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

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant.

BRIEF OF PETITIONER-RESPONDENT

APPEAL FROM A FINAL ORDER OF THE TREMPELEAU COUNTY CIRCUIT COURT, THE HONORABLE RIAN W. RADTKE, PRESIDING

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STATEMENT OF THE ISSUES

1. Did the circuit court correctly rule that Brian Aish's ("Aish's") conduct toward Nancy Kindschy, including his physical proximity and statements implying threat of harm to her and her family are harassment pursuant Wis. Stat. § 813.125?

The circuit court answered, "Yes."
This Court should answer, "Yes."

2. Did the circuit court currently determine that the injunction did not violate Aish's First Amendment right to free speech?

The circuit court answered, "Yes."
This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs of the parties fully present the issues and relevant legal authority.

Publication is not warranted because the issues can be resolved by application of well-settled law.

SUPPLEMENTAL STATEMENT OF FACTS

Nancy Kindschy ("Kindschy") has worked as a nurse practitioner at the Blair Health Center, which is operated by Planned Parenthood of Wisconsin since August, 2019. (R35:4-5[1]). The Blair Health Center provides family planning services; it is not an abortion clinic, (R35:29), and Aish knows this. (R36:27).

Since 2014, Aish has protested at various family planning clinics where Kindschy has been employed. (R35:5, 10, 21, 29). Earlier interactions between Aish and Kindschy had been less confrontational conversations about Aish and his beliefs. (R35:11, 22, 29). However, in Fall 2019, Aish's

[1] Citations to the record will be indicated by R[document number]:[page number].

behavior toward Kindschy significantly changed. On October 8, 2019, instead of standing on the sidewalk with a sign where he usually protested, Aish followed Kindschy to her car. (R35:7). While standing approximately three to four feet from her car, Aish stated that Kindschy 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. (R35:27). Additionally, on October 15, 2019, Kindschy observed Aish's demeanor to be cold, angry, and loud. (R35: 14).

In following encounters, Aish's behavior continued to be aggressive toward Kindschy and frightened her. (R35:15). On October 29, 2019, when Kindschy was leaving work, Aish "ran out into the road after [her] pumping his anti-abortion sign into [her] car window within inches of it." (R35:14).

Aish specifically singled out Kindschy from her fellow employees. (R35:19; R36:19). On February 18, 2020, as Kindschy left work, Aish followed Kindschy directly to her vehicle. (R35:15). Aish stated that Kindschy would be lucky if she got home safely, she could possibly be killed, and that bad things were going to start happening to her family. (R35:15-16, 64). And on February 25, 2020, Aish accused Kindschy of lying to the authorities about him and told her that she would be lucky to make it home safely, which caused her "great concern." (R35:19).

Fearing for her safety, Kindschy petitioned for a harassment injunction against Aish on March 10, 2020. (R1). The Honorable Rian W. Radtke held a hearing on July 13 and September 9, 2020. (R35, 36).

During the hearing, the circuit court heard testimony from Kindschy; her co-workers, Shonda Racine and Jessica Berenak; Aish; and his wife, Anna Aish. (R35, R36). The witnesses testified concerning the

incidents on October 8, 15, and 29, 2019 and February 18 and 25, 2020 at the Blair Health Center. (R35, R36). The circuit court also reviewed video footage of the incident on February 18, 2020. (R24).

The circuit court found Kindschy and her supporting witnesses to be credible. (R-App. 006;[2] R36:80).

Based on the evidence, the circuit court found Aish repeatedly committed acts that intimidated and harassed Kindschy. (R-App.011; R36:85). The circuit court found that Aish's repeated statements that Kindschy would be lucky if she made it home safely and that bad things would start happening to her family were threatening. (R-App.008, 009; R36:82, 83). The circuit court found that Aish used intimidation with intent to scare Kindschy into quitting her employment with Planned Parenthood. (R-App.011-15; R36: 85-89, 95). The court issued an injunction against Aish barring him, until September 9, 2024, from harassing Kindschy and requiring him to avoid Kindschy's residence or any premises temporarily occupied by her, including the health care center at which she works (R-App.001; R23; R-App.017-20; R36:91-94).

Aish filed Motion for Reconsideration, arguing 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." (R26). On October 5, 2020, the Circuit Court denied the Motion (R26). This appeal follows.

Additional facts will be incorporated, as necessary, in the brief.

[2] Respondent-Appellant's Appendix is paginated as R-App. We will utilize this same format when referencing his appendix.

