FILED
04-29-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
District III
Appeal No.: 2020AP1775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant.

RESPONDENT-APPELLANT'S BRIEF

On Appeal From a Decision Entered
September 9, 2020, in the Trempeleau County Circuit Court,
the Honorable Rian W. Radtke, Presiding,
Case No. 2020CV40

Respectfully Submitted,

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STATEMENT OF THE ISSUES PRESENTED

Whether the definition of "harassment" as used in Wis. Stat. §813.125 encompasses comments that implicitly or explicitly reference known negative possibilities, such as car accidents, but which comments in no way constitute threats?

Circuit Court Answer: Yes

Whether Wis. Stat. §813.125 allows enjoining comments made for purposes of influencing a Planned Parenthood worker to cease working for Planned Parenthood and to repent and embrace Jesus, but not with an intent to harass for the sake of harassing or intimidating?

Circuit Court Answer: Yes

Whether enjoining, for a period of four years, a longtime pro-life protestor from protesting on a public sidewalk in front of a Planned Parenthood during its business hours because he made comments urging a Planned Parenthood worker to repent before it is too late constitutes an unconstitutional restraint on First Amendment protected expression?

Circuit Court Answer: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent-Appellant, Brian Aish ("Aish") does not request oral argument because the briefs of the parties will adequately address the issues raised on appeal. Publication is warranted because the issues presented, including the proper interpretation and application of Wis. Stat. § 813.125, warrant publication.

STANDARD OF REVIEW

In *Welytok v. Ziolkowki*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359, the Court recognized that the Court of Appeals "independently reviews" a circuit court's conclusion to enter an injunction based on the established facts to determine whether reasonable grounds exist. Whether Kindschy met her burden of proof is also a question of law, subject to *de novo* review. See *Id.*, citing *Brandt v. Brandt*, 145 Wis.2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988). Put slightly differently, "whether reasonable grounds exist to grant the injunction is a question of law that [the reviewing court] review[s] *de novo*. *Board of Regents-UW System v. Decker*, 2014 WI 68, ¶20, 355 Wisc.2d 800, 850 N.W.2d 112, citing *Welytok*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359.

The Court of Appeals can reverse a circuit court decision to grant a harassment injunction when the record establishes an erroneous exercise of discretion by the circuit court. *Welytok*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359. In reviewing the Circuit Court's determination, the Court of Appeals should uphold findings of fact unless they are clearly erroneous. Wis. Stats. § 805.17(2).

STATEMENT OF THE CASE

On March 10, 2020, Petitioner-Appellee, Nancy Kindschy ("Kindschy") filed a request for issuance of an injunction against Aish. She premised her request on statements she alleged Aish, a pro-life protestor outside the Planned Parenthood at which she works, made on various dates in October and November, 2019, and February, 2020. (R.1-4, 5).

On July 13, 2020 and September 9, 2020, the Honorable Rian W. Radtke ("the Circuit Court") held a hearing on Kindschy's allegations. At the conclusion of the hearing, the Circuit Court made oral findings of fact and set forth the basis of its decision in favor of Kindschy. (R. 36-80 through 36-94). The Circuit Court found that Aish made the statements at issue to "scare" Kindschy into leaving her employment with Planned Parenthood and to embrace Aish's religious beliefs. (R. 36-84, 85). The alleged statements were to the effect that bad things, such as accidents and death, can happen to oneself and one's family at any time, and so Kindschy should immediately repent. (R. 36-83, 84). The Circuit Court concluded that, "even coming from a place of love or nonaggression," and despite a finding that Aish was not being angry or aggressive, the comments "would intimidate somebody" (R. 36-84) and were not made for a legitimate purpose. (R. 36-85 through 90).

On September 9, 2020, the Circuit Court entered an injunction against Aish barring him, until September 9, 2024, from harassing Kindschy and requiring him to avoid Kindschy's residence and/or any premises temporarily occupied by her, including the Planned Parenthood clinic at which she works and at which Aish formerly protested. (R. 23-2, 3; R. 36-91, 92, 93, 94).

On October 5, 2020, the Circuit Court denied Aish's Motion for Reconsideration in which he argued that the court committed manifest error "by determining that Mr. Aish's right to assemble and his right to freedom of expression under the First Amendment was not a legitimate purpose." (R. 26-1).

On October 22, 2020, Aish filed his Notice of Appeal (R. 28-1, 2), commencing this appeal.

STATEMENT OF FACTS

Procedural History

On March 10, 2020, Petitioner, Nancy Kindschy ("Kindschy") petitioned for the entry of a temporary restraining order and permanent injunction against Aish, a pro-life protester who protests at the Planned Parenthood clinic at which Kindschy works. In her signed statement submitted in support of her Petition for Temporary Restraining Order And/Or

Petition and Motion for Injunction Hearing ("Petition"), Kindschy asserted she works as a Nurse Practitioner at a Planned Parenthood located in Blair, Wisconsin (the "Blair Planned Parenthood"), (R.35-5), where Aish "regularly protests ... and has since approximately April of 2019 when the Blair Center opened." (R. 1-4). Kindschy purported to describe statements Aish has made to her on various occasions (R. 1-4, 5), and claimed that Aish makes her fear for her safety. The hearing on Kindschy's Petition was held over two dates. In support of her Petition, Kindschy presented her own testimony and the testimony of two of her co-workers at the Blair Planned Parenthood, Shonda Racine and Jessica Beranek. Kindschy also presented a video recording, taken on her phone, on which she recorded Aish on February 18, 2020. (R. 24-1, 2; R. 35-39, 40; R. 36-64; Pet. Ex. 2). Aish presented his own testimony and that of his wife and fellow pro-life protester, Anna Aish.

