

**Case No: CV2015-00025**

<b>APPELLANT</b> Patrick Fox [REDACTED] Burnaby, BC V5G 1T3 Canada 604-[REDACTED] Pro Se	<b>APPELLEE</b> James Pendleton 250 E. Placita Lago Del Mago Sahuarita, AZ 85629 520-288-8200 Pro Se
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**APPELLANT'S MEMORANDUM**

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**STATEMENT OF THE CASE:**

On July 23, 2015 Mr. Pendleton filed a Petition for an Injunction Against Harassment against Mr. Fox, in the Sahuarita Municipal Court. Based on Mr. Pendleton's sworn statements, the Municipal Court issued the Injunction Against Harassment. A copy of the Injunction Against Harassment was served on Mr. Fox on October 31, 2015. Mr. Fox thereafter requested a contested hearing in the Sahuarita Municipal Court, and a hearing was set for December 16, 2015. Mr. Pendleton and Mr. Fox both testified at the hearing. Upon completion of the hearing, the Municipal Court ordered the Injunction Against Harassment remain in effect. Mr. Fox timely filed a Notice of Appeal.

**STATEMENT OF FACTS:**

Mr. Fox and Desiree Capuano have a child, G [REDACTED], in common (12/16/15 Hearing Record (hereinafter "H.R.") at 10:12-10:20). In July, 2015, G [REDACTED] had been visiting with Mr. Fox. During that visit, Ms. Capuano relocated with G [REDACTED] from Phoenix, AZ to

Sahuarita, AZ, to move into her boyfriend, Mr. Pendleton's house. Ms. Capuano refused to inform Mr. Fox of G [REDACTED]'s relocation and the circumstances of G [REDACTED]'s new living environment, and instead attempted to conceal it by providing him a post office box as their new address (H.R. at 31:57-32:321).

On July 23, 2015, Mr. Pendleton, filed a Petition for Injunction Against Harassment in the Sahuarita Municipal Court, against Mr. Fox (Appendix A: Petition). The petition alleged Mr. Fox: used his son's cellphone GPS to locate Mr. Pendleton's address; surveilled [sic] him through various social media websites; sent harassing emails to his "tenant", Ms. Capuano; and posted various information, including his name, address, telephone number, photograph and security clearance level on a public website. On that same day, the Sahuarita Municipal Court granted Mr. Pendleton's petition and issued an Injunction Against Harassment against Mr. Fox (Appendix B: Orders). The Order prohibited Mr. Fox from having contact with Mr. Pendleton, and from going to or near Mr. Pendleton's residence.

A copy of the Injunction Against Harassment was served on Mr. Fox on October 31, 2015, by the Royal Canadian Mounted Police (RCMP) at Mr. Fox's residence in Burnaby, British Columbia, Canada. In early December 2015, Mr. Fox requested a hearing in the Sahuarita Municipal Court to contest the Order. A hearing was set for December 16, 2015.

At the hearing, on December 16, 2015, the Municipal Court asked Mr. Pendleton how

he knows Mr. Fox (H.R. at 30:50). Mr. Pendleton testified that that hearing was the first interaction he and Mr. Fox have ever had (H.R. at 30:52-30:59). Mr. Pendleton later reiterated that there has never been any contact between himself and Mr. Fox (H.R. at 35:32-35:47).

At some point in July and August, 2015 Mr. Fox obtained publicly accessible information about Mr. Pendleton from the Internet, including his address, telephone number, photograph, and security clearance level, and published that information on a public website (H.R. 32:55-33:28). All of the information about Mr. Pendleton, which Mr. Fox published on the website, had already been published and made publicly available, on the Internet, by Mr. Pendleton (H.R. at 50:15-50:30).

The remainder of Mr. Pendleton's testimony and examination focused on allegations of copyright infringement by Mr. Fox.

After hearing all testimony, the Municipal Court found that there was “reasonable evidence of harassment” of Mr. Pendleton by Mr. Fox. The Court ordered the previously issued Injunction Against Harassment remain in effect (H.R. at 58:48-59:09).

#### **STATEMENT OF ISSUES PRESENTED FOR APPEAL:**

1. Whether the Municipal Court misconstrued and incorrectly applied the “directed at a specific person” element of the statutory definition of “harassment”, thereby

finding evidence of prior harassment from statements published to the public?

2. Whether a finding of prior acts of harassment, to support the issuance of an injunction against harassment, may be based on the *content* of statements published in a public forum?

#### **REASONS WHY THE LOWER COURT RULED INCORRECTLY:**

1. **Whether the Municipal Court misconstrued and incorrectly applied the “directed at a specific person” element of the statutory definition of “harassment”, thereby finding evidence of prior harassment from statements published to the public?**

The Municipal Court erred in applying the “directed at” requirement of the definition of harassment to include public statements, made by Mr. Fox in a public forum, to the general public, and not specifically to Mr. Pendleton.

