

FILED
COURT OF APPEALS
DIVISION II

2013 MAY 29 PM 3:45

STATE OF WASHINGTON

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY ca
DEPUTY

In re the Marriage of:)	
)	Court of Appeals
BRIAN MASSINGHAM,)	No. 43926-3-II
Appellant,)	
)	RESPONDENT'S REPLY
vs.)	TO THE COURT'S
)	MOTION ON THE MERITS
)	
)	
)	Lewis County Superior
KAREN THIEL)	Court of Appeals No.
(f/k/a MASSINGHAM),)	11-3-00031-3
Respondent.)	
_____)	

IDENTITY OF MOVING PARTY/STATEMENT OF RELIEF SOUGHT

Pursuant to Rules of Appellate Procedure ("RAP") 18.9(c) and 18.14, Respondent on appeal Karen Thiel ("Thiel") responds to the court's motion on the merits. Thiel requests that the court affirm a motion on the

RESPONDENT'S REPLY TO THE
COURT'S MOTION ON THE MERITS - 1

ORIGINAL

merits to dismiss the appeal.¹ Thiel further requests that the court award her reasonable attorneys' fees and costs on appeal.

STATEMENT OF RELEVANT FACTS

Thiel incorporates by reference the complete Statement of Facts contained in the Brief of Respondent.

ARGUMENT

A. Legal Standards.

RAP 18.14(e)(1) permits an appellate court to affirm a decision of the trial court on the merits "if the appeal or any part thereof is determined to be clearly without merit."

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

1

Based on the sequence of the briefing schedule, Thiel assumes the Court's motion is a motion to *affirm* the trial court's issuance of an anti-harassment order, and has structured this reply accordingly. Frankly, however, given the range of possible outcomes, Thiel would prefer that the Court summarily *reverse* the trial court than deny the motion on the merits and permit this appeal to go any further. The attorneys fees for this appeal as well as Massingham's other appeals (Case No. 445832 and newly-filed appeal under Thurston County Superior Court Case No. 13-3-00123-4) and new trial court litigation (in TCSC Case No. 13-3-00123-4 and this underlying Lewis County case) are wreaking financial devastation on Thiel. *See discussion, infra*, Section D.

RESPONDENT'S REPLY TO THE
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and the decision was clearly within the discretion of the trial court or administrative agency.²

RCW 26.09.140 provides in pertinent part, “[u]pon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys’ fees in addition to statutory costs.” Further, RAP 18.9(a) allows the appellate court to order a party who files a frivolous appeal to pay terms.³

B. Settled Case Law Does Not Protect Massingham’s Harassing Conduct In This Case and the Issue On Appeal Is Clearly Without Merit.

This case satisfies the standard articulated in RAP 18.14 for an expedited decision by a motion on the merits. The first issue on appeal — whether the constitution protects Brian Massingham’s (“Massingham”) conduct at issue — is settled by current case law. As such, the appeal is clearly without merit and a motion on the merits to affirm the trial court should be granted.

² RAP 18.14(e)(1).

³ RAP 18.9(a).

The entirety of Massingham's argument relies on the presumption that Article 1, Section 5 of the Washington state constitution and the First Amendment to the United States constitution protect his right to stand in a public space and yell, "Kenny Gray." Massingham's argument goes like this: the First Amendment protects all speech except that which is specifically excluded. Yelling "Kenny Gray" is not specifically excluded, therefore it is constitutionally protected. This is a gross oversimplification of First Amendment protections and Massingham mischaracterizes the Lewis County Superior Court commissioner's ruling.

An analysis of pertinent case law must inform whether the First Amendment and Article 1, Section 5 of the Washington state constitution afford protections for Massingham's behavior. In *Trummel v. Mitchell*, Mitchell, a landlord of a non-profit housing complex, obtained an antiharassment order against Trummel, one of the residents, for bothering other residents in the complex.⁴ Among Trummel's arguments against the issuance of the antiharassment order was that the antiharassment order infringed upon several constitutionally-protected activities, including

⁴ *Trummel v. Mitchell*, 156 Wn.2d 653, 668, 131 P.3d 305 (2006).

speaking.⁵ The court, however, found that the trial court correctly relied on Trummel’s predatory behavior, not on the content of the speech, “which has little or no free speech protections.”⁶

In *Bering v. Share*, a medical clinic sought an antiharassment order against abortion protesters. In discussing the merits of the antiharassment order, the Washington Supreme Court conducted a thorough time, place, and manner restriction analysis of the antiharassment order, focusing on the conduct of the picketers, rather than the specifics of their speech.⁷

In *State v. Noah*, Noah targeted psychotherapist Calof and his practice by picketing in front of the building, entering the building, and taking photographs of Calof’s patients and staff.⁸ The appellate court agreed with Noah that lawful exercise of free speech cannot be the basis for an antiharassment order, but clarified that the inquiry is whether there was a factual basis for the antiharassment order, excluding consideration

⁵ *Id.* at 665.