At the conclusion of the hearing, the Circuit Court granted the Petition, ordering Aish to cease or avoid harassing Kindschy; to avoid Kindschy's residence and/or any premises temporarily occupied by her; to avoid contact that harasses or intimidates Kindschy; and to avoid contacting Kindschy or causing any other person, other than a party's attorney or law

enforcement officer, to contact Kindschy unless she consented in writing. By its terms, the injunction will remain in place until September 9, 2024. (R. 23-2, 3).

The Hearing On Kindschy's Petition

The February 18, 2020 Video

The video Kindschy took on her phone of Aish on February 18, 2020 was admitted into evidence and reviewed by the Circuit Court. (R. 24; R. 35-39, 40). It can be viewed via this link: https://drive.google.com/file/d/1Rpqi2j1fg3T3Xyptw6DByVc6uhfTE96C/view.

The events shown on the recording were cited by Kindschy as a basis for the entry of the requested injunction. (R. 1-5). Kindschy confirmed that what is shown in the February 18, 2020 video is indicative of the manner in which, on each of the dates between October 8, 2019 and February 25, 2020, Aish protested and which she cited in support of her claimed entitlement to an injunction. (R. 35-39, 40).

The 50 second recording shows Kindschy walking along a cement walkway which, straight ahead, ends in a sidewalk. To the left of the cement walkway is an area paved in asphalt. The recording briefly shows a person

walking alongside Kindschy to her right. Kindschy walks toward Aish, who is standing on the sidewalk at its intersection with the end of the asphalt. Aish holds a sign that says, "THOSE WHO LOVE ME, OBEY ME! JESUS."

Kindschy walks towards Aish. Aish speaks but his words are, for the most part, drowned out by the sound of the wheels on the bags rolled behind two other individuals, presumably other clinic employees, who walk between Aish and Kindschy. Those employees turn in front of Kindschy and walk out of the frame to her left. Aish turns in the direction in which the other clinic employees have walked and says something about, "Don't profess to be a Christian [inaudible].[1] The recording then turns towards a car (presumably Kindschy's), which has the driver's side backseat door open. Kindschy's car is parked the closest to where Aish is standing on the sidewalk. In the background Aish can be heard saying something about "lies" and then, "You know who the father of all lies is? [inaudible] Christian [inaudible]."

The recording pans back toward Aish on the sidewalk, briefly showing a security guard standing off to the side of Kindschy's car. Aish,

[1] Quotes from the recording have been transcribed as accurately as possible given the difficulty in discerning each of the words spoken by Aish as depicted in the recording.

who has partially turned back toward Kindschy states, "If I remember right, you are Lutheran aren't you? Kindschy turns away from Aish and back to her car. Kindschy then turns back toward Aish who says, "You understand the father of all lies is Satan, not God. You mock but he'll be mocking on the day of your day of judgment." The recording cuts away and appears to show Kindschy getting into the front driver's seat of her car. Aish is heard in the background stating, "I'll pray that you guys make it home safely for another day that you can turn to Christ and repent." The recording turns back to the security guard, who remains standing off to the side of Kindschy's car, at the intersection of the cement walkway and asphalted area. The recording briefly turns back to Aish, who is still standing on the sidewalk and who says, "You still have time." The recording pans back to the security guard and then ends.

Kindschy's testimony

Kindschy testified that she is a nurse practitioner employed by Planned Parenthood of Wisconsin. She works at two clinics, the Blair Planned Parenthood and at a clinic located in Lacrosse, Wisconsin. (R. 35-4). The Blair Planned Parenthood is only open on Tuesdays. Kindschy began working there in August, 2019. (R. 35-4, 5, 6).

Kindschy stated that Aish is a "frequent protester" at the clinics where she works. Aish began protesting in April, 2014, at a clinic at which Kindschy was working at that time which is located in Black River Falls, Wisconsin. (R. 35-5, 10, 21). Kindschy testified that Aish stands at the end of the sidewalk when Kindschy and her co-workers exit the clinic. (R. 35-25). Throughout the time period beginning in April, 2014, Aish had never touched Kindschy. (R. 35-22, 23). Kindschy acknowledged Aish is clearly against Planned Parenthood's platform. (R. 35-29).

Kindschy testified that, on October 8, 2019, when Kindschy left work with another co-worker, Aish was standing on the sidewalk, where he usually protested, holding a sign. Aish was approximately 3 to 4 feet away from Kindschy's car. On that occasion, Aish told Kindschy she still had time to repent. He also stated she might be killed by a drunk driver on her way home and that it would not be too long before bad things started happening to her and her family. Kindschy asserted that Aish made these statements in a "very aggressive," "loud," "very stern" manner. Under cross-examination, however, Kindschy admitted that Aish did not yell or scream at her but used "[a] very direct voice" toward her. (R. 35-27). Kindschy and her co-worker got in their cars and left. When Kindschy left, Aish was "still standing on the

sidewalk." (R. 35-7, 8, 9, 10). Kindschy testified that, on October 8, 2020, Aish did not do anything other than move out of Kindschy's way and she pulled out and left. (R. 35-31).

