NO. 43926-3-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

LEWIS COUNTY SUPERIOR COURT NO. 11-3-00031-3

BRIAN MASSINGHAM,
Appellant,

and

KAREN THIEL (f/k/a MASSINGHAM),
Respondent.

BRIEF OF RESPONDENT

S. Tye Menser, WSBA No. 37480
Megan Bartley, WSBA No. 42425
of Morgan Hill, P.C.
Attorneys for Respondent

MORGAN HILL, P.C.
2102 Carriage Drive SW, Bldg. C
Olympia, WA 98502
Tel: 360/357-5700
Fax: 360/357-5761

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Other

I. INTRODUCTION

The trial court issued an anti-harassment order against Appellant Brian Massingham ("Massingham") in favor of Karen Thiel (f/k/a Massingham) ("Thiel") based on multiple incidents of Massingham yelling at Thiel in front of friends and acquaintances, standing in front of her, blocking her view of her daughter's fast-pitch softball game at a softball field. The actions of Massingham during these incidents rose to the level of harassment in light of many, many other "annoying" acts Massingham engaged in that continually "pushed the envelope" of harassment according to the court, continually behaving in a way to "poke, poke, poke, poke, poke" at Thiel. The record supports the issuance of the order.

The court's order survives in either of two ways. First, when the total context is considered — the physical component of Massingham's actions at the ballfield plus all the other "annoying" acts found by the court (not just "saying 'Kenny Gray'," as characterized by Appellant) — then the order has a valid, constitutional basis. Alternatively, the court could have based the order on any number of the other "annoying" acts that Massingham was found to have committed, and thus this court can affirm the order on that alternate ground, even if it is broader than characterized

by the trial court. This analysis would separately support the anti-harassment order. As such, this appeal should be denied.

II. STATEMENT OF FACTS

On May 9, 2012, the Lewis County Superior Court entered final documents dissolving the marriage of Thiel and Massingham. At this time, the court entered an Agreed Parenting Plan and a Final Order of Child Support for the parties' two minor children, then ages 11 and 13.[1]

On June 21, 2012, Thiel filed a Notice of Intended Relocation of Children[2] as well as a Petition and Declaration for an Order for Protection.[3] The District Court entered an initial temporary protection order on June 21, 2012,[4] and the case was transferred to Superior Court on July 12, 2012.[5] Commissioner Mitchell presided over a hearing on Thiel's petition for an anti-harassment order on July 30, 2012.[6]

At the July 30, 2012 hearing, Thiel recounted numerous unpleasant and souring interactions between herself and Massingham. Shortly after

---

[1] Clerk's Papers 31-42, 152-162.
[2] CP 44-47.
[3] CP 20-22.
[4] CP 12-14.
[5] CP 1-2.
[6] Report of Proceedings (July 30, 2012). There are two Reports of Proceedings in this appeal, one from the anti-harassment trial on July 30, 2012 (hereinafter, "1RP"), and one from the motion to revise on September 7, 2012 (hereinafter "2RP").

entry of the final paperwork dissolving the parties' marriage, Massingham peeled out of Thiel's driveway one day after picking up the children.[7] Afterwards, Thiel noticed the ground level-windows had been broken, as if someone had kicked them in.[8] On May 16, 2012, Massingham attempted to back his truck up while Thiel stood beside the passenger seat with the door open.[9] Even the parties' son, who witnessed the event, stated, "Dad tried to run you over."[10] As Massingham began to drive away and in the presence of the parties' son, he stated he never wanted to speak to Thiel again.[11]

Thiel reported seeing Massingham slowly drive past her home twice on June 9, 2012, looking towards her house as he drove past.[12] Thiel learned through her children that Massingham drove the children to Thiel's house without her knowledge or consent.[13] For a period of time, Massingham intercepted and monitored Thiel's personal phone calls, text messages, and voicemails from her friends and family members without her knowledge or consent.[14] Massingham called Thiel's landlord and

