

FILED
07-26-2021
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 REPLY BRIEF

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

Respectfully Submitted,

THOMAS MORE SOCIETY
Joan M. Mannix
Illinois State Bar No. 6201561
Admitted Pro Hac Vice

BUTING, WILLIAMS & STILLING S.C.
Dudley A. Williams
State Bar No.: 1005730

Address:

135 South LaSalle St.
Chicago, IL 60601
Phone: 312-521-5845

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
ARGUMENT	4
I. The Circuit Court Erred In Finding That Aish Harassed And Intimidated Kindschy..	4
A. Aish Did Not Intimidate Or Harass Kindschy	4
B. Aish’s Conduct Served Legitimate, First Amendment- Protected Purposes	9
II. The Injunction Violates The First Amendment.	11
CONCLUSION	13
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(c)(2).....	14
CERTIFICATION OF MAILING	15

TABLE OF AUTHORITIES

WISCONSIN CASES:

<i>Welytok v. Ziolkowki</i> , 2008 WI App 67, 312 Wis. 2d 435, 752 N.W.2d 359	5
--	---

OTHER CASES:

<i>American Life League v. Reno</i> , 47 F.3d 642 (4 th Cir. 1995).....	10
<i>Bachowski v. Salamone</i> , 139 Wis.2d 397, 407 N.W.2d 533 (1987)	8
<i>Board of Regents-UW System v. Decker</i> , 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 533 (1987).....	8,9
<i>Hill v. Colorado</i> , 530 US 703 (2000).....	10
<i>Snyder v. Phelps</i> , 562 U.S. 443, 131 S.Ct. 1207 (2011)	10

Wisconsin Statutes:

Sec. 813.125	5, 8
Sec. 947.013	5

ARGUMENT

I. The Circuit Court Erred In Finding That Aish Harassed And Intimidated Kindschy.

(Reply to Pet. Br., pp. 8-13).

A. Aish Did Not Intimidate Or Harass Kindschy.

In her “Supplemental Statement Of Facts” (Pet. Br., pp. 4-6), and her argument (Pet. Br., pp. 8-11), Kindschy seeks to justify the entry of the injunction against Aish based her own testimony. But Kindschy’s testimony repeatedly mischaracterized Aish’s conduct and was demonstrably inaccurate. Kindschy’s characterizations of Aish’s behavior were disproved by the video evidence, her admission that the February 18, 2020 video was demonstrative of the manner in which, on each of the dates between October 8, 2019 and February 25, 2020, Aish protested (R. 35-39, 40), and rejected in significant respects by the trial court.

With respect to the Circuit Court’s credibility determinations, Kindschy states that the circuit court found her and her supporting witnesses to be credible. (Pet. Br., p. 6). Although the Circuit Court stated Kindschy appeared credible, it recognized that her recollection was far from perfect, stating, “there [were] 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.” Even more problematic, the Circuit Court recognized

that Kindschy's testimony regarding the events of February 18, 2020, was inconsistent with the recording of those events. (R. 36-80).

Throughout her brief, Kindschy seeks to persuade this Court that Aish repeatedly physically approached close to her (see *e.g.*, pp. 5, 9, 10), but all of the evidence established that at all times he remained on public property and, at no time, invaded her "personal space." (See *e.g.* R. 35-14, 15, 16, 30, 42).

Moreover, Kindschy claims throughout her brief that the evidence established Aish's demeanor toward her was "troubling" because it changed and became "aggressive," "cold, angry and loud." (Pet. Br., pp., 4-5, 9-10). The Circuit Court, however, accepted Kindschy's testimony that all of the incidents upon which she premised her claim for an injunction were "similar in nature as to tone" to the videotaped February 18, 2020 encounter. (Pet. Ex. 2). The Circuit Court "didn't find any aggression in the February 18, 2020 video." (R. 36-84).¹

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

¹ As for Kindschy's supporting witnesses, like Kindschy, both Racine and Beranek characterized Aish's behavior as "aggressive," but as noted above, the Circuit Court as noted above, found that Aish was not aggressive. (See *e.g.*, R. 35-50, 51, 63; R. 36-14, 15).