⁶ *Id.* at 666.

⁷ *See, Bering v. Share*, 106 Wn.2d 212, 221-225, 721 P.2d 918 (1986).

⁸ *State v. Noah*, 103 Wn. App. 29, 9 P.3d 858 (2000).

of protected speech.⁹ The court then went on to discuss Noah's conduct that gave rise to the antiharassment order.¹⁰

Like the courts in *Trummel*, *Bering*, and *Noah*, the trial court in this case "properly focused on the speaker's conduct and not the message, consistent with the constitution, to properly issue an antiharassment order."¹¹ The harm in this case that gave rise to the antiharassment order was Massingham's annoying and harassing behavior, as repeatedly outlined in Commissioner Mitchell's ruling.

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, intruding in a place she cannot remove herself from, and has no choice but to be given that her daughter is playing ball there. Even further, it was not

⁹ *Id.* at 867.

¹⁰ *Id.*

¹¹ *Trummel*, 156 Wn.2d at 668.

just the speech plus standing in front of her and intruding physically that constituted harassment, but doing all that *in 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. 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.

The First Amendment allows the government to “prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”¹² It is significant that Thiel, as a custodial parent at an out-of-town sporting event of her daughter’s, was not in a position to turn around and avoid the unwanted speech. “Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit.”¹³ But that is exactly what Massingham’s position would require — that Thiel continue to be subjected to harassment by Massingham, who is

¹² *Frisby v. Schultz*, 487 U.S. 474, 487, 108 S. Ct. 2495, 101 L.Ed.2d 420 (1988).

¹³ *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 737, 90 S. Ct. 1484, 25 L.Ed.2d 736 (1970).

given a “free pass” because the softball game is occurring in a park. In *Snyder v. Phelps*, cited by Massingham, the Supreme Court declined to extend the “captive audience” doctrine to a funeral service because the speaker “stayed well away from the memorial service” — the complaining party “could see no more than the tops of the sign when driving to the funeral.”¹⁴ These facts are clearly distinguishable from Massingham’s conduct here, getting in Thiel’s face and disrupting her enjoyment of her daughter’s game. Massingham’s conduct is more akin to sending publications to Thiel’s home than the “open public forum” Massingham posits.

Further, the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.¹⁵ Indeed, “[a] state may impose reasonable time, place and manner restrictions on all expression, whether written, oral or symbolized by conduct.”¹⁶ As previously discussed in Thiel’s Respondent’s

¹⁴ *Snyder v. Phelps*, 131 S. Ct. 1207, 1220-1222, 179 L.Ed.2d 172 (2011).

¹⁵ *Bering v. Share*, 106 Wn.2d 212, 222, 121 P.2d 918 (1986) (quoting *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 69 L.Ed.2d 298, 101 S. Ct. 2559 (1981)).

¹⁶ *Id.*

Brief, the order crafted by Commissioner Mitchell was an appropriate time, place, and manner restriction similar to that imposed and upheld in *Noah*.

Of course the main concern of the First Amendment is to protect “the public expression of ideas.”¹⁷ This, however, is not what is at issue in this case. Massingham was not expressing any ideas or disseminating information or relaying a message of some kind. He was merely engaging in harassing behavior, taunting Thiel, physically placing himself in Thiel’s line of vision, and yelling out words specifically designed to hurt her. Yelling “Kenny Gray” in a park with the intent to harass and badger is not deserving of the First Amendment’s protections.

It is not appropriate to characterize Massingham’s behavior in this case as constitutionally protected. Case law is clear on this issue and the appeal is therefore without merit and ripe for granting this court’s motion on the merits to affirm.

C. Commissioner Mitchell’s Order Was Narrowly Tailored, Supported By the Evidence In This Case.

¹⁷ *Street v. New York*, 394 U.S. 576, 592, 89 S. Ct. 1354, 22 L.Ed.2d 572 (1969).