[7] 1RP 11-13.
[8] *Id.*
[9] 1RP 16-18.
[10] *Id.* at 17.
[11] CP 22, 1RP 17-18.
[12] 1RP 13-15.
[13] 1RP 15-16.
[14] 1RP 31-32.

employer, multiple times — again, without Thiel's knowledge, without her consent, and seemingly without justification.[15]

The parties' daughter participates on a fast-pitch softball team and both parties frequently attend her games. Thiel reported two instances where Massingham harassed her and/or members of her family at one of her daughter's games. At a game in Kent on Mother's Day 2012, while Thiel's father was giving the parties' daughter a hug, Massingham screamed at him, repeatedly telling Mr. Thiel he was "a pain," stating that he should "get out of here."[16] When Mr. Thiel confronted Massingham, Massingham reiterated the statement.[17] Massingham repeatedly told members of the community that Thiel was having an affair with Kenny Gray, a pitching coach the parties' daughter went to for years.[18] Massingham has even made allegations of Thiel and Gray having a relationship in front of the parties' children.[19] At the game on Mother's Day, Massingham yelled out inappropriate sexual comments about Thiel in the presence of the parties' daughter, her teammates, Thiel, and Thiel's mother.[20] Massingham then shouted out to Thiel Ken Gray's name, loud

[15] CP 189-193, 196; 1RP 22-25, 31-32.
[16] CP 22, 198; 1RP 19.
[17] *Id.*
[18] CP 194, 212-213; 1RP 20-22.
[19] CP 194.
[20] CP 22.

enough so that Thiel and her family members could hear Massingham from 50-60 feet away.[21]

At a fast-pitch game in Kelso in April 2012, Massingham placed himself between Thiel and where the parties' daughter was warming up, obstructing Thiel's view of the field.[22] Massingham strategically positioned himself in Thiel's line of vision, despite the fact that there was ample room for Massingham to stand elsewhere.[23] Massingham continually turned around to face Thiel, yelling out Mr. Gray's name loud enough so that the mothers and 13-year old girls within 20 feet of Thiel could hear him.[24]

At the July 30, 2012 hearing, Commissioner Mitchell granted Thiel's request for an anti-harassment order.[25] Commissioner Mitchell repeatedly expressed concern for Massingham's behavior during her oral ruling. She characterized his behavior as very concerning, annoying, unreasonable, done with the intent to annoy Thiel, and evidence that Massingham just can't quite seem to emotionally get over the dissolution.[26] Commissioner Mitchell noted that Massingham's behavior

[21] CP 194; 1RP 21, 35.
[22] 1RP 25-26.
[23] 1RP 27.
[24] 1RP 26-27.
[25] 1RP 94-95.
[26] 1RP 95-97.

toward the grandfather was "annoying and probably harassment," but unlike repeatedly shouting the name "Kenny Gray" to Thiel, the single occurrence did not constitute a "course of conduct."[27]

Specifically, the court found Massingham's harassing conduct towards Thiel to be "continuing to tell her 'Kenny Gray' to her face."[28] Acknowledging that the parties will still need to communicate in some fashion with regards to the children, the court ordered that the parties will only communicate via text and email and only regarding parenting plan and the children.[29] The court acknowledged that due to the children's involvement in sports and activities and due to both parties attending ball games, it would be unduly restrictive to place distance restrictions on the parents.[30] However, to provide a cooling-off period in light of the conduct proven at trial, the court ordered that Massingham was not to go to Thiel's house.[31] The order did not restrain Massingham from uttering the name "Kenny Gray."[32] The order was limited to 6 months in duration.[33]

---

[27] 1RP 97.
[28] 1RP 99.
[29] 1RP 102.
[30] *Id.*
[31] 1RP 101.
[32] CP 221.
[33] CP 221.