The statutory definition of “harassment”, under A.R.S. § 13-2921(E), provides, in relevant part “...‘harassment’ means conduct that is directed at a specific person...”.

When the conduct in question is speech, as it is in the current matter, that requires the speech to be made directly from the harasser to the person alleging harassment. Speech made to another party, or made generally to the public,

which the person alleging harassment happens to overhear, but which was not directed at them, or specifically intended for them to hear, does not rise to the level of harassment. *State v. Brown*, 85 P.3d 109, 112 207 Ariz. 231 (Ct. App. 2004), (The focus of the offense of harassment is on the contact between particularized people).

In *LaFaro v. Cahill*, 56 P.3d 56, 59 203 Ariz. 482 (Ct. App. 2002), the Court considered the “directed at” requirement of the statutory definition and held that speech made to other parties does not meet the “directed at” requirement, even if the Plaintiff happens to overhear it.

Although LaFaro may have overheard a segment of that conversation, Cahill's communication does not satisfy the statutory definition of harassment, which requires a harassing act to be 'directed at' the specific person complaining of harassment... While Cahill was talking about LaFaro and expressing his opinion of the recall effort, his comments were 'directed at' Martelli, not LaFaro.

Likewise, in the instant matter, the statements made about Mr. Pendleton, by Mr. Fox, were made in a public forum, and intended to be received by the public at large, not specifically by Mr. Pendleton. Moreover, Mr. Pendleton could not possibly have been subjected to the statements against his will because he would have to deliberately go to the website in order to read them.

There is not yet a published precedent in this jurisdiction dealing specifically with the question of whether statements published by a party on a public website *about* another party, but directed to the general public, not specifically *to* the

other party, constitute harassment. However, this question has been directly addressed in other jurisdictions, and those courts have consistently held that such statements, published on a website, do not meet the “directed at” requirement. *Chan v. Ellis*, 770 S.E.2d 851, 296 Ga. 838 (2015) (The publication of commentary directed only to the public generally does not amount to “contact”... That a communication is *about* a particular person does not mean necessarily that it is directed *to* that person).

Significantly, Mr. Pendleton clearly and unequivocally concedes there has never been any contact, communication, or interaction between himself and Mr. Fox.

**2. Whether a finding of prior acts of harassment, to support the issuance of an injunction against harassment, may be based on the *content* of statements published in a public forum?**

Even in the event the Municipal Court did not err in its application of the “directed at” requirement, as discussed above, then the Municipal Court erred in considering the specific *content* of the published statements.

In *State v. Brown*, the Court held that the focus of harassment is on the *contact* between the parties, not on the *content* of the speech, *State v. Brown*, 85 P.3d 109, 112 207 Ariz. 231 (Ct. App. 2004) (The focus of the offense of harassment is on the contact between particularized people, not on the character of the

speech). Further, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971), Petitioners had been actively distributing pamphlets, containing information and content about Respondent which would be harmful to his reputation and business affairs, near respondent's home and place of business. However, the Supreme Court held that Petitioner's public dissemination of the potentially harmful information about Respondent was protected under the First Amendment:

This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment...The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. Petitioners were engaged openly and vigorously in making the public aware of respondent's...practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

Although *Org. for a Better Austin* differs from the instant matter in the specific medium utilized to publish the information – there they used pamphlets, here Defendant used a website – the intent and purposes of the respective Petitioners remains the same: to peacefully inform the public of what Petitioners consider to be Respondents' offensive conduct.

Moreover, Mr. Pendleton did not allege that any of the statements about him specifically, made by Mr. Fox on the website were untrue.

While the current injunction against harassment does not enjoin Mr. Fox from

continuing to publish statements or information about Mr. Pendleton, the mere existence of a injunction against harassment against him carries with it many collateral consequences – thereby, effectively punishing Mr. Fox for merely exercising his right to free speech, under the First Amendment. *Savord v. Morton*, 330 P.3d 1013, 1016, 235 Ariz. 256 (Ct. App. 2014) (the issuance of an order of protection is a very serious matter... Once issued, an order of protection carries with it an array of "collateral legal and reputational consequences" that last beyond the order's expiration.)

## **CONCLUSION**

For the foregoing reasons, appellant requests the court vacate the Injunction Against Harassment.

Respectfully submitted this 8<sup>th</sup> day of February, 2016.

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Patrick Fox

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## **CERTIFICATE OF MAILING**

I CERTIFY that I mailed a copy of this Memorandum to the Sahuarita Municipal Court.