Massingham’s second issue on appeal, that the antiharassment order was not narrowly tailored to achieve a compelling state interest, is not supported by established case law and is without merit. Further, a trial court is granted “broad discretion ... in devising an [antiharassment] order that protects the victim. The determination of how much is enough or is too much is a case-by-case determination.”¹⁸ Moreover, a state may restrict any form of expression if the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.¹⁹ As such, the trial court’s ruling — and the denial of the motion to revise that ruling — should be affirmed.

Because Massingham improperly focuses on his pure speech as what gave rise to the order, rather than his total conduct and behavior, he argues the only way to craft an order that is narrowly tailored is to prohibit him from saying the name “Kenny Gray.” Once again, this argument mischaracterizes the harm relating to Massingham’s conduct. The harm

¹⁸ *Noah*, 9 P.3d at 867.

¹⁹ *Bering v. Share*, 106 Wn.2d 212, 222, 121 P.2d 918 (1986) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 74 L.Ed.2d 794, 103 S. Ct. 948 (1983)).

was the annoyance and harassment directed at Thiel. The order is crafted with precision to only prohibit unwanted, predatory conduct with Thiel. The order leaves open ample alternative channels of communication in a similar fashion to *Noah*. There is no question that under settled case law, as well as the facts of this case, that Commissioner Mitchell's order was sufficiently narrowly tailored to achieve the compelling state interest of protecting a victim of harassment.

D. Massingham's Appeal Is Frivolous, Solely For Purposes Of Further Harassment, and Attorney's Fees Should Be Awarded.

The court should grant Thiel an award of attorneys fees. RCW 26.09.140 allows an appellate court to order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.²⁰ Massingham has ensnared Thiel into a litigation nightmare. He is appealing every possible order he can. He has filed either a motion for reconsideration or for discretionary review at every possible opportunity along the way. The record on appeal contains Commissioner Mitchell's ruling, which is replete with instances of Massingham's harassing, annoying, badgering, vindictive behavior. She

²⁰ RCW 26.09.140.

correctly identifies that Massingham has not been able to get over the divorce and move on with his life. Massingham's pursuits on appeal are but more of the same, directed at harassing Thiel even further.

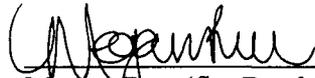
Additionally, RAP 18.9(a) allows the appellate court to award attorneys fees and costs to a party who has to defend a frivolous appeal.²¹ As outlined above, Massingham's appeal is without merit and in contravention of settled case law and is therefore frivolous. This appeal, as well as the others he is contemporaneously pursuing, exist only for the purpose of further harassing Thiel. Although he continues to lose his appeals, motions for reconsideration, and motions for discretionary review, Massingham persists. Thiel should be awarded attorneys fees and costs on appeal pursuant to RAP 18.9(a) as well as RCW 26.09.140 for having to suffer through Massingham's abusive use of the appellate court system. A financial declaration in support of Thiel's request for attorneys fees is concurrently filed herewith.

²¹ RAP 18.9(a).

CONCLUSION

For the foregoing reasons, the Court's motion on the merits to affirm should be granted.

Respectfully submitted this 29th day of May, 2013.



Megan Rue (fka Bartley)/WSBA No.42425
MORGAN HILL, P.C.
Attorneys for Respondent On Appeal

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re The Marriage Of:

Brian Massingham,

Vs.

Karen Thiel (fka Massingham),

Appellant,

Respondent.

Court of Appeals
No. 43926-3-II

Financial Declaration
Of the Respondent
(FNDCLR)

Name: Karen Massingham

Date of Birth: 07/11/1976

I. Summary of Basic Information

Declarant's Total Monthly Net Income (from § 3.3 below)		\$4161.00
Declarant's Total Monthly Household Expenses (from § 5.9 below)		\$0.00
Declarant's Total Monthly Debt Expenses (from § 5.11 below)		\$400.00
Declarant's Total Monthly Expenses (from § 5.12 below)		\$4,094.00
Estimate of the other party's gross monthly income (from § 3.1g below)	<input checked="" type="checkbox"/>	-
	<input type="checkbox"/>	Unknown

II. Personal Information

- 2.1 Occupation: Nurse
- 2.2 The highest year of education completed:
- 2.3 Are you presently employed? Yes No
- a. If yes:
- (1) Where do you work. **Employer's name and address must be listed on the Confidential Information Form.**
- (2) When did you start work there? (month/year) August 2008
- b. If no:
- (1) When did you last work? (month/year)
- (2) What were your gross monthly earnings? -
- (3) Why are you presently unemployed?