In the ruling, the court found Massingham drove by Thiel's house on June 9, 2012, and found Massingham contacted Thiel's insurance company.[34] However, the court held these actions were performed with a legitimate purpose and therefore could not be the basis of an anti-harassment order.[35]

The court found that Massingham contacted Thiel's landlord and her employer, and characterized these behaviors as "discerning" [sic], annoying, concerning, and "pushing the envelope," but determined these actions just barely stopped short of rising to the level of harassment.[36] The court found that Massingham yelled at Thiel's father, and that this was "annoying and probably harassing," but found there was not an established course of conduct towards Mr. Thiel to allow Thiel to "collateralize" off it.[37] The court apparently did not rule on whether Massingham's interception of Thiel's phone calls and text messages could be the basis for an anti-harassment order.

On August 9, 2012, Massingham filed a motion to revise, requesting a dismissal of the anti-harassment order because it violated

---

[34] 1RP 95.
[35] *Id.*
[36] 1RP 96.
[37] 1RP 97.

Massingham's free speech rights.[38] On September 7, 2012, the Superior Court denied the revision motion.[39] Massingham brought the instant appeal. Meanwhile, the order expired on January 30, 2012, and Thiel did not seek its renewal.[40]

III. STANDARDS OF REVIEW

Constitutional issues are reviewed de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). The court's setting of specific terms of a restraining order, however, are reviewed for an abuse of discretion. *Trummel v. Mitchell*, 156 Wn.2d 653, 668-70, 131 P.3d 305 (2006). When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Further, a Court of Appeals may *affirm* (but not reverse) a trial court decision if it is sustainable on any theory within the pleadings or proof. That is, even where the trial court's stated reason for a decision is untenable, a court of appeals may affirm if the record provides a tenable

[38] CP 233-40.
[39] CP 253-54.
[40] 1RP 101; CP 220-21.

basis for the decision. *See, e.g., State v. S.S.*, 67 Wn. App. 800, 812, 840 P.2d 891 (Div. I 1992) ("A trial court's correct ruling will not be disturbed on appeal merely because it was based on incorrect or insufficient reason"). This rule "is based on the belief that if the trial court's decision was correct, albeit for a different reason than that cited by the trial court, a re-trial of the case would serve no useful purpose." 14A Wash. Prac. § 34.2 (2012).

IV. ARGUMENT

A. Appellant Has Overly-Narrowly Characterized the Basis of the Trial Court's Order.

The starting point of Appellant's argument in this case is his belief that the anti-harassment order was based solely on Massingham saying the words "Ken Gray" or "Kenny Gray" at two softball games in public parks while Thiel is present.[41] This characterization of the basis of the trial court's order is repeated over and over by Massingham.[42] Appellant contends that this basis violates constitutional principles of free speech. Appellant, however, has over-simplified and too-narrowly characterized the basis for the anti-harassment order.

---

[41] 2RP 5; Respondent's Brief, p. 1, 4, 7, 8-9, 12, 16.
[42] Id.

The Commissioner was clear in her ruling that the offending conduct giving ride to the order was not merely saying Ken Gray's name. She specified that there was a physical component to Massingham's conduct. Further, Commissioner Mitchell cited several instances of annoying and harassing conduct that proved Massingham's intent and provided context that made his verbal tirades at the ball field rise to the level of harassment. Specifically, the Commissioner noted, that Massingham "was standing in front of [Thiel] and turning around" — basically blocking her view of the field where her daughter was playing softball — constituted harassment.[43] Further, the Commissioner found that Massingham contacted Thiel's employer and her landlord, stating, "I would consider that annoying."[44] The Commissioner further found Massingham's yelling at Thiel's father in her presence and the presence of her children to be "[a]nnoying and probably harassing [to the grandfather]," and concerning because it was being done in front of the kids.[45] Finally, the Commissioner recognized other evidence that evidenced Massingham's course of conduct showing an unreasonable intent to annoy and harass Thiel: Massingham "just continues to want to

[43] 1RP 95.
[44] 1RP 96.
[45] 1RP 97.

poke, poke, poke, poke, poke, to the point where ... it's not reasonable. ... And I do find he's doing that to annoy her. He can't quite seem to get over that emotional part of the dissolution."[46]