STANDARD OF REVIEW

"The scope of an injunction is within the sound discretion of the trial court." *Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359. On appeal, the Court "review[s] a circuit court's decision to grant a harassment injunction for an erroneous exercise of discretion." *Id.*

"Though the decision to issue an injunction is within the discretion of the circuit court, in order to grant an injunction under Wis. Stat. § 813.125, the circuit court must find 'reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.'" *Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶ 20, 355 Wis. 2d 800, 814–15, 850 N.W.2d 112 quoting Wis. Stat. § 813.125(4)(a)3. This finding presents a mixed question of fact and law. *Decker,* 2014 WI 68, ¶ 20. A reviewing court will uphold the factual findings of the circuit court unless they are clearly erroneous. *Id*. However, whether reasonable grounds exist to grant the injunction is a question of law that the court reviews *de novo*. *Id.*

ARGUMENT

I. The Circuit Court Correctly Concluded That Aish's Conduct Toward Kindschy Was Harassment.

Under Wisconsin Statutes, § 813.125(1)(am)(2), "harassment" is defined as:

> (1) Engaging in a course of conduct or repeatedly committing acts
> (2) which harass or intimidate another person, and
> (3) which serve no legitimate purpose.

Under this statute, following a hearing, the judge may grant an injunction limiting the respondent's contact with the petitioner if the judge "finds reasonable ground to believe that the respondent has engaged in

harassment with intent to harass or intimidate the petitioner." Wis. Stat. § 813.125(4)(a)3. The record here supports the circuit court's injunction.

A. Aish repeatedly committed acts that harassed and intimidated Kindschy.

To "'harass' means 'to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger and 'intimidate' means 'to make timid or fearful.'" *Welytok*, 2008 WI App 67, ¶¶ 35-37 (citing *Bachowski v. Salamone*, 139 Wis. 2d 397, 407 N.W.2d 533 (1987)). Aish's conduct toward Kindschy between October 2019 and February 2020 was repetitious, harassing, and intimidating. The evidence demonstrates that Aish exhibited a pattern of repeated actions toward Kindschy that created her to worry and be fearful for herself and her family (R35:7-45; 48-51; R36:8-11).

Aish repeatedly got physically close to Kindschy and verbally accosted her, causing her to be worried about her personal safety. First on October 8, 2019, Aish followed closely behind Kindschy all the way to her car. (R35:7). While standing approximately three to four feet from her vehicle, Aish said to Kindschy, in a raised and direct voice, that Kindschy would possibly 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. (R35:7, 27, 28). The combination of Aish's words and his physical proximity to her car frightened Kindschy. (R35:7, 10).

At the time of the October 8, 2019 incident, Kindschy had known Aish as a protestor for six years; however, she previously had not heard him make statements indicating that she would be killed or that harm would come toward her family. (R35:10-11). Kindschy testified that in the previous years, when Aish approached her, he spoke nicely to her and

discussed his beliefs, his mission, and would tell her to have a nice day. (R35:11, 22, 29). As a result, Kindschy was very frightened not only by Aish's proximity and words, but by the change in his demeanor. (R35:19).

On October 15, 2019, Kindschy discovered that Aish's change in demeanor was not a singular event. As she was leaving the health center, she observed Aish being loud and aggressive,. (R35:12). She saw Aish receive a ticket from a police officer. (R35:12). She was scared of Aish's aggressive and angry behavior. (R35:12). Aish approached her vehicle and said to her in an angry, cold, and loud tone "you have blood on your hands." (R35:14). Two weeks later on October 29, 2019, Aish displayed additional conduct that made Kindschy feel threatened, when in response to her ignoring him, Aish "ran out into the road after [her] pumping his anti-abortion sign into [her] car window within inches of it." (R35:16).

On February 18, 2020, as Kindschy left work, Aish again followed her directly to her vehicle. (R35:15). Aish accused Kindschy of being a liar. (R35:15). And again, Aish stated that Kindschy 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. (R35:15, 63-64). On February 25, 2020, Aish accused Kindschy of lying to the authorities about him and threatened that she would be lucky if she were able to make it home safely. (R35:19). Kindschy testified that she felt threatened by and scared of Aish. (R35:12, 16-17, 19, 42).

The evidence established pattern of repeated actions that scared Kindschy. (R35:12, 16-17, 19, 42) Aish approached Kindschy's repeatedly over the course of months and during each unsolicited interaction, he berated Kindschy with veiled threats suggesting harm toward both Kindschy and her family, falsely accusing Kindschy of actions she did not

commit, and berating her. (R35:5-42, 48-51; R36:8-11). Aish's actions were troubling not only because of the content of his words and his physical proximity, but because of his more aggressive behavior.