Kindschy also premised her injunction request on an interaction which she alleged occurred on October 15, 2019. With respect to that date, Kindschy claimed Aish said something to Kindschy, in a "cold, angry, loud" manner, about having blood on her hands. (R. 35-11, 12, 13, 14).

According to Kindschy, on October 29, 2019, when Kindschy and her co-worker left, Aish was "at the end of the sidewalk where he would line himself up." Kindschy left quickly. She stated that after she left, Aish "ran out into the road after [her] pumping his anti-abortion sign into my car window within inches of it" and she sped off. (R. 35-14).

Kindschy asserted that, on February 18, 2020, as she was leaving work with a co-worker, Aish "followed [her] directly to [her] vehicle." She later acknowledged he was 3 to 4 feet away from her. According to Kindschy, Aish said, "'Ma'am, you have time to repent. If I recall you are a Lutheran." He told her she had blood on her hands and that she was a liar. He also said, "'Do you know who plays the game of lies, ma'am? It's [S]atan. Satan will come to judge you." She said these comments "frightened her so

bad." Upon further questioning by her counsel, Kindschy claimed Aish also said she would be lucky if she got home safely, that she could possibly be killed, and that bad things were going to start happening to her family." He was "very loud," "very stern" and "very agitated" when he made these comments and Kindschy stated "she felt threatened." Aish did not prevent her from leaving. (R. 35-14, 15, 16).

The Court viewed the video that Kindschy took on February 18, 2020. (R. 35-39, 40; Ex. 2). The video from February 18, 2020 shows Aish off to the side, doing nothing to block Kindschy's vehicle. Kindschy acknowledged she had no video evidence that Aish had ever blocked her vehicle, preventing her from leaving. (R. 35-41). She claimed, however, that "he's just been very close, which [had] frightened [her] that he could step into [her] vehicle." (R. 35-41, 42). She admitted, however, that he had never stepped into her vehicle and, as far as she was aware, had never touched her vehicle. (R. 35-42). The video of this incident clearly shows that Aish was never "very loud," "very stern" and "very agitated" when he made the comments to Kindschy," contrary to her sworn testimony.

Kindschy stated that, on February 25, 2020, Aish "told [her] she had been a liar and still [had] time to repent." Kindschy claimed she felt

threatened when Aish told her she had been a liar. (R. 35-17). Kindschy then reviewed her petition to help refresh her recollection regarding the events of February 25, 2020. Based on that review, Kindschy testified that on that date, when she was leaving work Aish said she had been a liar, that she had lied to the authorities about him and that she would be lucky to make it home safely. Kindschy asserted that this caused her "great concern" because Aish's "behavior has continued to just get more aggressive, specifically toward [Kindschy]." (R. 35-19, 20). Kindschy stated Aish was "very loud", "very stern" and "very agitated" when he made the comments, but did not block Kindschy's way or make it difficult for her to leave. (R. 35-20, 21).

Kindschy acknowledged that, at no time during any of the interactions Kindschy described did Aish leave the sidewalk and approach her as she walked the 50 to 75 feet from the entry to the Blair Planned Parenthood to her car. (R. 35-30).

Kindschy maintained that she feels threatened by Aish because he "continues to single [her] out, even as he harasses other staff and patients, which was what she alleged in her Petition." (R. 1-5; 35-42).

In January, 2020, the Blair Planned Parenthood put up two security cameras - one at the parking lot and the other covering a wide angle to the right of the door. (R. 35-34, 35). These recordings would have shown Aish's conduct when he protested, but Kindschy had not asked to obtain any recordings from the cameras. (R. 35-35, 40, 41). Kindschy stated she made videos of Aish in February, 2020, and that other employees "possibly" made videos of him "a few times" (R. 36-63), but the only video evidence introduced at the trial was the February 18, 2020, video.

Testimony of Shonda Racine

Shonda Racine ("Racine"), a Planned Parenthood center manager, had known Kindschy through work since August, 2019. (R. 35-46, 47). She also knew Aish from the Blair Planned Parenthood. (R. 35-47). Racine stated that when she was at the Blair Planned Parenthood there were typically 3-4 protestors. (R. 35-53). Aish was there almost every Tuesday when Racine was there. (R. 35-54). Aish protested throughout the day when he was present at the Blair Planned Parenthood, making his position known to everyone in the area; he did not protest only when Kindschy was present. (R. 35-74).

Racine claimed she heard Aish say to Kindschy she had blood on her hands, that bad things are going to start happening to her and her family, that she needed to repent, and that he could not help her. (R. 35-48).

Racine testified that on that, on October 8, 2019, she saw through her rearview mirror that Aish prevented Kindschy from leaving "by standing in the road in her way with his sign" but that he eventually moved. (R. 35-49). However, Kindschy herself testified that when she left the clinic on that date Aish was standing on the sidewalk (R. 35-7, 8, 9, 10), and did nothing other than move out of Kindschy's way as she pulled out and left (R. 35-31).