Thus, even setting aside calls to Thiel's employer, unexplained calls to Thiel's landlord, and other pieces of Massingham's total course of conduct (*see discussion*, Section IV.C, *infra*), Massingham's harassing actions in the park were not merely "saying a name in a public forum," but Massingham's *physical actions* and *intent* in connection with the speech. The court was clear, even with respect to the ball field incidents alone, that there was a *physical component* to the harassing behavior. It was not just the speech, but the speech while standing in her space, blocking her view of the field,[47] intruding in a place she cannot remove herself from, and has no choice but to be given that her daughter is playing ball there.[48]

Even further, it was not just the speech plus standing in front of her and intruding physically that constituted harassment, but doing all that *in*

---

[46]1RP 96-97.

[47]Massingham argued at the motion for revision that the Commissioner never found that there was a physical component to the harassing speech, but he was mistaken: "I find the testimony regarding his telling her 'Kenny Gray, Kenny Gray,' and *standing in front of her* and turning around and saying 'Kenny Gray,' is very credible." 1RP 95 (emphasis added). Later, the Commissioner clarified that physical component included "[c]ontinuing to tell her 'Kenny Gray' *to her face* ...." 1RP 99 (emphasis added).

[48]Thus the legal principle, cited by Appellant, that, generally speaking, a person must avert eyes from unwanted speech, has no application here, as will be discussed more fully in Section IV.B, *infra*.

the context of all the other actions the Commissioner found did occur and were designed to "annoy" her, and "poke" at her, and not be able to get over the dissolution.[49] Massingham tried to clarify at the hearing that these other related acts, in and of themselves, may not have supported an anti-harassment order, but in connection with Massingham's actions at the ball field, they transformed any claim of constitutionally-protected speech into legal harassment.[50] For these reasons, it is of no importance that the speech component of Massingham's course of conduct did not contain a "true threat."[51]

This was exactly the analysis of the Superior Court judge on revision — another decision Massingham is appealing. The judge recognized that the order was *not* based — as Appellant contends — on merely "saying Kenny Gray in a public place":

> So to argue this is constitutionally protected speech when it was clear that the intent of the comments, *the intent of the speech, given what was said, how it was said, where it was said, the frequency of it, it's clear to me that this was harassment*, that the order for protection against harassment was appropriate.[52]

---

[49] 1RP 91.

[50] The Commissioner repeated this at various points of her ruling. *See, e.g.*, 1RP 96 (Massingham's course of conduct "concerning, particularly when you start seeing the snowball effect").

[51] *See,* Opening Brief, Section V.C, pp. 11-12.

[52] 2RP 13 (emphasis added).

The Superior Court judge was correct in rejecting Massingham's overly-narrow characterization of the conduct constituting harassment and recognizing that the harassment was based on a broader basis of the intent, physical actions, and total content of Massingham's behavior.

B. Even as Characterized, the Order Did Not Violate Free Speech Based on Principles Articulated In *Trummel v. Mitchell.*

Even if we assume *arguendo* that the basis of the anti-harassment order was as characterized by Appellant — based only on verbal statements involving the name "Kenny Gray" — the order may still be affirmed by this Court.

First, the record is undisputed that Massingham engaged in "yelling" the name Kenny Gray at one or both of the times at the ball field.[53] *Trummel v. Mitchell*, cited by Appellant, includes "yelling and screaming" as appropriately included within a harassing course of conduct. 156 Wn.2d 653, 666, 131 P.3d 305 (2006).

Second, *Trummel* discusses the constitutional principle conceded by Appellant that the Constitution does not protect the "right to impose speech [on those who do not want it] — it supports the right to receive speech." *Id.* at 667. Thus, there is no right to send unwanted publications,

[53] 1RP 21, 26-27, 35, 93, 99.

for example, otherwise protected by the First Amendment, into another's home. *Id.* The anti-harassment order in this case merely restricts Massingham from accessing Thiel's home.