Financial Declaration (FNDCLR) - Page 1 of 7
WPF DRPSCU 01.1550 (6/2006) - RCW 26.18.220 (1)

III. Income Information

If child support is at issue, complete the Washington State Child Support Worksheet(s), skip Paragraphs 3.1 and 3.2. If maintenance, fees, costs or debts are at issue and child support is Not an issue this entire section should be completed. (Estimate of other party's income information is optional.)

3.1 Gross Monthly Income

If you are paid on a weekly basis, multiply your weekly gross pay by 4.3 to determine your monthly wages and salaries. If you are paid every two weeks, multiply your gross pay by 2.15. If you are paid twice monthly, multiply your gross pay by 2. If you are paid once a month, list that amount below.

	Karen	
a. Imputed Income	-	-
b. Wages and Salaries	\$5,485.00	-
c. Interest and Dividend Income	-	-
d. Business Income	-	-
e. Spousal Maintenance Received From	-	-
f. Other Income	-	-
g. Total Gross Monthly Income (add lines 3.1a through 3.1e)	\$5,485.00	
h. Actual Gross Income (Year-to-date)	-	-

3.2 Monthly Deductions From Gross Income

	Karen	
a. Income Taxes	\$724.43	
b. FICA/Self-employment Taxes	\$372.49	
c. State Industrial Insurance Deductions	\$8.20	-
d. Mandatory Union/Professional Dues	\$50.00	-
e. Pension Plan Payments	\$138.21	-
f. Spousal Maintenance Paid	-	-
g. Normal Business Expenses	-	-
h. Total Deductions from Gross Income (add lines 3.2a through 3.2g)	\$1,293.32	

3.3 Monthly Net Income (Line 3.1f minus line 3.2h or line 3 from the Child Support Worksheet(s).) **\$4,191.68**

3.4	Miscellaneous Income	Karen	
a.	Child support received from other relationships		
	Name:	-	-
	Name:	-	-
b.	Other miscellaneous income		
	(list source and amounts)		
	Income of current spouse		
	Name:	-	-
	Name:	-	-
	Income of children		
	Name:	-	-
	Name:	-	-
	Income from assistance programs		
	Name:	-	-
	Name:	-	-
	Non-recurring income		
	Name:	-	-
	Name:	-	-
	Other Income:	-	-
		-	-
		-	-
		-	-
		-	-
		-	-
c.	Total Miscellaneous Income	-	-
	(add lines 3.4a through 3.4b)		
3.5	Income of Other Adults in Household		
	Name:	-	-
	Name:	-	-
3.6	If the income of either party is disputed, state monthly income you believe is correct and explain below:		

IV. Available Assets

4.1	Cash on hand	-
4.2	On deposit in banks	-
4.3	Stocks and bonds	-
	Cash value of life insurance	-
4.4	Other liquid assets:	-

V. Monthly Expense Information

Monthly expenses for myself and dependents are: (Expenses should be calculated for the future, after separation, based on the anticipated residential schedule for the children.)

5.1	Housing	
	Rent, 1st mortgage or contract payments	\$1,395.00
	Installment payments for other mortgages or encumbrances	-
	Taxes & insurance (if not in monthly payment)	\$15.00
	Total Housing	\$1410.00

5.2	Utilities		
	Heat (gas & oil)		-
	Electricity	\$200.00	
	Water, sewer, garbage	\$100.00	-
	Telephone	\$136.37	-
	Cable	\$136.00	-
	Other:		
	Internet		
	Total Utilities	\$572.37	
5.3	Food and Supplies		
	Food for 3 persons	\$700.00	
	Supplies (paper, tobacco, pets)	\$50.00	
	Meals eaten out	\$50.00	
	Other:		
	Total Food Supplies	\$800.00	
5.4	Children		
	Day Care/Babysitting		
	Clothing	\$50.00	
	Tuition (if any)		
	Other child-related expenses: Sports' fees	\$30.00	
	Total Expenses Children	\$80.00	
5.5	Transportation		
	Vehicle payments or leases		-
	Vehicle insurance & license	\$70.00	
	Vehicle gas, oil, ordinary maintenance	\$325.00	
	Parking		-
	Other transportation expenses		-
	Total Transportation	\$400.00	
5.6	Health care (Omit if fully covered)		
	Insurance	80.36	
	Uninsured dental, orthodontic, medical, eye care expenses	\$800.00	
	Other uninsured health expenses		-
	Total Health Care	\$880.36	
5.7	Personal Expenses (Not including children)		
	Clothing		-
	Hair care/personal care expenses		-
	Clubs and recreation		-
	Education		-
	Books, newspapers, magazines, photos		-
	Gifts		-
	Other:		-
	Total Personal Expenses		-

