaton appeals the “Order on Motion for Revision” entered June 3rd, 2019, CP 136-37, which denied a motion for revision of the “Restraining Order” entered April 16th, 2019, CP 55-57, both entered by the Superior Court of Benton County.

The decision restrained Appellant from entering the grounds of, or coming near, his own home. The Superior Court judge on revision ruled that Appellant “fails to establish that Comm. Stam abused her discretion.” CP 137.

Mary Jane Eaton (petitioner in the trial court) moved for a restraining order. CP 1-7. Her declaration in support thereof described Mr. Eaton as “aggressive in his communications” since separation. CP 6. She said Mr. Tracy Eaton “stated he is going to stop paying for everything, and it appears that he is making good on his threats.” CP 7.

In his timely response, CP 12-22, Mr. Eaton stated that after he was dead bolted out of the home in February of 2019, without a court order, his only communications with Ms. Eaton were by text or email, all of which he provided with his response. CP 14-15. In

March of 2019, after Ms. Eaton did not respond to his communications about dividing property, Mr. Eaton has said in a text and an email, that if he did not hear from her in one hour, he would turn off the DirectTV, and in the next hour, he would turn off the internet, and in the next hour he would cancel the auto insurance coverage for the 23 year old daughter of the parties. CP 20-22. He denied that his communications were threatening, but were only made out of frustration that Ms. Eaton would not respond to his communications about financial matters. CP 13.

In reply, CP 29 through CP 32, Ms. Eaton did not describe any communications after February 27th, 2019 from Mr. Eaton other than the text and email provided by Mr. Eaton, but she described them as “threatening.” CP 30. For the first time in her reply, Ms. Eaton now said that after she locked Mr. Eaton out of the home, that the following morning, she found a broken window in the garage door. “The next day, I discovered that he had broken a window in the garage door to get into the room at the back of the house.” CP 31. She surmised that Mr. Eaton had broken the window to enter the home. Ms. Eaton offered no facts indicating it was Mr. Eaton who broke the window. Ms. Eaton, for the first time in reply also went into events from 2018, during a prior separation.

At the time of her reply, under local court rules, the time had elapsed for Mr. Eaton to respond further to the motion. CP 59.

In their declarations, the parties disagreed about how much clothing Mr. Eaton was provided the night he was locked out. He said Ms. Eaton threw his iPad in the snow and put only a couple pair of underwear, jeans and socks outside for him. CP 14. Ms. Eaton had a different amount of clothing. CP -31, part 9. Ms. Eaton at no time claimed she saw or heard Mr. Eaton in the home the night of February 27th. She did not explain why she would give Mr. Eaton clothing if he had access to the home via a broken window.

At the hearing, counsel for Mr. Eaton objected to the Court considering matters Ms. Eaton first raised in reply.

MR. EDELBLUTE: And she brings up a bunch of stuff only in reply for the first time, there's no grounds for a restraining order.

...

CP 120, line 24 to CP 121, line 1.

MR. EDELBLUTE: And she says he broke into the house, there was no allegation of that in the original declaration. In a reply, she says he broke a window in the garage to gain access to the house, and - -

COMMISSIONER STAM: And you said this happened - -

MR. EDELBLUTE: - - I ask the Court not to consider that,

because my client would deny that if he was given any fair chance. She first brought it up in a reply after never mentioning such a thing while she was convincing the Court to issue a restraining order. Wouldn't she have said that? She made no mention of such a thing, and he's –

...

CP 125, line 20 to CP 126, line 7.

Mr. Eaton's counsel argued that he had shown all of his communications with Ms. Eaton, and they were not threatening. CP 117-18.

The Court Commissioner said, realizing Mr. Eaton did not have a chance to reply about the broken garage window, that nevertheless, that was the basis for "fear" that justified granting the restraining order.

COMMISSIONER STAM: The Court has reviewed the declarations in this matter. The Court is going to keep the restraining order in place. Since he has moved out of the home, and given the allegations that he did break into the home, and understanding that Dad, given the opportunity, would deny that, the – the fear of that is enough for the Court to continue with a restraining order to remain in place during the – during the transition of the dissolution of this marriage.