Racine testified that on October 15, 2019, as Kindschy and Racine were leaving, Aish stated to Kindschy she had blood on her hands. (R. 35-50).

Racine testified that on October 29, 2019, it was "more of the same" and that Aish was "aggressive and screaming that Kindschy needed to repent and had blood on her hands." (R. 35-50, 51, 63).

Racine claimed she walked out of the Blair Planned Parenthood with Kindschy on other dates, but those did not stand out for her like the dates in October, 2019. She claimed that on those unknown dates Aish told Kindschy

that she had blood on her hands and said bad things could start happening to her and her family if she did not repent. (R. 35-63, 64).

Testimony of Jessica Beranek

Jessica Beranek ("Beranek"), a center manager for Planned Parenthood Wisconsin, had known Kindschy for 15 or 16 years, (36-4, 5). Beranek had known Aish since April, 2014; she knew him as a protestor at the Whitehall clinic (which later moved and eventually became the Blair Planned Parenthood), the Blair Planned Parenthood, and the Black River Falls Clinic. (R. 36-6, 13).

Berenak stated she was at the Blair Planned Parenthood on February 18, 2020. (R. 36-6, 7). On that date, Beranek, Kindschy and another employee, Marshall Carter, left together. (R. 36-8, 9, 10, 11, 12). She confirmed that Aish remained on public property on that date. (R. 36-9).

Berenak both claimed Aish had become "more aggressive" in his comments toward Kindschy than he had been in 2018 and 2019 (R. 36-14, 15), and that on prior occasions Aish was "as aggressive" and "pointedly going after Nancy." (R. 36-19). Berenak acknowledged Blair Planned Parenthood had security cameras installed to see what was going on in the

areas where Aish and the other protestors were, but she had not reviewed the security camera recordings. (R. 36-20).

Testimony of Brian Aish

Aish, a retired law enforcement officer, testified that he is a Christian who believes that "salvation is only through Jesus Christ and through repentance...." (R. 36-27, 35). For approximately 9 years he has protested at Planned Parenthood and other clinics that perform abortions to "stand for children." He started protesting at the Black River Falls Clinic. (R. 36-27, 28).

He and the other protesters tried to make sure someone was always at the clinic "to represent God and to be there for women coming in and being misled in the wrong direction." (R. 36-28). Aish tries to be present at the Blair Planned Parenthood in the afternoon. Members of Aish's family sometimes join him there and a couple of other families with kids are also usually there in the afternoon. (R. 36-31, 32).

His priority is to share the gospel, to warn women they will be accountable to God on the day of judgment if they proceed, and to try to persuade them to repent. (R. 36-29, 30). After the last appointments for the

day, Aish stays until the employees check out "because they all stand condemned apart from Jesus Christ and [he] just want[s] them to hear the gospel and [he] want[s] them to turn away from their sin..." He urges them not to wait because bad things can happen and they might not make it to the next week when he sees them again and has another opportunity to try to persuade them to repent. (R. 36-30, 31, 34, 35).

Aish denied "focusing" on Kindschy. He knew Kindschy was a Lutheran because he believed she told him she was when they were at the Black River Falls Clinic. (R. 36-32, 46). He asked her if she was Lutheran to try to get a dialog going with her - something he had done many times over the years he had known her. (R. 36-32). Aish has had several dialogues through the years with Kindschy; his goal is to try to get the employees to open up, plant a seed and get them to think about what they are doing. (R. 36-37).

He addresses all the clinic employees. (R. 36-32, 33, 40, 41). He does not talk to the employees with an intent to harass or intimidate them; he talks to them because he loves them and is trying to persuade them to repent, without delay, by sharing "the gospel" - "the truth" with them. All of the signs Aish uses have Bible verses written on them and when he speaks he

repeats Bible verses and warnings that God gives "through his word." (R. 36-33, 34, 41).

Aish sought to share the gospel and warn everyone going into or coming out of the building to repent, and to educate them about what Planned Parenthood does ("kill children and make money on it"). This included clinic employees and patients, others employed in the same building and people doing business with the clinic or with other occupants of the building. (R. 36-41, 42, 44-48). The building also houses the Department of Vocational Rehabilitation and other businesses besides Planned Parenthood. (R. 36-48). The protestors also talk to people passing on the street. (R. 36-48).

Aish had no desire to harm or intimidate Kindschy. (R. 36-35, 40). When he said that bad things happen, like drunk driving accidents, he said this because he is aware that 7,000 people a day die in the United States, and he wanted her to turn away from sin and put her faith in Jesus Christ before it is too late. (R. 36-35, 36).

Aish testified that the video Kindschy took and admitted into evidence (Pet. Ex. 2) shows the usual volume and tone of his voice. Aish modulates his voice based on how close or how far away he is from the person he is speaking to. (R. 36-36, 37).

Aish never sought to block Kindschy's ingress or egress. (R. 36-37, 38). He was present at the clinic one evening when the police came and stated the clinic workers had called and said he was blocking them, but, in fact, the workers had not yet come out to leave. (R. 36-40, 41). The workers frequently called the police and, apparently, reported Aish to the FBI on at least one occasion. (R. 36-39, 40).

Aish confirmed that the clinic employees routinely recorded him as they left the building and that the Blair Planned Parenthood had security cameras, but Kindschy only offered the February 18, 2020 video as evidence of purported threatening or harassing behavior by Aish. (R. 36-39; Pet. Ex. 2).