Kindschy's was not alone in her distress about Aish's conduct toward her. Kindschy's colleagues, Shonda Racine and Jessica Beranek each testified that they personally observed Aish specifically targeting Kindschy. (R35:48-51; R36:11-15, 17-19). The circuit court found that Kindschy's testimony was credible, as was that of her colleagues. (R-App.006; R36:80).

Aish's behavior was intimidating. Kindschy was frightened because of Aish's statements and actions. (R35:7, 10, 12, 17, 19). And by February 25, 2020, she felt Aish was threatening her. (R35:17, 19). For example, Kindschy testified: "He said that I had been a liar and I lied to the authorities about him, and then he said that I would be lucky if I'm able to make it home safely." (R35:19). This statement is an implicit threat of harm to Kindschy.

Aish appears to want this Court to believe that he was merely "drawing her attention to the reality of commonplace but serious dangers" and that there "was no explicit or suggested causal relationship to Aish" and these dangers. (Appellant's Brief at 32). Without citation to the record, Aish erroneously claims "the Circuit Court found that Aish intimidated Kindschy, not by causing her to fear him, but by causing her to think about the unfortunate but obvious reality that bad things, like car accidents, happen every day and can happen to anyone and their families." (Appellants Brief at 32-33).

This claim is not supported by either Kindschy's testimony, other testimony, or the court's oral ruling. Kindschy testified that she was scared

of Aish, (R35:12, 16, 17, 19, 42); not that she was suddenly fearful that she or her family might be the victim of some wholly unrelated accident or other bad thing. Ms. Beranek observed that Kindschy appeared scared and nervous, walking quickly to her car to avoid Aish. (R36:18). She did not testify that Kindschy appeared to be nervous or scared about "dangers that everyone knows exist" brought to her attention by Aish. The health center added a security guard and security cameras, to address Kindschy's concerns about Aish while he was onsite, (R1:5; R36:9, 20)—not some other potential but random, unfortunate life event.

It would be absurd if a court could not consider veiled threats as harassment and could only issue an injunction if the respondent expressly articulates that it will be the respondent who will cause the petitioner harm. Fortunately, there is no such standard in Wisconsin law.

The Court should uphold the circuit court's finding that Aish's pattern of conduct toward Kindschy was harassing and intimidating pursuant Wis. Stat. § 813.125.

B. Aish's conduct was not for a legitimate purpose.

The circuit court correctly found that Aish's conduct was not for a legitimate purpose. (R-App.012-20; R36:86-95).

Without a record citation, Aish falsely claims that "the Circuit Court specifically found that Aish was not engaged in harassment with an intent to harass. (Appellant's Brief at 37). Actually, the court found that Aish intended to use intimidation and scare tactics to pressure Kindschy to quit her job at the health center. (R-App.011-15; R36:85-89, 95). The court notes that this is not protected speech (R-App.013-14; R36:87-88). The court

refused to accept Aish's claim that Aish's actions were done out of a concern for Kindschy or her spirituality. (R36:95).

Despite Aish's stated intent related to his views on abortion, it is notable that Kindschy does not work at an abortion clinic and does not perform abortions. (R35:29; R-App.0 09; R36:83). And Aish knows this. (R36:27) Nonetheless, Aish approached Kindschy week after week as she was leaving work to accuse her of having blood on her hands, to accuse her of lying about him, and to make statements and veiled threats about death and harm coming to her and her family. (R35:7, 10, 12, 17, 19). Aish specifically targeted Kindschy, (R35:19; R36:19), and repeatedly frightened her with his words and actions. (R35:7, 10, 12, 17, 19).

Aish testified that he wanted Kindschy to quit working at the clinic. (R36:33-35) The court found that Aish's goal was to get Kindschy to quit her employment with Planned Parenthood and possibly to get her to adopt his religious views. (R-App.013-14; R36:87-88, 95). Specifically, the court determined that 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[.]" (R-App.015; R36:89). The court declined to find a legitimate purpose in intimidation to get someone to leave their job because the person making the intimidating statements does not agree with the position of that employment or what that employer stands for. (R-App.015-16; R36:89-90). The court also indicated that using force or targeted scare tactics, in the manner that Aish did, in order to sway Kindschy's religious beliefs was not protected activity. (R-App.011-12; R36:85-86, 95). The court rejected Aish's assertion that his actions were done out of concern for Kindschy's spirituality. (R36:95).