Moreover, because Massingham and Thiel share parenting responsibilities, Thiel cannot fully avoid contact with Massingham. The harassing verbal conduct in this case was not merely in a public park where Thiel was present and could simply "avert her eyes." *See, id.* (noting the "general rule that the burden is on the viewer to avert his or her eyes from unwanted speech"). Here, Thiel is not able to "avert her eyes" — she is attending her daughter's sporting event as a residential, custodial parent. She is not in a position to avoid the unwanted speech. Massingham's conduct, by "standing in front of her," repeatedly uttering the name of "Kenny Gray" in an effort to annoy Thiel, is more akin in these circumstances to sending publications to her home than the "open public forum" Massingham posits. Even more so, because a publication can be quickly recognized and discarded without further dissemination or publication to third parties. In this case, Thiel had no ability to avoid *any* of Massingham's unwanted speech — or keeping it from others — without abandoning her parenting activities and responsibilities.

Any issue about defamation aside, the issue in this case is about Massingham's abusive and controlling course of conduct the court found unlawfully harassing under RCW 10.14.080. The order was well-justified by the totality of facts in the record.

C. The Record Contains Tenable Basis For Order Despite More-Limited Nature of Commissioner's Ruling.

In this case, though the Commissioner's factual findings will not be disturbed, the Court is not bound by the Commissioner's *legal* conclusions about whether the acts that occurred constitute harassment. Even if we were to assume that (1) the Commissioner *only* relied on the acts in the ball park for the anti-harassment order, and (2) those acts alone are insufficient to constitute legal harassment — the order should still be affirmed if *other* acts established by the evidence and/or found by the trial court provide a sufficient basis for the order, whether or not the Commissioner believed they did.

In this case, we have a broad series of acts by Massingham. A few of them the trial court could not find occurred: peeling out from driveway, running Thiel over with car door open, breaking windows.[54] Many others, however, the Commissioner *did* find occurred — and even found some

[54] 1RP 95.

were designed to "annoy" Thiel and did annoy Thiel — but did not specifically include them as the explicit basis for the order: (1) driving by Thiel's home,[55] (2) coming unannounced to home when Thiel not present,[56] (3) calling her employer on multiple occasions,[57] (4) calling Thiel's landlord,[58] (5) contacting her insurance company,[59] (6) harassing her father at the ball field,[60] (7) telling people in community that Thiel had an affair,[61] and (8) intercepting and/or monitoring Thiel's calls and texts for a period of time.[62] This Court, in assessing the anti-harassment order, may consider this second group of acts by Massingham, and affirm the trial court's order if it believes that any of these acts would have supported the anti-harassment order. *State v. S.S.*, 67 Wn. App. 800, 812, 840 P.2d 891 (Div. I 1992).

The definition of "unlawful harassment" in RCW 10.14.020 includes "conduct directed at a specific person which seriously alarms, *annoys*, harasses, or is detrimental to such person, and which serves no

---

[55] 1RP 95.
[56] 1RP 92. Though the court did not seem to draw a final, definitive conclusion about whether this occurred or not.
[57] 1RP 93.
[58] 1RP 96.
[59] 1RP 95.
[60] 1RP 97.
[61] 1RP 94.
[62] 1RP 94.

legitimate or lawful purpose." RCW 10.14.020(2) (emphasis added). Therefore, acts directed at Thiel that annoyed her would qualify as harassment under the statute. As laid out above, the trial court found *many* acts occurred that were specifically found as intended to annoy Thiel.[63] Therefore, there is no basis not to consider them as a proper basis of the order, despite any suggestion of the Commissioner to the contrary upon questioning by Massingham's counsel. For this separate reason, this Court should affirm the issuance of the anti-harassment order.