CP 127, lines 7-16.

At the time of presentment of the order, the Court Commissioner signed an order which had proposed findings, based on the oral ruling, stricken from it. The findings in the order did not specify what acts resulted in a threat of harm to Ms. Eaton. CP 55-57. Cf. CP 52-54.

Mr. Eaton timely moved for revision, following all local court rules required for revision, CP 58-110, attaching all materials that were before the Commissioner to the motion. Mr. Eaton also furnished a transcript although not required by local rules. CP 111-35.

The "Order on Motion for Revision" states the motion is denied. "The respondent fails to establish that Comm. Stam abused her discretion." CP 136-37. On the lack of due process, due to facts raised for the first time in reply, the Superior Court Judge stated "... it is clear that Comm. Stam based her decision on the entirety of the facts before her" "Comm. Stam's decision is affirmed." *Id.* The order does not specify how it was clear that the Commissioner based her decision on the entirety of facts before her given no reference to any other facts by the Commissioner in her oral ruling set forth above or in the restraining order.

Appellant timely filed a Notice for Discretionary Review which the

Court treated as a Notice of Appeal. Appellant had filed and served a Motion for Discretionary review, to which Respondent filed no Reply.

C. ARGUMENT

1. The Superior Court denied Petitioner's constitutional right of revision by deciding a motion for revision on an "abuse of discretion" standard of review with no de novo review.

All commissioner rulings are subject to revision by the superior court. RCW 2.24.050; Wash. Const, art. IV, § 23. The superior court "reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner." *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). This right ensures litigants that disputed decisions are made by elected judges.

Article IV, section 23 of the Washington Constitution provides for the appointment of superior court commissioners "who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision[s] by such judge" RCW 2.24.050 governs the revision process, providing that "[s]uch revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner."

"A revision denial constitutes an adoption of the commissioner's decision, and the court is not required to enter separate findings and conclusions." *In re Marriage of Williams*, 156 Wn. App. 22, 27-28, 232 P.3d 573 (2010). On appeal, the appellate court reviews the superior court's ruling, not the commissioner's. *In re Marriage of Stewart*, 133 Wn. App. 545, 550, 137 P.3d 25 (2006).

Clearly the Superior Court judge applied the wrong standard of review. "The respondent fails to establish that Comm. Stam abused her discretion." Order on Motion for Revision. CP 136-37.

Mr. Eaton's right to have the ruling of an unelected Court Commissioner reviewed de novo by a Superior Court judge, applying the de novo standard of review, has been blatantly denied to him. There can be no denial that the Superior Court did not apply the correct standard of review, which is a profound departure from the usual course of proceedings, unconstitutionally restraining Mr. Eaton's freedom to act and imposing a stigma upon him.

The record indicates that Mr. Eaton is one as a physicist in the nuclear energy field and is actively looking for new employment. Having a restraining order against him, unjustifiably, could not help his employment prospects in a field known for requiring a high level of security and background checks.

2. The Superior Court denied due process of law by basing a restraining order on facts first alleged in a reply.

Local Civil Rule 94.07W

DOMESTIC RELATIONS MOTIONS

(a) Domestic relations motions. ...

(1) *Benton County and Franklin County Family Court motions.*

(A) Timelines. The moving party shall no later than fourteen (14) calendar days prior to hearing date, file with the clerk and serve on the opposing party/counsel the motion, note for motion and all supporting documents. The opposing party's strict response must be filed and served no later than noon, five (5) court days prior to the hearing. Documents filed in strict reply to the response must be filed and served not later than noon, two (2) court days prior to the hearing. **The Court will not consider any issues raised for the first time in the strict reply document.** (Emphasis added.)

From the hearing transcript:

MR. EDELBLUTE: And she brings up a bunch of stuff only in reply for the first time, there's no grounds for a restraining order.

...