Date: February 9, 2016

By: \_\_\_\_\_  
Patrick Fox, Appellant



## **Appendix A: Petition**

Sahuarita Municipal Court- 360 W. Sahuarita Center Way, Sahuarita, Az. 85629 520-344-7150

<u>James Pendleton</u> <b>Plaintiff / Plaintiff Employer</b> (Work Injunction ONLY) Birth Date: _____ Agent's Name (Work Injunction ONLY)	<del>Patrick Fox</del> <b>Defendant</b> <u>Patrick FOX</u> Address _____ City, State, Zip Code, Phone _____	Case No. <u>CV 2015-00025</u> <div style="background-color: black; color: white; padding: 5px; text-align: center;"> <b>This is <u>not</u> a court order.</b> </div> PETITION for <input type="checkbox"/> Order of Protection <input checked="" type="checkbox"/> Injunction Against Harassment <input type="checkbox"/> Workplace Injunction
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**DIRECTIONS:** Please read the Plaintiff's Guide Sheet before filling out this form.

- Defendant/Plaintiff Relationship: ☐ Married now or in the past ☐ Live together now or lived together in the past  
☐ Child in common ☐ One of us pregnant by the other ☐ Related (parent, in-law, brother, sister or grandparent)  
☐ Romantic or sexual relationship (current or previous) ☐ Dating but not a romantic or sexual relationship  
☒ Other: Tenant's Ex-Husband
- ☐ If checked, there is a pending action involving maternity, paternity, annulment, legal separation, dissolution, custody, parenting time or support in NIA Superior Court,  
 Case #: \_\_\_\_\_ (COUNTY)
- Have you or the Defendant been charged or arrested for domestic violence OR requested a protective order?  
☐ Yes ☒ No ☐ Not sure  
 If yes or not sure, explain: \_\_\_\_\_
- I need a court order because: (PRINT both the dates and a brief description of what happened.)

Tell the judge what happened and why you need this order. A copy of this petition is provided to the defendant when the order is served. (Do not write on back or in the margin. Attach additional paper if necessary.)

Dates	
<u>07/18/15</u>	<u>Defendant used his son's cellphone GPS to locate my address, and name.</u>
<u>07/18/15</u>	<u>Defendant surveilled me through social media including LinkedIn, Facebook, and indeed.com.</u>
<u>07/18/15</u>	<u>Defendant sent harassing emails to my tenant Desiree Capuano referencing above information in veiled threats.</u>
<u>07/18/15</u>	<u>Defendant posted my name, address, picture, and home phone number on a public &amp; harassing site <sup>pretending</sup> to be Desiree.</u>
<u>07/22/15</u>	<u>Defendant posted my security clearance level, and additional information with racist comments on his harassment site as Desiree.</u>

## **Appendix B: Orders**

SAHUARITA MUNI. COURT  
360 W. SAHUARITA CENTER WAY SAHUARITA, AZ 85629

(520) 344-7150

JAMES PENDLETON	M-1046-CV-201500025	<b>HEARING ORDER</b>  <input type="checkbox"/> Order of Protection <input checked="" type="checkbox"/> Injunction Against Harassment <input type="checkbox"/> Injunction Against Workplace Harassment  <b>Issued Date:</b> 7/23/2015 (mm/dd/ccyy)
Plaintiff	Case No.	
Birth Date: 12/10/1981		
V.		
PATRICK FOX	AZ010051J	
Defendant		

- ☐ The request for:
- ☐ A protective order is ☐ granted ☐ denied ☐ withdrawn.
  - ☐ A hearing is denied.
  - ☐ A motion to continue is denied.
  - ☐ A motion to modify is denied.
- ☐ The Court continues the hearing set for \_\_\_\_ / \_\_\_\_ / \_\_\_\_ (Date). See Notice of Hearing.
- ☐ The Court cancels the hearing set for \_\_\_\_ / \_\_\_\_ / \_\_\_\_ (Date).
- ☐ On Plaintiff's motion, the Court dismisses the protective order listed above.

**At time of hearing:**

Plaintiff: ☒ Appeared ☐ Failed to Appear but did not have Notice ☐ Failed to Appear but had Notice  
Defendant: ☒ Appeared ☐ Failed to Appear but did not have Notice ☐ Failed to Appear but had Notice

*Telephonic*

- ☐ The Court dismisses the protective order listed above.
- ☐ A protective order is ☐ denied ☐ granted ☐ Brady applies.
- ☒ The protective order listed above remains in effect. ☐ Brady applies.
- ☐ As attached, the Court modifies the protective order listed above. ☐ Brady applies.