Citing *Welytok v. Ziolkowski*, 2008 WI App 67, ¶¶35-37, Kindschy repeatedly claims that Aish's conduct caused her to worry, to be frightened, and be fearful for the safety of herself and her family (Pet. Br., pp. 8-11), but she fails to point to any evidence which she claims supports a conclusion that Aish made the comments at issue with an intent to harass or intimidate her. *Welytok*, however, makes clear that an injunction pursuant to Wis. Stat. §813.125 is only proper when the person accused of harassment and/or intimidation has acted "with intent to harass or intimidate another person," meaning, "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." See *Welytok* at ¶25, citing Wis. Stat., §947.013. Although the Circuit Court concluded someone could find some of Aish's comments intimidating, the Circuit Court made irreconcilably inconsistent findings as to whether Aish acted with an intent to harass or intimidate. The Circuit Court found that Aish was "trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus" and "trying to share the gospel, and also has a stance of being against the things that Planned Parenthood does, which include abortions...." (R. 36-83, 84). Further, The Circuit Court found Aish's comments were made "in the context of

wanting to send this message” and “coming from a place of love....” (R. 36-84).²

Instead of focusing on the innocent intent with which Aish made comments to Kindschy, the Circuit Court focused exclusively on the claimed impact of his comments on Kindschy. The Circuit Court stated, “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”. (R. 36-84). Similarly, with respect to Aish's statements relating to ““bad things happening to you and your family” and ‘you're lucky if you make it home safe’” the Circuit Court found, “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 Circuit Court also found:

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.

² The Circuit Court stated: “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.”

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....” (R. 36-89, 90).

As discussed in greater detail *infra*, in making those findings, the Circuit Court acknowledged that Aish’s purpose was to “stop[] or end[] Planned Parenthood” and to persuade Kindschy to embrace his religious perspective. (R. 36-89, 90). Those are legitimate First Amendment purposes.

Kindschy asserts, “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.’” (Pet. Br. p. 10). In fact, in his brief, Aish quoted the Circuit Court’s ruling that Aish’s statements were intimidating because they “address somebody’s loss of life or their family members being hurt or harmed.” (R. 36-84). The Circuit Court did not find that Aish threatened to harm Kindschy or her family. The Circuit Court concluded it was intimidating to cause Kindschy “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).

B. Aish's Conduct Served Legitimate, First Amendment-Protected Purposes.

Kindschy accuses Aish of “falsely” claiming “the Circuit Court specifically found that Aish was not engaged in harassment with an intent to harass.” (Pet. Br., p.11, citing Appellant’s Br., p. 37). Kindschy, however, acknowledges the Circuit Court found that Aish was attempting to persuade Kindschy to leave her employment with Planned Parenthood and to adopt his religious views. (Pet. Br., p. 12).³ The Circuit Court further determined that, to the extent one of Aish’s goals was to influence Aish to leave her job, that goal was intended to achieve his “underlying goal of her stopping or ending Planned Parenthood”. (R. 36-89, 90). These are legitimate purposes that show that Aish never harassed Kindschy with an intent to harass, as was the case in *Board of Regents-UW System v. Decker*, 2014 WI 68, ¶42, 355 Wisc.2d 800, 850 N.W.2d 112. As the Court stated in *Bachowski v. Salamone*, 139 Wis.2d 397, 408, 407 N.W.2d 533, 537-538 (1987), Wis. Stat. § 813.125 is directed against, “chronic, deliberate behavior, with no legitimate purpose” which is “designed to harass another person....” [Emphasis added.]

³ The Circuit Court found Aish was “trying to convey a message of repentance, a message in an attempt to encourage someone to turn their life over and turn to Jesus,” “to share the gospel,” to communicate “his stance of being against the things that Planned Parenthood does, which include abortions” and that his comments were made “in the context of wanting to send this message.” (R. 36-83, 84).

Kindschy's reliance on *Decker* is misplaced. (Pet. Br., p. 12). In *Decker*, the Court rejected the argument that, "conduct done with both the purpose of protesting and the purpose of harassing cannot constitute harassment." *Decker*, 2014 WI App 68 ¶36. In *Decker*, the evidence established, and the Court found that the respondent "repeatedly trespassed on UW property with the intent to disrupt university proceedings." *Id.* at ¶39.