Testimony of Anna Aish

Anna Aish ("Anna") is Aish's wife of 21 years. They have two daughters, a 16 year old and a 9 year old. (R. 36-49). About ten years before, she and Aish started going to the Black River Falls Clinic to counsel abortion-minded women, trying to save them and their babies. (R. 36-50, 51). When Black River Falls closed, they started going to the next closest clinic. (R. 36-51).

They give the mothers Christian literature with pictures of babies in the womb at various stages of development. Anna and Aish try to help the women. They encourage them to change their minds and offer to talk with them and direct them to a clinic that performs ultrasounds. (R. 36-51).

They started doing the same things at the Blair Planned Parenthood. There are anywhere from a few protesters (Anna and her two daughters and Aish when "he can still go") and ten protesters at the clinic. (R. 36-51, 52). Anna has been present when Aish ministers to the clinic employees. She testified that Aish is very passionate about trying to help them see what they are doing is wrong and they pray they will change their hearts. He does not do this to be mean but to help them. (R. 36-53, 54). He has never threatened Kindschy nor spoken about wanting to hurt her. (R. 36-54).

The Circuit Court's Ruling in Favor of Kindschy

The Circuit Court found Aish "to be very credible as to what happened on the incidents, as well as his positions on his religious beliefs." (R. 36-80).

The Court concluded Kindschy appeared credible, but also found, "there was sometimes where it seemed as though she might have maybe blended some of the days" and "[t]here were times when her recollection wasn't exactly clear on certain details." For example, the Court noted there

was testimony from Kindschy that on February 18th, 2020, Mr. Aish said "bad things would happen to her" but, based on the Circuit Court's review of Exhibit 2, "that wasn't said." The Court also found the other witnesses to be credible. (R. 36-80).

Nonetheless, the Circuit Court found Aish engaged in intimidation of Kindschy. The Court acknowledged that Aish was a frequent protester at the Blair Planned Parenthood where Kindschy works, and that "a number of contacts in late 2019 and early 2020 between Mr. Aish and Ms. Kindschy that ... were directed towards Ms. Kindschy" had occurred. The Circuit Court concluded, "[t]he February 18th, 2020 video clearly points out that Mr. Aish is talking to Ms. Kindschy," that he asked her, "I believe you are a professing Christian," and he then made the statement, "You are Lutheran if I remember right." The Court further stated, "It appears from the video it was directed towards Ms. Kindschy, so I don't find that Mr. Aish was just making generic comments out loud to anybody who would hear, that they were specifically directed to Ms. Kindschy". (R. 36-81).

The Circuit Court, however, recognized that "Mr. Aish also testified himself that he directs comments towards people and tries to engage in

dialogue to -- in order to pass the message that he's trying to convey." (R. 36-82).

With regard to whether Aish's comments were "harassing" or "intimidating," the Court stated, "Clearly, Ms. Kindschy was annoyed and bothered by it working for Planned Parenthood and a protester against the things that Planned Parenthood does. I'm not surprised that an employee there is -- felt harassed or felt bothered by that. I think the Court's, I guess, bigger concern here is the intimidation."

The Circuit Court determined that Aish intimidated Kindschy based on comments he made on October 8, 2019, February 18, 2020, and February 25, 2020. The Court found that, on October 8, 2019, "Mr. Aish stated that [Kindschy] has time to repent and that 'it won't be long before bad things will happen to you and your family' and 'you could get killed by a drunk driver tonight.'" As to February 18, 2020, the Court concluded Aish stated to Kindschy, "'I pray you guys make it home safely for another day or two until you turn to Christ and repent. You still have time.'" With respect to February 25, 2020, the Court stated Aish indicated that Kindschy would be lucky if she made it home safely. (R. 36-82, 83).

The Circuit Court concluded those statements "appear to be intimidating," even in the context that is presented here where Aish is "trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus." The Court found Aish was "trying to share the gospel, and also has a stance of being against the things that Planned Parenthood does, which include abortions.....". The Court further concluded, "I believe based on the testimony that the protest was the fact that Planned Parenthood itself, even though not at this particular facility, is engaged in procedures that result in the loss of life of unborn children and that is what Mr. Aish was wanting to stop or change…." The Court concluded:

> Even in that context that that would be intimidating to tell somebody, even if it's in the context of wanting to send this message and even coming from a place of love or nonaggression, which I didn't find any aggression in the February 18, 2020 video, and Ms. Kindschy testified that the other incidents were similar in nature as to tone, although there was some testimony that Mr. Aish was loud or aggressive. Based on the testimony here I think it's more likely that Mr. Aish is passionate about his beliefs and not that he was being angry or aggressive; however, that doesn't mean that somebody can't on the receiving end feel that it was aggressive or loud. But, nonetheless, I do find that there was intimidation Mr. Aish made towards Ms. Kindschy, these statements of "bad things happening to you and your family" and 'you're lucky if you make it home safe.' Those types of things certainly would intimidate somebody because they lead to -- they are

> statements that address somebody's loss of life or their family members being hurt or harmed and certainly that would intimidate somebody. (R. 36-84).