D. RCW 10.14.020(2) Is Not Unconstitutionally Vague or Overbroad.

State v. Williams held one portion of the *criminal* harassment statute (former RCW 9A.46.020(1)(a)(iv)) to be vague and overbroad, with respect to the concept of a threat to harm a victim's "mental health." 144 Wn.2d 197, 26 P.3d 890 (2001). Appellant in this case, without support, argues that this Court should treat the concept of "substantial emotional distress" in the civil anti-harassment statute (RCW 10.14.080) similarly. This argument is without merit.

Although the anti-harassment statute at issue in this case does not define "substantial emotional distress," the "'fact that some terms in a statute are not defined does not mean the enactment is unconstitutionally

[63] 1RP 91, 93-94, 96-97.

vague.'" *Id.* at 204, *quoting, State v. Lee*, 135 Wn.2d 369, 393, 957 P.2d 741 (1998). "Rather, [a] statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and defer as to its applicability." *Id.* (internal quotations omitted). In *Williams*, the court's analysis focused on the wide variety of conditions that relate to the broad concept of someone's "mental health" — from temporary, "mere irritation" to a substantial and prolonged, diagnosable mental condition. *Id.* The court's holding was narrow, focused entirely on the specific nuances of the term "mental health." That analysis has no bearing on the constitutionality of the term "substantial emotional distress."

In *State v. Askham*, the court examined the phrase "substantial emotional distress" in RCW 10.14.020 and rejected a litigant's argument that expert testimony was required to establish the necessary level of emotional distress. 120 Wn. App. 872, 883, 86 P.3d 1224 (Div. III 2004). "Emotional distress" is a more narrow term than "mental health" in that it is focused on the negative aspects of stress, such as fear. *See, e.g., State v. Kintz*, 169 Wn.2d 537, 556, 238 P.2d 470 (2010) (harassing acts were "such as would cause a reasonable person to suffer substantial emotional

distress, and actually caused substantial emotional distress, as evidenced by [victim]'s very real fear").

Moreover, the term "emotional distress" is entrenched in the common law, with well-established definitions. It is an essential element of several tort causes of action, as well as its own separate cause of action. *See, Reid v. Pierce County*, 136 Wn. 2d 195, 202, 204, 961 P.2d 333 (1998) (negligent infliction of emotional distress; element of outrage); *Kloepfel v. Bokor*, 149 Wn. 2d 192, 195, 66 P.3d 630 (2003). The *Kloepfel* case is instructive. The Washington Supreme Court conducted an extensive analysis of the term "emotional distress," analyzing whether that element of a tort case must be proven with evidence of objective symptoms, or even constitute a diagnosable emotional disorder. *Id.* at 196-98. Though the holding of the case was making distinctions between recovery in negligent versus intentional inflictions of emotional distress cases, the Restatement (Second) of Torts was quoted at length in the opinion, providing detailed definitions of "emotional distress" and "severe emotional distress," and relying on them in the decision: *" 'Emotional distress' includes 'all highly unpleasant mental reactions, such as fright, grief, horror, shame, humiliation, embarrassment, anger, chagrin,*

disappointment, worry, and nausea.'" Id. at 203, *quoting,* Restatement (Second) of Torts § 46, cmt. j at 77 (1965) (emphasis added).

These examples demonstrate that the concept of "emotional distress" is well-established and understood in Washington courts, and the Court's ruling regarding former RCW 9A.46.020(1)(a)(iv) in *Williams* has no bearing on the constitutionality of RCW 10.14.020.

E. The Court's Order Was Narrowly Tailored To Remedy the Harassment Proven At Trial.

Appellant further complains that the terms of the order bear no nexus between Massingham's harassing conduct and the proscribed conduct under the order. He essentially contends that if Massingham's harassing conduct was speaking Kenny Gray's name, the terms of the order should have been aimed at Massingham's speech. This argument should be rejected.