MR. EDELBLUTE: And she says he broke into the house, there was no allegation of that in the original declaration. In a reply, she says he broke a window in the garage to gain access to the house, and - -

COMMISSIONER STAM: And you said this happened - -

MR. EDELBLUTE: - - I ask the Court not to consider that, because my client would deny that if he was given any fair

chance. She first brought it up in a reply after never mentioning such a thing while she was convincing the Court to issue a restraining order. Wouldn't she have said that? She made no mention of such a thing, and he's –

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COMMISSIONER STAM: The Court has reviewed the declarations in this matter. The Court is going to keep the restraining order in place. Since he has moved out of the home, and given the allegations that he did break into the home, and understanding that Dad, given the opportunity, would deny that, the – the fear of that is enough for the Court to continue with a restraining order to remain in place during the – during the transition of the dissolution of this marriage.

CP 120, line 24 to CP 121, line 1; CP 125, line 20 to CP 126, line 7;
CP 127, lines 7-16.

The was no evidence Mr. Eaton “moved out” of the home, he returned home after being out for a while and found he was deadbolted out of the home by Ms. Eaton without a Court order.

In *Dr. Robert L. Meinders, D.C., Ltd. v. Unitedhealthcare, Inc.*, 800 F.3d 853, 856 (7th Cir. 2015), Meinders moved to strike United's reply because it offered new facts and a new legal issue. The district court denied his motion to strike and entered judgment against him.

Meinders first contends on appeal that the district court denied him due process by entering judgment against him on factual and legal issues to which he did not have a full

and fair opportunity to respond. After a review of the record, we agree.

Id. at 858.

Due process, we have cautioned, requires that a plaintiff be given an opportunity to respond to an argument or evidence raised as a basis to dismiss his or her claims. See, e.g., *Smith v. Bray*, 681 F.3d 888, 903 (7th Cir.2012) (“[D]istrict courts need to ensure that they do not base their decisions on issues raised in such a manner that the losing party never had a real chance to respond.”); *English v. Cowell*, 10 F.3d 434, 437 (7th Cir.1993)

Id.

It was held that the district court denied Meinders due process by considering a reply to which he was not able to respond. *Id.* Further, the procedure here violated the local rule requiring replies to be in strict reply to the response and forbidding the court to rely upon material in violation of said rule.

Mr. Eaton has had no fair chance to explain his side of the story as to whether, after he was locked out of his home without a court order, he broke a garage door window. The trial court is aware he would deny it if given the chance.

The Superior Court has restrained Mr. Eaton from exercising his liberty interest in going into or coming near his own home, when he had no chance to respond to the allegation that he had broken a

garage door window to gain access to the home. The oral finding by the Commissioner explicitly stating she was using the broken window allegation as the basis for the restraining order, realizing Mr. Eaton had no chance to explain, has not been properly subjected to the right of revision and therefore is in reality the only reason provided for the restraining order. The Superior Court judge's ruling, made under an erroneous "abuse of discretion" standard, that the restraining order was based on other facts suffers from the same problem; other such allegations were also only raised for the first time in reply. Nothing in the original declaration supported a restraining order based on fear of physical safety. It only went on the "aggressive communications" which said Mr. Eaton, if she did not respond about the financial issues he brought up, would stop paying for things such as television, internet and their adult daughter's car insurance.

Given that relying upon facts first set forth in a reply violates not only the local court rule but also the Due Process Clause, the restraining order should be reversed and vacated. The Superior Court added insult to injury by condoning locking someone out of their home without a court order, then entering an unconstitutional restraining order against them, falsely branding them as a "threat."

3. The Superior Court erred by entering an order restraining Petitioner's liberty without making findings sufficient to permit meaningful review.

To facilitate appellate review, a trial court must enter findings of fact and conclusions of law and set forth its reasons for issuing a preliminary injunction. *Alderwood Assocs. v. Wash. Env'tl. Council*, 96 Wn.2d 230, 233-34, 635 P.2d 108 (1981); CR 52(a)(2)(A); CR 65(d).

San Juan County v. No New Gas Tax, 160 Wn.2d 141, 157 P.3d 831, (2007).

Here the only written finding is a conclusory: "The Restrained Person represents a credible threat to the safety of the Protected Person." CP 56. And the oral findings are a frank admission that the Court Commissioner relied upon material first provided in a reply document. But then the Commissioner omitted her own ruling from the restraining order even though language closely following the oral ruling was put into a proposed version of the order. CP 53. And now those findings, or lack thereof, are the order of the Superior Court judge under review.

