No. 43926-3-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

KAREN THIEL,

Respondent,

v.

BRIAN MASSINGHAM,

Appellant.

ON APPEAL FROM
LEWIS COUNTY SUPERIOR COURT
(Commissioner Tracy Loiacono Mitchell
Judge James W. Lawler)

BRIAN MASSINGHAM'S REPLY BRIEF

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I. INTRODUCTION

Respondent Karen Thiel fails to respond to the central issue in this appeal. She fails to address the specific clause in the unlawful harassment statutes that makes the statutes facially constitutional. Specifically, she fails to address the requirement that a harasser must engage in a knowing and willful "course of conduct" in order to commit unlawful harassment necessary to support an action under chapter 10.14 RCW. She does not address the specific statutory exclusions within the statutory section that defines "course of conduct" that specifically excludes "constitutionally protected free speech" as well as other "[c]onstitutionally protected activity" from being included within the "course of conduct" definition.

Once this Court focuses on this statutory scheme and specifically understands the constitutional history behind the unlawful harassment statutes, then it is clear that the provision excluding "constitutionally protected free speech" and other "[c]onstitutionally protected activity" from comprising a course of conduct makes this statutory scheme facially constitutional. It emphasizes this appeal's importance and shows these exclusions are constitutional in nature and must be strictly enforced. Once this provision is strictly enforced, then Mr. Massingham's record

should be cleansed by this Court, and this matter should be reversed and remanded with instructions to the trial court to vacate the Order of Protection entered in this case and dismiss Ms. Thiel's Petition.

II. REPLY ARGUMENT

A. The provision in RCW 10.14.020(1) and (2) excluding constitutionally protected activity from constituting a course of conduct necessary for unlawful harassment makes the unlawful harassment statutes facially constitutional.

Statutory interpretation is reviewed de novo.[1] This issue essentially requires this Court to interpret the definition sections in the unlawful harassment statues – specifically the "unlawful harassment' and "course of conduct." definitions in RCW 10.14.020. Review is, therefore, de novo.

The provision in RCW 10.14.020(1) and (2) excluding constitutionally protected activity from constituting a course of conduct necessary for unlawful harassment makes the unlawful harassment statutes facially constitutional. RCW 10.14.020(2) defines unlawful harassment to require a "knowing and willful *course of conduct*." RCW 10.14.020(1) defines a "course of conduct" and specifically excludes "constitutionally protected free speech" and more generally excludes constitutionally protected activity. ("Constitutionally protected activity is

[1] State v. Becklin, 163 Wash. 2d 519, 525, 182 P.3d 944, 946 (2008)

not included within the meaning of 'course of conduct.'").[2] Moreover, the harassment chapter may not be used "to infringe upon any constitutionally protected rights including, ... freedom of speech." RCW 10.14.190.[3]

This exclusion in RCW 10.14.020(1) makes the unlawful harassment statutes facially constitutional. The first step in a free speech overbreadth analysis is to determine whether a statute reaches constitutionally protected speech or expressive conduct.[4] Here, explicitly excluding "constitutionally protected free speech" and more generally "[c]onstititonally protected activity" from "course of conduct," together with RCW 10.14.190 that prohibits the unlawful harassment statutes from infringing upon constitutionally protected rights, including freedom of speech, guarantees the unlawful harassment statutes escape a free speech overbreadth challenge.[5] As such, these provisions are important and must be given effect.

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[2] In re Marriage of Suggs, 152 Wash. 2d 74, 80, 93 P.3d 161, 163-64 (2004); and State v. Noah, 103 Wash. App. 29, 38-39, 9 P.3d 858, 865 (2000)
[3] In re Marriage of Suggs, 152 Wash. 2d at 163-64.
[4] Catsiff v. McCarty, 167 Wash. App. 698, 710, 274 P.3d 1063, 1069 (2012), reconsideration denied (May 14, 2012), review denied, 175 Wash. 2d 1016, 287 P.3d 10 (2012) and cert. denied, 133 S. Ct. 1470 (U.S. 2013)
[5] *See* State v. Williams, 144 Wn.2d 197, 26 P.3d 890 (2001).