As this Court has already pointed out,[64] the restrictive provisions of the court's order are not broad: the court restrained Massingham from Thiel's home and required him to exchange the children at a neutral location. "[T]his is not a case in which the court enjoined Massingham from speaking about Gray and Thiel to any third parties."[65] *Cf., In re: Marriage of Suggs*, 152 Wn.2d 74, 93 P.3d 161 (2004) (order overbroad in

[64]Ruling Denying Motion For Emergency Stay, October 11, 2012, page 5.
[65]Id.

covering all speech about victim to third parties). Appellant has argued that speech restrictions have to be "tailored as precisely as possible."[66] Here, the court was able to craft provisions for protection that avoiding speech restrictions altogether; the court was very sensitive to not curtailing Massingham's free speech rights.

Appellant complains that Massingham wasn't restricted from saying Gray's name — which he argues would honor the nexus between the conduct and the harm. But again, this mischaracterizes the "harm" related to Massingham's conduct. The harm was the annoyance and harassment of Thiel. The most restrictive way to remedy that harm is to keep Massingham away from Thiel — not curtail Masingham's speech altogether. The court's order is not a blanket prohibition on Massingham's fundamental personal liberty, including free speech, in the future. To the contrary, the order is crafted with precision to only prohibit unwanted, predatory conduct *with Thiel*. The order leaves open ample alternative channels of communication for expression of Massingham's constitutional rights, including free speech, just not with the victim — in similar fashion to *State v. Noah*, 103 Wn. App. 29, 42, 9 P.3d 858 (Div. I 2000), *review denied by, Calof v. Casebeer*, 143 Wn.2d 1014, 22 P.3d 802 (2001).[67]

---

[66] 2RP 4.

[67] *See,* extended discussion, Section IV.F, *infra.*

Appellant nonetheless contends that the remedy in the order "bears no relation" to the objective.[68] But Appellant misses the point of a harassment finding. The harassment finding is based on intent to harass, injure, or annoy the Petitioner. RCW 10.14.020(2). A court cannot predict all the possible means a Respondent might use to achieve that goal. If Massingham's intent is to harass Thiel through a course of conduct — which is what the court found — then a narrow order telling him not to do it in the first way he did it will only result in him harassing her through an alternate means. If Appellant's logic is followed, it would result in potentially infinite numbers of restraining orders, as Thiel comes back to court each time Massingham finds a new means to harass her. We already know that *would* happen in this case, as the trial court found that Massingham had engaged in *many* different, diverse, borderline-harassing acts.[69]

Accordingly, rather than craft provisions related to specific *means* of harassment — which would likely be overbroad in capturing non-harassing conduct as well — the court focused the provisions on contact *between* the parties, so that the harassment *of Thiel* cannot occur in any form. This is a sensible approach in most anti-harassment orders, and is

[68]Opening Brief, p.12.
[69]See, Section IV.C, p. 16, *supra.*

narrowly tailored to achieve the objective: to prevent Massingham's ability to harass Thiel by *any* means.

F. The Order Was a Valid Time/Place/Manner Restriction on Massingham.

The restrictions entered by the trial court — to the extent they impinge on speech at all — fall within the category of acceptable time, place, and manner restrictions on speech. *See, Noah*, 103 Wn. App. at 41-42. A government regulation may not rise to the level of an impermissible prior restraint where it is merely a time, place, or manner restriction. *Id.* at 41.

> Under the Federal Constitution, statutes regulating time, place[,] or manner restriction are upheld if they are "content neutral, are narrowly tailored to serve significant government interest, and leave open ample alternative channels of communications." (Citation omitted). Under the Washington Constitution, the standard is stricter: a "compelling" not "significant" government interest is required to uphold a statute regulating time, place[,] or manner. (Citation omitted).

Id.

RCW 10.14.080 grants broad discretion to the trial court in devising orders that protect anti-harassment victims, seeking to protect citizens from harassment. *Id.* at 41. Further, the State has a legitimate interest in restraining such conduct. *State v. Lee*, 135 Wn.2d 369, 391-92, 957 P.2d 741 (1998). The court's authority under RCW 10.14.080(6) includes broad no-contact orders with the victim, restraining any

surveillance, and requiring a stated distance from the victim's residence and workplace. In *Noah*, the court clarified that the *compelling* state interest served in an anti-harassment case is the safety, security, and peace of mind of the victim. *Noah*, 103 Wn. App. at 41. In *Noah*, the anti-harassment no-contact order obtained by a psychotherapist, to restrain a father who opposed recovered-memory therapy for his daughter, was a reasonable time/place/manner restriction on speech. *Id.* at 42.