The Court found Aish engaged in a course of conduct and a repeated committing of acts which intimidated or harassed Kindschy. (R. 36-85). The Court then addressed whether "the intimidation serves any legitimate purpose." (R. 36-85). The Court found the purpose was "to scare" Kindschy to persuade her to leave her employment "or to stop doing what she was doing" (R. 36-85, 86), and to get Kindschy "to ... adopt Mr. Aish's religious beliefs." (R. 36-86).

The Court held these were not legitimate purposes because:

> We live in a country where not everybody has the same religious beliefs.... [W]e live in a country where ... freedom of expression and religion is -- is a right that people have and so to say that -- that to force someone -- or not force someone, to scare someone through things that may from the perspective of someone's religious beliefs might be important to tell somebody, somebody else could look at that as being scared or intimidated to change their religion or change how they're living in their religion or to change their job and to use a religious basis for that. I don't see here in the state of Wisconsin or the United States that that is a legitimate purpose for expressing someone's religious rights... but I think it's difficult because I think on one hand you have Mr. Aish expressing his First Amendment rights to protest and have his opinions and his views on this and the question is has this gone too far to the point where the Court by its order here today is going to say no, you can't express that and in particular to this person or in this manner, I think that's -- it's very serious. These are First Amendment rights that are very

> guarded and protected in our nation and in our state; but, on the other hand, to then say that Ms. Kindschy is to endure being intimidated with statements that make her have to even think about that she might get killed on her way home or bad things are going to happen to her and her family, I think that that crosses the line into an area of not -- not a legitimate purpose in this particular case (R. 36-88, 89).

The Court further stated:

> I think it's hard to really adopt Mr. Aish, his argument, that this was done to be concerning for Ms. Kindschy and -- and her spirituality. It seemed more based on the context here that this was done to intimidate of getting her to change her job, so that Mr. Aish's underlying goal of her stopping or ending Planned Parenthood could be achieved, and so for those reasons I'm going to find that Mr. Aish engaged in a course of conduct of repeatedly committed acts that harassed and certainly intimidated Ms. Kindschy and that those intimidation actions did not serve any legitimate purpose, as I don't find it's a legitimate purpose to use that intimidation to get someone to leave their job because the person making the intimidating statements doesn't agree with the position of that employment or what that employer stands for, and I don't also believe that it's a legitimate purpose to intimidate someone to get them to change or reaffirm their religious beliefs. I don't believe that that's a legitimate purpose here. (R. 36-89, 90).

The Court entered an injunction/order of protection against Aish that is to remain in place until September 9, 2024. Among other things, the injunction ordered Aish to avoid Kindschy's residence and/or any premises temporarily occupied by her and to avoid contact that that harasses or intimidates Kindschy. The Court ruled that the injunction covers the Blair

Planned Parenthood whenever Kindschy is or might be at work or otherwise present there. (R. 23-2, 3; R. 36-91, 92, 93, 94).

ARGUMENT

I. The Circuit Court Erred in Finding That Comments Allegedly Made by Aish On October 8, 2019, February 18, 2020 and February 25, 2020 Constitute Harassment as Defined by Wis. Stat. § 813.125.

A. The Comments Upon Which The Circuit Court Based Its Harassment Finding Called Attention to Dangers That Everyone Knows Exist And Do Not Constitute Harassment.

As relevant to this case, Wis. Stat. § 813.125(1) defines "harassment" to mean, "Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose."[2] The Circuit Court determined that Aish harassed and intimidated Kindschy based on comments Aish allegedly made on October 8, 2019, February 18, 2020 and February 25, 2020 that implicitly alluded to or explicitly referenced the fact that bad things, like car accidents and drunk

[2] Wis. Stat. § 813.125 also defines "harassment" to include, "1. Striking, shoving, kicking or otherwise subjecting another person to physical contact; engaging in an act that would constitute abuse under s. 48.02(1), sexual assault under s. 940.225, or stalking under s. 940.32; or attempting or threatening to do the same." Kindschy never alleged, and there was no certainly evidence that Aish committed any of the foregoing acts.

drivers, could happen to her and her family so she should repent while she still has time. (R. 36-82, 83).[3] The Circuit Court found those comments constituted intimidation because "they are statements that address somebody's loss of life or their family members being hurt or harmed and certainly that would intimidate somebody." (R. 36-84). It held Kindschy was entitled to protection from "statements that make her have to even think about that she might get killed on her way home or bad things are going to happen to her and her family...." (R. 36-89).

However, there was no evidence, and no finding by the Circuit Court, that Aish threatened Kindschy or otherwise suggested that Aish might play a role in any bad thing that might happen to Kindschy or her family. The Court's finding that making statements referring to dangers everyone knows exist constitutes harassing and intimidating conduct within the scope of Wis.

[3] The Court found Aish to be "to be very credible as to what happened on the incidents, as well as his positions on his religious beliefs." (R. 36-80). Aish never testified that he made any statements to Kindschy referencing her family. There was no testimony regarding any family Kindschy may have and no evidence that Aish had any knowledge relating to any family Kindschy might have. Kindschy, on the other hand, claimed that Aish referenced her family on October 8, 2019, by stating it would not be too long before bad things started happening to her and her family. (R. 35-27). With respect to February 18, 2020, Kindschy testified Aish said that bad things were going to start happening to her family." (R. 35-15, 16). The recording (Pet. Ex. 2), however, disproves that claim. Kindschy did not claim that Aish made any reference to her family on February 25, 2020. Although the Court also found Kindschy was credible, it qualified that finding noting her recollection on certain details wasn't clear and that sometimes it "seemed as though she might have maybe blended some of the days in describing." (R. 36-80).