B. By Definition, Therefore, The Unlawful Harassment Statutes Cannot be Used to Regulate Constitutionally Protected Speech or Other Constitutionally Protected Activity.

By definition, therefore, the unlawful harassment statutes cannot be used to regulate constitutionally protected speech or other constitutionally protected activity. Mr. Massingham argues in his Opening Brief that he did not engage in unlawful harassment, as defined in RCW 10.14.020(2). He argues that he did not engage in the requisite "course of conduct" when he uttered the words "Ken Gray" in a public forum. In her Response Brief, Ms. Thiel argues the Order for Protection issued in this case was a valid time, place and manner restriction on Mr. Massingham's free speech rights.[6]

Ms. Thiel's argument misses the mark because by definition the unlawful harassment statutes cannot be used to regulate constitutionally protected free speech. That is because there is no *unlawful* harassment in the first instance. Unlawful harassment is defined to require a knowing and willful "course of conduct." RCW 10.14.020(2). A "course of conduct" is defined to specifically exclude "constitutionally protected free speech" and to generally exclude other "[c]onstitionally protected activity." Constitutionally protected free speech cannot, therefore, form

[6] Brief of Respondent (BOR) at 23-25.

the basis for an unlawful harassment order for protection; and it is not, therefore, a valid method to regulate constitutionally protected free speech.

Ms. Thiel's reliance on *State v. Noah*[7] is misplaced. *Noah* actually supports Mr. Massingham's position. The *Noah* opinion starts by correctly holding the lawful exercise of a person's free speech is excluded from the definition of "course of conduct," and cannot be the basis for an anti-harassment order.[8] In *Noah*, the court limited its inquiry on review to "whether there was a factual basis for the antiharassment order, *excluding consideration of the protected speech.*"[9] There, the harasser trespassed onto the victim's private property, made a true threat, and made efforts to find the victim's ill father who was recovering from surgery.[10] It was these constitutionally unprotected activities that led to the order for protection in *Noah*. Here, however, Mr. Massingham engaged only in constitutionally protected activity.

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[7] 103 Wn.App. 29, 9 P.3d 858 (2000)
[8] State v. Noah, 103 Wash. App. 29, 38-39, 9 P.3d 858, 865 (2000)
[9] Noah, 103 Wn.App at 39 (emphasis added)
[10] *Id.* at 39

C. Ms. Thiel did not Argue Against, and by Tacit Omission Conceded, Mr. Massingham Engaged in Constitutionally Protected Activity When he Uttered the Words Ken Gray.

In her Response Brief Ms Thiel did not argue, and by tacit omission conceded, Mr. Massingham engaged in constitutionally protected activity when he uttered the words Ken Gray. Nowhere in Ms. Thiel's Response Brief does she argue that Mr. Massingham's uttering the words "Ken Gray" was not constitutionally protected free speech. Instead, she strains the facts to convince this Court Mr. Massingham did more than engage in constitutionally protected activity or constitutionally protected free speech. She never argued, or testified in the trial court, that she did not have an affair with Ken Gray; and that, therefore, Mr. Massingham' speech was untrue and constitutionally unprotected defamatory speech. Her main argument was that Mr. Massingham has "over simplified and too-narrowly characterized the basis for the anti-harassment order."[11]

Ms. Thiel then posits that because the Massingham "was standing in front of [Thiel] and turning around" when addressing her somehow went beyond free speech and constituted constitutionally unprotected

[11] BOR at 9

activity.[12] This argument has no merit. When people address one another they typically face the person they are addressing. This was, therefore, a component of exercising free speech.[13]

Even if this was conduct separate and apart from exercising free speech, there is also a right to assemble in a public park. Parks have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of *assembly* as well as communicating thoughts between citizens.[14] Here, Mr. Massingham engaged in constitutionally protected assembly activity when standing in a public park even if it was conduct separate and apart from his uttering the words Ken Gray.[15] And as clarification Mr. Massingham only turned to Ms. Thiel on one of the two occasions. Ms. Thiel testified that on the other of the two occasions she and her mother were "walking by" and that it was her mother who turned around and saw Mr. Massingham.[16]