The *Noah* court recognized that the "no-contact" restrictions authorized by the anti-harassment statutes are "content neutral" in their scope: "no contact — whether profession of love, screams of hate, or anything in between." *Id.* at 41. Such a content-neutral restriction:

> ... is narrowly tailored by focus on the victim and a no-contact zone around the victim. It leaves open ample alternative channels of communications, by leaving open every alternative channel so long as no contact is made with the victim and the proscribed zone is not violated. The antiharassment order authorized by the statute is an appropriate time, place, and manner restriction. The order issued against Noah is consistent with the statute and does not constitute unconstitutional prior restraint.

Id. at 41-42.

In this case, the safety, security, and peace of mind of Thiel constitutes the compelling government interest to be served by the narrowly-tailored restrictions prohibiting Massingham from having any contact with her in person or at her residence. Ample alternative channels

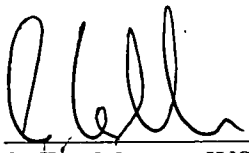
of communications were left open by the court, just as in *Noah*. The order specifically allowed Massingham to communicate by text or e-mail. Importantly — just as in *Noah* and tracking the constitutional anti-harassment statute — the provisions of the order at issue are completely content neutral. As such, the order ***is*** narrowly tailored to address the harm: which is not merely Massingham shouting "Kenny Gray," but his course of conduct that shows an intent to harass Thiel.

V. CONCLUSION

The trial court's issuance of an anti-harassment order in this case did not violate Massingham's right to free speech, its provisions were narrowly tailored to address the harassment found by the court, and the order should not be disturbed.

DATED this 1st day of April, 2013.

Respectfully submitted,



S. Tye Menser, WSBA #37480
Megan Bartley, WSBA #42425
MORGAN HILL, P.C.
Attorneys for Respondent

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:	)	
	)	
BRIAN MASSINGHAM,	)	
Appellant,	)	No. 43926-3-II
	)	
vs.	)	AFFIDAVIT OF SERVICE
	)	
KAREN THIEL ,	)	Lewis County
Respondent.	)	Superior Ct. No.
	)	11-3-00031-3
	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

The undersigned, being first duly sworn on oath, now deposes and states:

The undersigned is now and at all times herein mentioned was a citizen of the United States and 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 therein.

I certify that on April 1st, 2013, at 10:00 am I caused to be personally served a true and correct copy of the **Brief of Respondent** upon the following individuals:

Washington State Court of Appeals, Division II Court Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Dennis J. McGlothin
Olympic Law Group
2815 Eastlake Ave. E., Suite 170
Seattle, WA 98102

On April 1st, 2013, at 9:30am I also provided email and telephonic notice of the same to the following individuals:

Dennis J. McGlothin
Olympic Law Group
2815 Eastlake Ave. E., Suite 170
Seattle, WA 98102

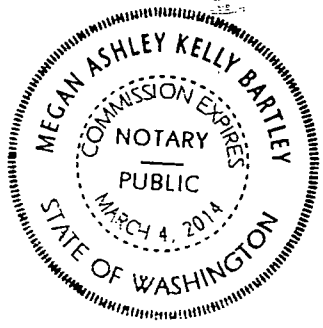
Karen Thiel, Client
2202 Nut Tree Loop SE
Olympia, WA 98501

DATED this 1st day of April, 2013, at Olympia, Washington.

Traci Goodin

Name: Traci Goodin of
MORGAN HILL, P.C.

SUBSCRIBED AND SWORN to before me this 1st day of April, 2013, by Traci Goodin.



Notary Public in and for the State of Washington, residing at: Olympia, WA
My commission expires 3/4/2014