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 the "continuing stigma" of an anti-harassment protection order. Mr. Eaton is deprived of meaningful review of an order that restricts his liberty and puts a stigma upon him by the deliberate failure to

make adequate findings.

Refusing to include in the order the findings that were made orally at the time of the hearing contributes to the violations of Mr. Eaton's constitutional right to revision and to have been afforded due process instead of having his liberty restricted by new allegation made only in "reply."

4. The Superior Court erred by making an order based on allegations made without personal knowledge.

ER 1101 (a) provides that the Rules of Evidence apply to all proceedings unless an exception applies. There is no exception for a restraining order issued under RCW 26.09. ER 602 requires a witness to only testify as to matters within their personal knowledge.

While Ms. Eaton claimed she saw a broken garage window the morning after she unilaterally dead bolted Mr. Eaton out of the community home without a court order, she did not provide any facts to establish she had personal knowledge that he broke the window, when it had been broken or how, or how it meant Mr. Eaton gained access to the home thereby, since her account of the preceding evening did not mention him being inside the home.

This error clearly affected the outcome as it was the only

“evidence” that Mr. Eaton had broken a window. An error is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’ ” *In re Det. of West*, 171 Wn.2d 383, 410, 256 P.3d 302 (2011).

5. The “findings” by the Superior Court are not supported by substantial evidence

Findings of fact must be supported by substantial evidence, i.e., evidence sufficient to persuade a rational person of the truth of the premise,” *State ex rel. J.V.G. v. Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (2007).

The Superior Court judge upheld the Commissioner’s finding that Mr. Eaton presented a “credible threat to the safety of” Ms. Eaton. CP 55. Especially when the allegations first brought up in a reply and made without personal knowledge are not considered, there simply is no evidence to support such a finding. Even if someone who was unlawfully locked out of their own home without a court order had broken a garage door window to access their own home, it is highly questionable that would constitute a safety threat to the person who chose to angrily lock them out of the home.

To the extent that the Superior judge’s ruling that the

Commissioner based the restraining order “on the entirety of the facts,” CP 137, is a “finding” not only is there no evidence of any kind to support such a finding, the Commissioner’s oral ruling was flatly to the contrary, she said realizing Mr. Eaton never had a chance to reply on the broken window and that he would deny it, nevertheless that was the basis for “fear” by Ms. Eaton. The only other fact mentioned by the Commissioner was that Mr. Eaton had “moved out” of the home. CP 127, lines 7-16. That was false, the undisputed facts were that he was locked out with only minimal clothes placed out in the snow for him. Being locked out or even moving out does not support that someone is a credible threat to the safety of another.

6. Request for attorney fees on appeal

This appeal has arisen from Ms. Eaton and her counsel blatantly violating not only the local rule of procedure as to reply documents, but the Due Process Clause in order to deny Mr. Eaton due process of law, with no sense of fair play.

This constitutes bad faith and intransigence which support and an award of fees for this appeal and for any proceedings needed on remand. A court has authority in awarding attorney's fees if the losing party's conduct constituted bad faith. *Seals v. Seals*, 22 Wn.

App. 652, 590 P.2d 1301, (Div. 3 1979). Intransigence in the trial court can also support an award of attorney fees on appeal. *In re Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999).

D. CONCLUSION

This court should reverse and vacate the restraining order and its finding that Mr. Eaton is a safety risk to another party, when said order was entered as a result of denial of due process of law and sustained in violation of his constitutional right of revision. To restore Mr. Eaton's freedom to act and remove the stigma unfairly and unlawfully placed upon him. This Court can see all the facts properly presented prior to the unlawful "reply" so there should be no need for another hearing on remand.

Alternatively, this court should reverse and remand for a new decision, before an unbiased decision-maker, without consideration of facts first alleged in a reply. Or for a hearing with a full opportunity for Petitioner to respond to the allegations first raised in reply and for findings sufficient to permit meaningful review, before an unbiased decision-maker.

September 2nd 2019

Respectfully submitted,

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September 02, 2019 - 1:06 PM

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

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