*defendant has to appeal*

12/16/15  
Date

*[Signature]*  
Judicial Officer

**CERTIFICATE OF TRANSMITTAL**

Copy ☐ mailed ☒ provided personally to Plaintiff on 12/16/15 by *[Signature]*  
Copy ☒ mailed ☐ provided personally to Defendant on 12/16/15 by *[Signature]*  
Copy ☒ mailed ☐ delivered ☒ faxed to Sheriff on 12/16/15 by *[Signature]*

## Injunction Against Harassment

☐ Amended Order

☐ Dating relationship, no law enforcement service fee

Case No. M-1046-CV-201500025

Court ORI No. AZ010051J

County PIMA

State AZ

Former Case No. \_\_\_\_\_

### PLAINTIFF

JAMES PENDLETON

First Middle Last

### PLAINTIFF IDENTIFIERS

Date of Birth of Plaintiff

And/or on behalf of minor family member(s) and other Protected Person(s): (List name and DOB.)

V.

### DEFENDANT

PATRICK FOX

First Middle Last  
Defendant/Plaintiff Relationship: TENANT'S EX-HUSBAND

Defendant's Address :  
BURNABY, BC V5G1T3 BURNABY,

### DEFENDANT IDENTIFIERS

SEX	RACE	DOB	HT	WT
M	W			
EYES	HAIR	Arizona Prohibits Release of Social Security Numbers		
BRO	BRO			
DRIVER'S LICENSE #		STATE	EXP DATE	

**CAUTION:** ☐ Weapon Alleged in Petition

☐ Estimated Date of Birth

**WARNINGS TO Defendant:** This Injunction shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. § 2265). Crossing state, territorial, or tribal boundaries to violate this Injunction may result in federal imprisonment (18 U.S.C. § 2262). Federal law provides penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C. § 922(g)(8)). **Only the Court, in writing, can change this Injunction.**

**This Injunction is effective for one year from date of service. VERIFY VALIDITY (call Holder of Record):**

PIMA COUNTY SHERIFF'S DEPARTMENT - (520)351-4625

### THE COURT HEREBY FINDS:

That it has jurisdiction over the parties and subject matter.

☐ Defendant received actual notice of this Hearing and had an opportunity to participate.

**Additional findings of this Order and warnings are set forth on the next page(s).**

### THE COURT, FINDING REASONABLE CAUSE, HEREBY ORDERS:

**NO CRIMES.** Defendant shall not commit any act of "harassment" against Plaintiff or Protected Person(s).

☒ **NO CONTACT.** Defendant shall have no contact with **Plaintiff** except through attorneys, legal process, court hearings, and as checked: ☐ Phone ☐ Email/Fax ☐ Mail ☐ Other: \_\_\_\_\_

☐ **NO CONTACT.** Defendant shall have no contact with **Protected Person(s)** except through attorneys, legal process, court hearings and as checked: ☐ Phone ☐ Email/Fax ☐ Mail ☐ Other: \_\_\_\_\_

**THE COURT FURTHER ORDERS:**

**PROTECTED LOCATIONS.** Defendant shall not go to or near the Plaintiff's or other Protected Person's:

☒ Residence (leave blank if confidential):

250 E PLACITA LAGO DEL MAGO, SAHUARITA, AZ, 85629;

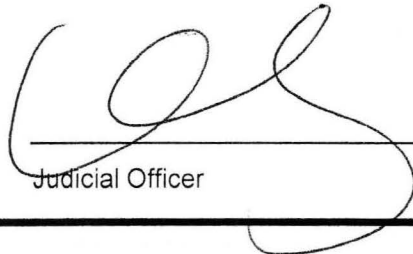
☐ Workplace (leave blank if confidential):

☐ School / Other:

**OTHER ORDERS.**

07/23/2015

Date



Judicial Officer

MARIA M. AVILEZ

Printed Name

**Warning**

This is an official Court Order. If you disobey this Injunction (even if the Plaintiff contacts you), you may be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this Injunction. Violations of this Injunction should be reported to a law enforcement agency, not the Court. Both parties must notify this Court if an action for dissolution (divorce), separation, annulment or paternity/maternity is filed. This is NOT a parenting time (visitation) or custody order. You must file those requests separately in Superior Court. If you disagree with this Injunction, you have the right to request a hearing which will be held within 10 business days after your written request has been filed in the Court that issued this Injunction. Nothing the Plaintiff does can stop, change, or undo this Injunction without the Court's written approval. You must appear in Court to ask a judge to modify (change) or quash (dismiss) this Injunction. **Even if the Plaintiff initiates contact, you could be arrested and prosecuted for violating this protective order. If you do not want the Plaintiff to contact you, you have the right to request a protective order against the Plaintiff. However, orders are not automatically granted upon request. Legal requirements must be met.**

PCO Codes: 1,4,5.

FILED

Sahuarita Municipal Court, Pima County, Arizona

10 FEB 2016 12 36

Case No: CV2015-00025

**APPELLANT**

Patrick Fox

Burnaby, BC V5G 1T3

Canada

604- [REDACTED]

Pro Se

**APPELLEE**

James Pendleton

250 E. Placita Lago Del Mago

Sahuarita, AZ

85629

520-288-8200

Pro Se

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