

No. 43926-3-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

BRIAN MASSINGHAM,

Appellant,

v.

KAREN THIEL (f.k.a.  
Massingham),

Respondent.

APPELLANT'S RESPONSE TO  
THE COURT'S MOTION ON  
THE MERITS

(Lewis County Superior Court  
Nos. 11-3-00031-3, 12-H86)

**I. Responding Party**

Appellant BRIAN MASSINGHAM seeks the relief set forth in Section II, below.

**II. Relief Requested**

Brian Massingham asks this Court to grant a Motion on the Merits to Reverse, or in the alternative, to deny a Motion on the Merits to Affirm.

**III. Statement of Facts**

The background and facts of this case are clearly set forth in Brian Massingham's opening brief and are incorporated herein by reference.<sup>1</sup> In summary, the parties' marital dissolution became final on May 9, 2012, and then on June 21, 2012, Karen Thiel (formerly Karen Massingham)

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<sup>1</sup> See Appellant's Opening Br. at 2-5. See also RAP 18.14(c) (a response to a motion on the merits "may incorporate material in a brief by reference").

filed a Petition and Declaration for an Order for Protection.<sup>2</sup> At the same time, she filed a notice of intended relocation.<sup>3</sup> At a hearing on July 30, 2012, in the Lewis County Superior Court, Commissioner Tracy Loiacono Mitchell entered an Order for Protection—Harassment (the “Order”) because on two occasions Brian Massingham uttered the words Kenny Gray in a public park within hearing of Ms. Thiel.<sup>4</sup> The Order, which was in effect for six months, restrained Brian Massingham from 1. making any attempt to contact Karen Thiel except in regards to the children by text or e-mail; and 2. entering or being within 500 feet of Karen Thiel’s residence, at the time in Chehalis, Washington.<sup>5</sup> The Order also required the parties to exchange the children at Hillcrest service station “or other mutually agreeable neutral location.”<sup>6</sup> The Order did not restrain Mr. Massingham from continuing to utter the name Kenny Gray in public places, including at future sporting events.<sup>7</sup>

#### **IV. Argument**

Mr. Massingham incorporates by reference the arguments made in his Opening Brief and in his Reply Brief to the extent that they support his response to the Court’s Motion on the Merits. He also argues as follows.

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See also CP 221.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

**A. A Motion on the Merits to Reverse should be submitted to a panel of the appellate court with a recommendation that it be granted.**

A motion on the merits to reverse may be denied by a commissioner (or judge) or submitted with a recommendation to a panel of the appellate court.<sup>8</sup> A motion on the merits to reverse will be granted in whole or in part if the appeal or any part thereof is determined to be clearly with merit.<sup>9</sup> In making these determinations, the commissioner (or judge) will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and clearly not supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly an abuse of discretion.<sup>10</sup>

Mr. Massingham's appeal is clearly with merit. It is well settled law, and RCW 10.14.020(1) expressly states, that a course of conduct that can form the basis for issuance of an anti-harassment order "does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of 'course of conduct.'"<sup>11</sup> As fully elaborated in Brian Massingham's Reply Brief, and incorporated

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<sup>8</sup> RAP 18.14(d).

<sup>9</sup> RAP 18.14(e)(2).

<sup>10</sup> RAP 18.14(e)(2).

<sup>11</sup> RCW 10.14.020(1).

herein by reference, the basis for issuing the anti-harassment order was pure speech uttered in a public park.<sup>12</sup>

It is well settled law that pure speech uttered in a public park is a “constitutionally protected activity,” specifically “constitutionally protected free speech.” The U.S. Supreme Court has stated, “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.”<sup>13</sup> 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 public questions.<sup>14</sup> Because it is clearly settled law that speech uttered in a public park is constitutionally protected speech, such speech could not form the basis for a course of conduct on which an anti-harassment order could be issued, such order should not have been issued, and the appeal is clearly with merit. A motion on the merits to reverse should therefore be submitted with a recommendation to a panel of the appellate court that the motion be granted, reversing the trial court.

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<sup>12</sup> Appellant’s Reply Br. at 12-14.

<sup>13</sup> *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) (emphasis added); Appellant’s Reply Br. at 13-17.

<sup>14</sup> *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. Appellant’s Reply Br. at 13-17.

Neither was the anti-harassment order a valid restriction on the time, place, and manner of Mr. Massingham's speech. As elaborated in Mr. Massingham's Reply Brief, and incorporated herein by reference, the anti-harassment laws, chapter 10.14 RCW, cannot be used to regulate constitutionally protected speech in any fashion, including restrictions of time, place, and manner.<sup>15</sup>

**B. A Motion on the Merits to Affirm should be Denied because this case does not meet the standards for A Motion on the Merits to Affirm.**

A motion on the merits to affirm shall be determined initially by a commissioner (or judge) of the appellate court.<sup>16</sup> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit.<sup>17</sup> In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court.<sup>18</sup>

Mr. Massingham's appeal does not meet the standards for an appeal clearly without merit, as would be required to grant a motion on the

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<sup>15</sup> See Appellant's Reply Br. at 13-16.

<sup>16</sup> RAP 18.14(d).

<sup>17</sup> RAP 18.14(e)(1).

<sup>18</sup> RAP 18.14(e)(1).

merits to affirm. As argued above, the appeal has merit. A motion on the merits to affirm should be denied.

DATED this 15th day of May, 2013.

Respectfully submitted,



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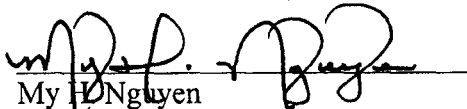
**CERTIFICATE OF SERVICE**

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 Appellant's Response to the Court's Motion on the Merits to the following individuals:

Office of the Clerk State of Washington Court of Appeals, Div. II 950 Broadway Suite 300 Tacoma, WA 98402-4427	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email
S. Tye Menser Megan Bartley Morgan Hill, P.C. 2102 C. Carriage Drive SW Olympia, WA 98502	<input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Email

Signed this 15th day of May, 2013 Seattle, Washington.

  
My H. Nguyen  
Legal Assistant