5.8	Miscellaneous Expenses	
	Life insurance (if <u>not</u> deducted from income)	-
	Other:	-
	Other:	-
	Total Miscellaneous Expenses	
5.9	Total Household Expenses	
	(The total of Paragraphs 5.1 through 5.8)	\$4,142.73

5.10	Installment Debts Included in Paragraphs 5.1 Through 5.8		
	<u>Creditor/Description of Debt</u>	<u>Balance</u>	<u>Month of Last Payment</u>
		-	
		-	
		-	
		-	
		-	
		-	
		-	
		-	
		-	

5.11	Other Debts and Monthly Expenses not Included in Paragraphs 5.1 - 5.8		
	<u>Creditor/Description of Debt</u>	<u>Balance</u>	<u>Month of Last Payment</u>
	Citibank	\$4900.00	May 2013
		-	Amount of Monthly Payment
		-	\$200.00
		-	-
		-	-

Total Monthly Payments for Other Debts and Monthly Expenses

\$ 200.⁰⁰-

5.12 Total Expenses (Add Paragraphs 5.9 and 5.11)

\$ 4,342.73

VI. Attorney Fees

6.1 Amount paid for attorney fees and costs to date:

\$70,000

6.2 The source of this money was: Car accident settlement money and property settlement agreement from dissolution.

6.3 Fees and costs incurred to date:

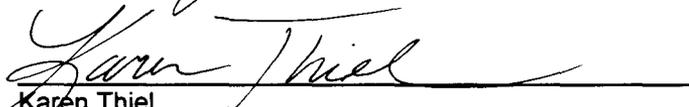
\$70,000 - \$75,000

6.4 Arrangements for attorney fees and costs are:

6.5 Other:

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Olympia, [City] WA [State] on 5/29/13 [Date].


Karen Thiel
Signature of Declarant

The following financial records are being provided to the other party and filed separately with the court.

Financial records pertaining to myself:

Individual Partnership or Corporate Income Tax returns for the years: _____ including all W-2s and schedules;

Pay stubs for the dates of _____

Other: _____

Do not attach these financial records to the financial declaration. These financial records should be served on the other party and filed with the court separately using the sealed financial source documents cover sheet (WPF DRPSCU 09.0220). If filed separately using the cover sheet, the records will be sealed to protect your privacy (although they will be available to all parties in the case, their attorneys, court personnel and certain state agencies and boards.) See GR 22 (c)(2).

FILED
COURT OF APPEALS
DIVISION II

2013 MAY 29 PM 3:46

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON STATE OF WASHINGTON

BY C
DEPUTY

In re the Marriage of:)
)
BRIAN MASSINGHAM,)
 Appellant,)
)
 vs.)
)
KAREN THIEL ,)
 Respondent.)

)

No. 43926-3-II

AFFIDAVIT OF SERVICE

Lewis County
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 May 29th, 2013, at 3:00 p.m. I arranged personal service of a true and correct copy of the **Respondent's Reply to the**

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Court's Motion on the Merits and Financial Declaration of

Respondent upon the following individuals:

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

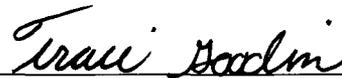
Dennis J. McGlothin
Olympic Law Group
2815 Eastlake Ave. E., Suite 170
Seattle, WA 98102

On May 29th, 2013, at 3:30 p.m., I also provided an email of the same to the following individuals:

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

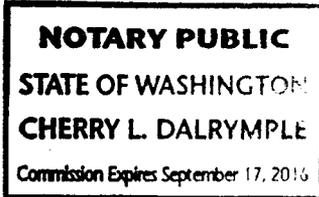
Karen Thiel, Client
2202 Nut Tree Loop SE
Olympia, WA 98501

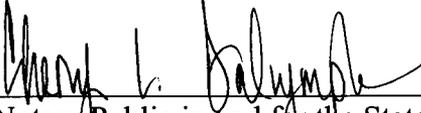
DATED this 29th day of May, 2013, at Olympia, Washington.



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

SUBSCRIBED AND SWORN to before me this 29th day of May,
2013, by Traci Goodin.





Notary Public in and for the State of
Washington, residing at: OLYMPIA, WA
My commission expires 9-17-16
Print Name: CHERRY DALRYMPLE