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[12] BOR at 10.
[13] *See* Sanders v. City of Seattle, 160 Wash. 2d 198, 208-09, 156 P.3d 874, 879-80 (2007) (parks are traditional public fora used to communicate ideas between citizens.) How could one communicate an idea to another without looking at them"
[14] Sanders , 160 Wash. 2d at 208-09
[15] *See* Noah, 103 Wash. App. at 38-39 (picketing was also excluded from the course of conduct definition in the unlawful harassment statutes)
[16] RP 21:9-13.

D. Ms. Thiel's Attempts to Scour the Record to Support an Unlawful Harassment Conclusion are Equally Unavailing.

Ms. Thiel's attempts to scour the record to support an unlawful harassment conclusion are equally unavailing. In Ms. Thiel's Response Brief she desperately tries to point to constitutionally unprotected activity to support the trial court's legal conclusion that Mr. Massingham engaged in constitutionally protected activity. The problem for Ms. Thiel is that the Commissioner expressly found against her on these additional incidents that she uses to support the trial court's legal conclusion. Ms. Thiel has not cross-appealed, assigned errors to, or otherwise challenged the trial court's unfavorable findings; they are, therefore, verities on appeal.[17]

The trial court specifically found that Ms. Thiel's allegations regarding Mr. Massingham peeling out and breaking a window were not supported by a preponderance of the evidence. As Mr. Massingham pointed out in his opening brief, the trial court made an express finding that there was insufficient evidence regarding the broken glass and the "peeling out."[18]

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[17] Fuller v. Employment Sec. Dep't of State of Wash., 52 Wash. App. 603, 605, 762 P.2d 367, 369 (1988)
[18] RP 94:25-95:12 (July 30, 2012).

The trial court also found that Mr. Massingham's calling Ms. Thiel's landlord and work as well as his driving by her home were all for a legitimate purpose. In order to constitute "unlawful harassment" the conduct the purported victim relies upon must be conduct that "serves no legitimate purpose." RCW 10.14.020(2). The trial court's specific finding that Mr. Massingham's other conduct served a legitimate purpose precludes that conduct from being considered in the course of *conduct* necessary to support an unlawful harassment conclusion.

Mr. Massingahm testified that calling Thiel's landlord was for the legitimate purpose of investigating an alleged mold problem in the house where Thiel lived with the parties' children, and driving past Thiel's home in June of 2012 was for the legitimate, work-related purpose of reaching the home of Dr. O'Neill, a client of Massingham's farrier service.[19] Ms. Thiel admits in her Response Brief that the trial court determined these incidents were for legitimate purposes and could not, therefore, form the basis for an anti-harassment order.[20] Mr. Massingham testified that calling Thiel's employer's was for the legitimate purpose of inquiring about continuing health care coverage.[21] Similarly, Ms. Thiel

[19] RP 42:12-43:3 (July 30, 2012).
[20] BOR. at 7.
[21] RP 46-47 (July 30, 2012).

admits in her Response Brief that the trial court determined this incident also was not unlawful harassment.[22]

The trial court also made no express finding that Mr. Massingham may have intercepted some of Ms. Thiel's phone calls or text messages. When a trial court fails to make a finding on an issue upon which a party bears the burden of proof, the appellate court will imply a finding against the party having the burden of proof on that issue.[23] Here, Ms. Thiel bore the burden to prove a course of constitutionally unprotected conduct that served no legitimate purpose that caused her severe emotional harm to prove her unlawful harassment claim. Ms. Thiel admits in her Response Brief that the trial court did not find Mr. Massingham's alleged interception of phone calls and text messages in fact happened or that it served no legitimate purpose or that it caused her any emotional distress and that the trial court failed to conclude this constituted unlawful harassment.[24]