By contrast, in this case, the evidence did not support a determination, and the Circuit Court did not find, that Aish acted with "the purpose of harassing." In this case, the Circuit Court's findings show that Aish's only purposes were to protest and oppose Planned Parenthood and abortion, to persuade Kindschy to leave her employment with Planned Parenthood in furtherance of his opposition to Planned Parenthood and abortion, and to influence Kindschy to embrace Aish's Christian religious views.

Kindschy suggests that there was no legitimate purpose for Aish's speech because Kindschy did not work at a Planned Parenthood location that performed abortions. (Pet. Br., p. 12). Kindschy cites no support for the proposition that speech is not legitimate if it is performed in a traditional public forum, but not the forum that she thinks would be preferable.

II. The Injunction Violates The First Amendment.

(Reply to Pet. Br., pp. 11-15).

Kindschy maintains that the injunction does not violate the First Amendment because the courts have upheld statutes that prevent anti-abortion protesters from approaching patients and employees entering or leaving abortion clinics. (Pet. Br., p. 14, citing *Hill v. Colorado*, 530 U.S. 703 (2000), *American Life League v. Reno*, 47 F.3d 642 (4th Cir. 1995). In this case, however, there is no claim that Aish violated the federal Freedom of Access to Clinics Act, or any similar state statute. Moreover, Kindschy makes no attempt to analyze the constitutionality of Aish's First Amendment protected-speech on public property adjacent to the Blair Planned Parenthood Clinic under the principles applied by the courts in *Hill* and *American Life League*. (R. 36-93). Among other things, there is nothing the least bit "tailored" about the injunction entered against Aish. As the Circuit Court recognized, the injunction constitutes a blanket prohibition of Aish's speech. (R. 36-93). The Circuit Court recognized that Aish's speech was intended to protest Planned Parenthood and abortion and to promote Aish's religious views - both consummate First Amendment protected speech. (R. 36-83).

Kindschy, however, suggests that Aish's speech was not entitled to the "special [First Amendment] protection" afforded speech regarding public affairs (as opposed to purely private matters). See *Snyder v. Phelps*, 562 U.S.

443, 452, 131 S.Ct. 1207 (2011). Kindschy asserts, “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.... [H]e was attempting to get a private citizen to end her employment with a private organization.” (Pet. Br., p. 14).

The record fails to support Kindschy’s arguments. As the Circuit Court concluded, 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 recognized, “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....” (R. 36-83). The evidence established that Aish’s speech occurred outside the Blair Planned Parenthood on public property as part of his attempt to change the hearts and minds of the people who worked at the Blair Planned Parenthood, the people who worked at other businesses in the building, visitors to the building and members of the public passing by. (R. 36-32, 33, 40-42, 44-48).

Needless to say, Kindschy cites no precedent at all in support of her argument that only protests outside facilities that actually perform abortions or at State Capitols are subject to the heightened protection recognized by the Court in *Snyder*. To the contrary, as the Court recognized in *Snyder*, “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.]

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,

THOMAS MORE SOCIETY

By: Electronically Signed By
Joan M. Mannix

Joan M. Mannix
Illinois State Bar No.6201561
Pro Hac Vice
Attorney for Respondent-Appellant

BUTING, WILLIAMS & STILLING, SC

By: Electronically Signed By
Dudley A. Williams

Dudley A. Williams
State Bar No. 100573
Attorney for Respondent-Appellant

CERTIFICATION

I hereby certify that this document conforms to the rules contained in Sec. 809.19 (8)(b)(bm)(c) for a brief. The length of this document is 2,317 words.

Dated this 26th day of July, 2021.

By: Electronically Signed By
Dudley A. Williams

Dudley A. Williams
State Bar No. 100573
Attorney for Respondent-Appellant

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 26th day of July, 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:

Attorney Richard A. Schaumberg
14455 10th St.
P.O. Box 91
Osseo, Wisconsin 54758-0091

Dated this 26th day of July, 2021

By: Electronically Signed By
Dudley A. Williams

Dudley A. Williams

State Bar No. 100573

Attorney for Respondent-Appellant