Stat. § 813.125 is unprecedented. Counsel has been unable to identify any case construing Wis. Stat. § 813.125 in such a manner.

Moreover, the Circuit Court found that Aish's comments were intimidating, even though it concluded they came from "a place of love or nonaggression" (the Circuit Court found Aish did not act angrily or aggressively). (R. 36-84). In *Welytok v. Ziolkowki*, 2008 WI App 67, ¶ 18, 312 Wis. 2d 435, 752 N.W.2d 359, the Court of Appeals noted that "intimidate means to make timid or fearful." Implicit in the concept of intimidating someone is to act with a purpose of creating timidity or fear of the person doing the alleged intimidating. The Circuit Court held that Aish intimidated Kindschy within the meaning of the statute by drawing her attention to the reality of commonplace but serious dangers even though there was no explicit or suggested causal relationship to Aish. See *Welytok*, 2008 WI App 67, ¶ 18.[4] In other words, the Circuit Court found that Aish intimidated Kindschy, not by causing her to fear him, but by causing her to

[4] In *Welytok*, the Court remarked, "Mrs. Welytok has certainly discussed her fear of Mr. Ziolkowski's repeated pattern directed at her." *Welytok*, 2008 WI App 67, ¶ 18. That pattern included the respondent blocking the petitioner's path and yelling at her, threats to take away the petitioner's law license, contacting petitioner's business associates and a litany of other misconduct.

think about the unfortunate but obvious reality that bad things, like car accidents, happen every day and can happen to anyone and their families. Under these circumstances, no grounds exist for the imposition of the injunction. See *Welytok v. Ziolkowki*, 2008 WI App 67, ¶ 25.

Aish's conduct, as displayed in Kindschy's February 18, 2020 video was, by Kindschy's own admission, typical of his behavior on other occasions which Kindschy alleged in support of her claimed need for an injunction. (R. 35-39, 40). The video clearly establishes that Aish engaged in no conduct with the purpose to harass and intimidate Kindschy.

If the Circuit Court's flawed construction of Wis. Stat. § 813.125 were correct, the statute would be necessarily unconstitutional. As the Supreme Court explained in *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S.Ct. 1207 (2011), speech regarding public affairs, as opposed to speech regarding purely private matters, is entitled to special protection. "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Id.* at 453. [Citations omitted throughout.]

Abortion, and whether Planned Parenthood can continue to find people to employ and remain in business, are matters of public concern. "Such speech cannot be restricted simply because it is upsetting or arouses contempt. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'" Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" *Id.* at 458. [Citations omitted throughout.] If, as the Circuit Court (erroneously) found, Wis. Stat. § 813.125 prohibits the utterance of words on a matter of public concern on a public sidewalk simply because the words might result in upsetting someone, it is unconstitutional. Even if Aish's statements to Kindschy could be deemed "upsetting", "offensive" or "disagreeable", they are protected by the First Amendment.

B. The Circuit Court Erred in Finding That Comments Allegedly Made by Aish On October 8, 2019, February 18, 2020, and February 25, 2020 Served No Legitimate Purpose.

Aish contended that his conduct was protected by the First Amendment (R.36-24, 25, 77, 78), and the Circuit Court explicitly recognized that Aish was exercising his First Amendment rights to protest

and proclaim his opinions and his views. (R. 36-88). The Circuit Court found that Aish's comments were intended to influence Kindschy to leave her employment in furtherance of his goal of shutting down Planned Parenthood (R. 36-86, 89), and to embrace his religious perspective. (R. 36-86). The comments at issue were made in the context of attempting to convey Aish's message regarding the need for urgent action. The Circuit Court found that Aish's intended purposes - "saving the lives of unborn children and also from -- from the religious perspective of saving Ms. Kindschy's soul by sharing the gospel," were not legitimate because Aish went "too far." (R. 36-86, 87, 88, 89).

The Circuit Court's decision is contrary to controlling precedent interpreting Wis. Stat. § 813.125(1). In *Bachowski v. Salamone*, 139 Wis.2d 397, 408, 407 N.W.2d 533, 537-538 (1987), this Court explained that Wis. Stat. § 813.125 prohibits harassment and intimidation intended to harass. The Supreme Court stated, "It is clear from sec. 813.125, Stats., that chronic, deliberate behavior, with no legitimate purpose designed to harass another person is proscribed by the statute." The Supreme Court further concluded the statute is not overbroad and does not chill free speech because:

The intent requirement and the phrase "no legitimate purpose"

> make clear that protected expression is not reached by the statute. *See* Model Penal Code sec. 250.4 comment 6 at 371-72. It is not directed at the exposition of ideas but at oppressing repetitive behavior which invades another's privacy interests in an intolerable manner. *Bachowski*, 139 Wis.2d at 411, 407 N.W.2d at 539.