Ms. Thiel tries to rely upon an incident where she was not the target of Mr. Massingham's conduct. "RCW 10.14.020(1) provides that harassing conduct be 'directed at a specific person'. The words 'directed

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[22] BOR. at 7.
[23] *Burns v. McClinton*, 135 Wn. App. 285, 300, 1743 P.3d 630 (2006) ("Absent an express finding upon a material fact, it is deemed to have been found against the party having the burden of proof.")
[24] Id.

at' cannot be ignored, and the only way to give them meaning is to conclude that the scienter aspect goes not only to the commission of the conduct, but to the identity of the targeted victim as well."[25] In her Response brief Ms. Thiel tries to rely upon statements that Mr. Massingham might have made to Ms. Thiel's father, but she admits the trial court found that these statements were not made to her and then concluded that she could not "collateralize" off of them to obtain an anti-harassment order.[26] Not only did Ms. Thiel fail to cross-appeal or assign error, but the trial court was also correct in its conclusion.

Finally, Ms. Thiel asserts that Mr. Massingham's yelling the name Ken Gray was conduct apart from speech. Legally, Mr. Massingham disputes that volume or tone can be separated from constitutionally protected free speech; rather regulating tone and volume would be something the unlawful harassment statutes are not designed to do if the words are constitutionally protected free speech. That would be a manner restriction upon constitutionally protected free speech. This Court does not have to reach that issue, however, because the trial court did not find that Mr. Massingham yelled Ken Gray. To be sure, when Mr. Massingahm's counsel inquired whether the trial court was entering the anti-harassment order based upon Mr. Massingham's yelling the name

[25] Burchell v. Thibault, 74 Wash. App. 517, 522, 874 P.2d 196, 199 (1994)
[26] BOR. at 7.

Ken Gray, the trial court correctly found that it was because of Mr. Massingham's "continuing to *tell* her 'Kenny Gray' to her face" and "whether it's yelling out or not, he's still saying it to her."[27] There was no finding Mr. Massingham yelled anything out to Ms. Thiel.

E. Mr. Massingham, Therefore, Engaged Only in Constitutionally Protected Free Speech and Assembly in a Public Park and did not Engage in a Course of Conduct of Constitutionally Unprotected Activity That That Served No legitimate Purpose.

What is left, and what the trial court expressly found formed the basis for its anti-harassment order, is Mr. Massingham "[c]ontinuing to tell [Thiel] "Kenny Gray" to her face."[28] Ms. Thiel's testimony was that one of these incidents occurred during softball at the park while she and her mother "were walking by" and that it was not even Thiel herself but her mother who "turned around" and saw Massingham.[29] In the other incident, Ms. Thiel's testimony was that she came to the backstop in the park, and Massingham stood in front of her, turned around, and said things about Kenny Gray.[30]

Mr. Massingham's testimony is that he was the coach and would warm up the softball pitchers.[31] Ms. Thiel did not dispute this testimony.

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[27] RP 99:2-8.
[28] RP 98:21-99:6.
[29] RP 21:9-13.
[30] RP 26:15-19.
[31] RP 70.

Obviously, Mr. Massingham has to stand in front of the backstop to warm up the pitchers, and, thus, where he was standing served a legitimate purpose. Because it served a legitimate purpose it could not constitute unlawful harassment. RCW 10.14.020(2). Ms. Thiel testified that she was the one who chose to put her chair up "behind the backstop."[32]

Moreover, there was no finding that Massingham stood where he did with an intent to annoy. There was no finding that Massingham willingly and knowingly obstructed Ms. Thiel's view, as would be required for issuance of an anti-harassment order.[33] The anti-harassment order was granted for pure speech. Turning and facing Thiel does not add a conduct element.

F. Mr. Massingham's Speech was Constitutionally Protected Activity, and so there was no Course of Conduct upon which an Anti-Harassment Order Could be Based.

The issue in this case boils down to whether Mr. Massingham's speech is constitutionally protected. The answer is yes. How much constitutional protection it is given is irrelevant; what determines this case is whether it is within the spectrum of constitutionally protected speech. In most circumstances, "the Constitution does not permit the

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[32] RP 26:15-16.