Aish's claim that his "protests" are fully protected under the First Amendment is inconsistent with the law. Harassing behavior cannot be transformed into non-harassing, legitimate conduct simply by labeling it as a "protest." The Court rejected that notion in *Decker*, 2014 WI App 68 ¶36. As the Court of Appeals explained:

> Taken to its logical conclusion, this argument suggests that if an individual has both a legitimate and an illegitimate purpose, the legitimate purpose automatically protects the individual's conduct from being enjoined. Put another way, according to [this] logic, conduct done with both the purpose of protesting and the purpose of harassing cannot constitute harassment. This is a senseless argument that flatly contradicts our holding in *Bachowski* that intentionally harassing conduct can never serve a legitimate purpose.

Id.

Here, Aish cannot shield his harassing conduct from regulation by labeling it "protest." Consistent with *Decker*, because at least some of his conduct harassed the Petitioner, his conduct may be enjoined under Wis. Stat. § 813.125. Therefore, the Court should uphold the circuit court's finding that Aish's conduct was not for a legitimate purpose.

II. The Injunction Does Not Violate the First Amendment.

Contrary to Aish's argument, the mere fact that one is a protester does not give that person *carte blanche* to intimidate or harass others and claim First Amendment protections.

It is well established that an individual's ability to protest is not unlimited. *Decker*, 2014 WI 68, ¶ 44 (upholding an injunction against a student protesting student fees); *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 683, 112 S.Ct. 2701 (1992) (upholding statute which restricts distribution of literature in airport terminal); *Frisby v. Schultz*, 487 U.S. 474, 486, 108 S.Ct. 2495 (1988) (upholding ordinance

prohibiting picketing before or about the residence or dwelling of any individual).

Likewise, the right to protest abortions is not unfettered. The United States Supreme Court upheld a Colorado statute which banned anti-abortion protesters from approaching patients and employees entering or leaving clinics, which had been challenged on First and Fourth Amendment grounds. *Hill v. Colorado*, 530 U.S. 703 (2000). In *American Life League v. Reno*, 47 F.3d 642 (4th Cir. 1995), the Fourth Circuit upheld the constitutionality of the Freedom of Access to Clinic Entrances Act of 1994, a federal law enacted to limit anti-abortion activists who had become increasingly violent in their attempts to shut down or disrupt abortion clinic operations.

Furthermore, Aish's contention that any conduct done in the name of anti-abortion protest is public in nature and therefore subject to special protection must be rejected (Appellant's Brief at 33-34, citing *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S.Ct. 1207 (2011)). To be clear, Aish was not protesting at an abortion clinic, the State Capitol, or the like. His efforts were not geared toward changing the minds of the public or legislators. Rather, he was attempting to get Kindschy to change her mind and to resign her position as a nurse practitioner at the health center. (R-App.015-16; R36:33-35, 89-90). In other words, he was attempting to get a private citizen to end her employment with a private organization. His efforts were personal—and not public—in nature. This is true even if his actions were part of some larger idea or scheme that he would make it difficult for Planned Parenthood to retain staff. Aish focused on Kindschy and her personal professional employment with Planned Parenthood and there is

no protected interest in harassing people to motivate them to quit their jobs.

The circuit court recognized the importance of Aish's First Amendment right to protest and express his religious beliefs. (R-App.014; R36:88). However, the court correctly found that there is no First Amendment right to threaten or scare people in order to sway their religious beliefs or quit their jobs and properly concluded that Aish had engaged in harassment that was not protected by the First Amendment. (R-App.011-20; R36:85-95).

The First Amendment does not provide a basis to vacate the harassment injunction issued to Nancy Kindschy against Brian Aish.

CONCLUSION

As set forth in the record and above, the circuit court considered the evidence presented at hearing, applied the proper legal standard, and correctly concluded that Brian Aish was harassing Nancy Kindschy. Therefore, Ms. Kindschy respectfully requests that this Court uphold the order for the injunction entered on September 9, 2020.

Respectfully submitted this 29th day of June, 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,078 words.

Dated this 29th day of June, 2021.

Electronically signed by:
Diane M. Welsh

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

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 by electronic filing or by paper copy.

Dated this 29th day of June, 2021.

Electronically signed by:
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this brief to be served on the following by placing the same in the U.S. mail, first class postage, on June 29, 2021 as addressed below:

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