Similarly, in *Board of Regents-UW System v. Decker*, 2014 WI 68, ¶42, the Court upheld the injunction at issue based on "ample evidence" that the respondent "engaged in harassment with the intent to harass." The Court rejected the respondent's claim that he had a legitimate First Amendment purpose - protesting student fees. However, the evidence in that case established:

> [F]irst, [respondent] swore at and threatened the [University] Chancellor in a meeting and stabbed the Chancellor's documents with a pen during a heated argument. Second, [respondent] told the suspension committee that he had no intention of complying with his suspension, and [respondent] was aware his suspension prohibited him from entering [University] property. Third, [respondent] trespassed on [University] property on numerous occasions after his suspension and disrupted several university meetings. Fourth, [respondent] attempted to purchase a handgun immediately after police endeavored to serve him with a restraining order. *Board of Regents-UW*, 2014 WI 68, ¶40.

The Court determined that the respondent's right to protest on the University of Wisconsin's property could be properly restricted "when he engages in harassment with the intent to harass or intimidate." *Board of Regents-UW*,

2014 WI 68, ¶45.

In this case, the Circuit Court specifically found that Aish was not engaged in harassment with an intent to harass. See *Board of Regents-UW System v. Decker*, 2014 WI 68, ¶42, 355 Wisc.2d 800, 850 N.W.2d 112. Instead, as previously noted, the Circuit Court found that the comments Aish made were in furtherance of two First Amendment protected goals - an attempt to influence Kindschy to leave her work with Planned Parenthood (in furtherance of Aish's efforts to shut down Planned Parenthood) and to proselytize. (R. 36-86, 89), The Court manifestly erred in interpreting and applying the statute to reach protected expression and in determining Kindschy has a greater interest in not hearing words that might cause her to contemplate negative realities than Aish has in exercising his First Amendment rights and expressing his pro-life, anti-Planned Parenthood, Christian viewpoint.

Under these circumstances, the Circuit Court misinterpreted and. misapplied the statute in determining Aish had no legitimate purpose for his statements to Kindschy.

II. The Injunction Impermissibly Infringes Upon Aish's First Amendment Rights.

The Circuit Court entered a four-year injunction which effectively bans Aish from conducting any First Amendment protected activity at the Blair Planned Parenthood because he may not be present whenever Kindschy is or might be at work or otherwise present at the clinic. (R. 23-2, 3; R. 36-93, 94). Although the Circuit Court indicated Aish could be present at the Blair Planned Parenthood when Kindschy was not present, the evidence was that the Blair Planned Parenthood was only open on Tuesdays and that Kindschy worked there on Tuesdays. (R. 35-6). There was no way Aish could know when, for some reason, Kindschy would not be at the Blair Planned Parenthood. The Court effectively recognized that Aish was completely banned from protesting at the Blair Planned Parenthood, stating, "If somehow he were to know that she's not there for certain, then I don't see any violation of the order, but if she's there or even if I would say even if he's unsure, that's really risky, because if she's there and he's there that's a violation of this order." (R. 36-93).

The Supreme Court of the United States has consistently held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) [Citations omitted.]

Because of this, the "Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *Id.* [Citation omitted.]. An order which restricts First Amendment rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968).

As previously discussed, Aish's opposition to Planned Parenthood because of its participation in abortion is First Amendment expression on a matter of public interest. Abortion remains a hotly contested political and social issue. As Aish's opposition to Planned Parenthood and efforts to spread a pro-life, Christian message relate to matters of public concern, his message is accorded the highest level of First Amendment protection. The injunction entered by the Circuit Court is invalid because it impermissibly effectively completely bans Aish from exercising his First Amendment right to protest at the Blair Planned Parenthood. It fails to meet the "heavy burden of showing justification for the imposition of such a restraint." See *New York Times Co*, 403 U.S. at 714.

CONCLUSION

The law does not support the issuance of an injunction, based on non-threatening statements made without the intent to harass or intimidate for the sake of harassment or intimidation. Aish's exercise of his First Amendment rights constitutes a legitimate purpose for statements he made to Kindschy. The Circuit Court's findings that Aish did not act with aggression, but with a pro-life purpose of influencing Kindschy to leave her employment with Planned Parenthood and to repent, fundamentally conflict with its determination that, nonetheless, Kindschy was entitled to a four-year injunction that effectively bars Aish from conducting any First Amendment advocacy at the Blair Clinic Planned Parenthood. The injunction unnecessarily and impermissibly censors Aish's speech.

Accordingly, Aish respectfully requests that this court vacate the order for the injunction entered on September 9, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this document conforms to the rules contained in '809.19(8), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this document is 7,634 words.

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief. I also hereby certify that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated this 29th day of April, 2021.

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STATE OF WISCONSIN
COURT OF APPEALS
District III
Appeal No.: 2020AP1775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant.

CERTIFICATION OF MAILING

Pursuant to Wis. Stat. 809.80(3)(b), I hereby certify that on the 28th day of April, 2021, I mailed in a properly enclosed postage-paid box a copy of the Respondent-Appellant's Brief and Appendix addressed to the following named person(s) at the proper post office address, to-wit:

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names

and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I further certify that I have submitted an electronic copy of this appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

I further certify that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix.

Dated this 29th day of April, 2021.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS:

A. Injunction-Harassment (Order for Protection) entered September 9, 2020.

B. Transcript of Judge Radtke's oral findings and ruling on September 9, 2020.