[33] Unlawful harassment "means a *knowing and willful* course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose." RCW 10.14.020(2) (emphasis added).

government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[34]

It matters not that Ms. Thiel may have been a "captive audience," for regulating that speech is normally reserved for intrusions into one's home, which is not the case here. "As a general matter, [courts] have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech. For example, [courts] have upheld a statute allowing a homeowner to restrict the delivery of offensive mail to his home, (citations omitted) and an ordinance prohibiting picketing "before or about" any individual's residence, (citations omitted)."[35] That was the difference between this case and *Trummel v. Mitchell*.[36] There, the harasser sent unwanted messages into the residences of unwilling listeners. Here, like *Snyder*, the speaker utilized a traditional public forum for his speech activities.

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[34] Snyder v. Phelps, 131 S. Ct. 1207, 1220, 179 L. Ed. 2d 172 (2011) (citations omitted)
[35] Snyder, 131 S. Ct. at 1220
[36] 156 Wn.2d 653, 131 P.3d 305 (2006).

1. Even Harassing Speech is Constitutionally Protected.

Harassing speech is still constitutionally protected. "There is no categorical 'harassment exception' to the First Amendment's free speech clause."[37] Words must do more than offend, cause indignation, or anger the addressee to lose the protection of the First Amendment.[38] " It is firmly settled that under our Constitution the *public* expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[39] As a general matter, the U.S. Supreme Court has indicated that in public debate, American citizens must tolerate insulting, and even outrageous, speech.[40] Even if Thiel was insulted, offended, and outraged by Massingham's public references to Kenny Gray, this would not move Massingham's speech outside the realm of constitutional protection.

2. A Public Park is the Quintessential Public Forum.

Streets and parks have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing

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[37] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d. Cir. 2001).
[38] Hammond v. Adkisson, 536 F.2d 237, 239 (8th Cir. 1976).
[39] Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) (emphasis added).
[40] Schenck, 519 U.S. at 383, 117 S.Ct. 855

public questions.[41] "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is ... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[42] This is because, in most circumstances, "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, ... the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[43]

Here, it is undisputed that Massingham's speech was not directed at Thiel in her home but instead took place in a public park. Pure speech in a public park does not fall within the narrow list of speech courts recognize as unprotected.

3. An Intent to Annoy is Insufficient to Constitute Unlawful Harassment.

An intent to annoy is insufficient to constitute unlawful harassment. Unlawful harassment requires a course of conduct that 1. is knowing and willful; 2. is directed at a specific person; 3. seriously alarms, annoys, harasses, or is detrimental to such person; 4. serves no

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[41] Sanders v. City of Seattle, 160 Wn.2d 198, 208-09, 156 P.3d 874, 879-80 (2007), citing Perry Educ. Ass'n, 460 U.S. at 45, 103 S.Ct. 948.
[42] Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).
[43] Snyder v. Phelps, 131 S. Ct. 1207, 1220, 179 L. Ed. 2d 172 (2011), citing Erznoznik v. Jacksonville, 422 U.S. 205, 210–211, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

legitimate or lawful purpose; 5. would cause a reasonable person to suffer substantial emotional distress; and 6. shall actually cause substantial emotional distress to the petitioner.[44] The only thing the trial court expressly found was that Mr. Massingham had an intent to annoy or "poke" at Ms Thiel when he uttered the words Ken Gray. This satisfies only 1 out of 6 elements necessary to conclude Mr. Massingham engaged in unlawful harassment. As such, the trial court's findings do not support the legal conclusion it reached. Reversal is required. Remand should include instructions to clear Mr. Massingham's record, vacate the Order for Protection, and dismiss Ms. Thiel's Petition.

DATED this 1st day of May 2013.

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[44] RCW 10.14.020.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, 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.

On the below written date, I caused delivery of a true copy of the Reply Brief to the following individuals via U.S. Mail:

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Signed this 1st day of May, 2013 Seattle, Washington.

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