STATE OF WISCONSIN

SUPREME COURT

Case No. 2020AP1775

NANCY KINDSCHY,

Petitioner-Respondent,

v.

BRIAN AISH,

Respondent-Appellant-Petitioner.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, APPEAL FROM A FINAL ORDER ENTERED BY THE TREMPEALEAU COUNTY CIRCUIT COURT, THE HONORABLE RIAN W. RADTKE, PRESIDING

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Petitioner Brian Aish ("Aish") attempts to make a First Amendment case out of his garden variety harassment of Respondent Nancy Kindschy ("Kindschy"), a nurse practitioner. The harassment injunction issued by the circuit court in response to Aish's repetitive, intimidating statements concerning death and bodily harm, directed at Kindschy while following her, does not unconstitutionally restrain his First Amendment speech, merely because he harassed an employee of a family planning clinic. Nor does the injunction muddy this Court's bright line between protected speech relating to public concerns and "repetitive behavior which invades another's privacy interests in an intolerable manner." *Bachowski v. Salamone*, 139 Wis. 2d 397, 411, 407 N.W.2d 533, 539 (1987). Because neither the injunction nor the court of appeals decision implicates any question of constitutional import, the law on harassment requires no clarification, and the court of appeals decision does not conflict with controlling precedent, this court should deny Aish's Petition for Review.

STATEMENT OF THE CASE

Nancy Kindschy has worked as a nurse practitioner at the Blair Health Center, which is operated by Planned Parenthood of Wisconsin, since August 2019. (R.35:4-51.) The Blair Health Center provides family planning services; it is not an abortion clinic, (R.35:29), and Brian Aish knew this. (R.36:27.)

Since 2014, Aish had protested at various family planning clinics where Kindschy has been employed. (R.35:5, 10, 21, 29.) Earlier interactions between Aish and Kindschy had been less confrontational

conversations concerning Aish and his religious beliefs. (R.35:11, 22, 29.) However, in the fall of 2019, Aish's 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. (R.35:7.) While standing approximately three to four feet from her car, Aish stated that Kindschy might be killed on her way home and that it would not be too long before bad things started happening to her and her family. (R.35:27.) In following encounters, Aish's behavior continued on an aggressive trajectory, with Aish confronting Kindschy with a cold and angry demeanor, frightening Kindschy. (R.35:15.) 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." (R.35:14.)

Aish specifically singled out Kindschy from her fellow employees. (R.35:19; R.36:19.) On February 18, 2020, as Kindschy left work, Aish followed Kindschy directly to her vehicle. (R.35:15.) 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. (R.35:15-16, 64.) Then on February 25, 2020, Aish angrily 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." (R.35:19.)

Fearing for her safety, Kindschy petitioned for a harassment injunction against Aish on March 10, 2020. (R.1.) The Honorable Rian W. Radtke held a hearing on July 13 and September 9, 2020. (R.35, 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. (R.35, R.36.) The witnesses testified concerning the

incidents on October 8, 15, and 29, 2019 and February 18 and 25, 2020 at the Blair Health Center. (R.35, R.36.) The circuit court also reviewed brief video footage of the incident on February 18, 2020. (R.24.) The court found Kindschy and her supporting witnesses to be credible. (R.36:80; App.19:8-10, 19-21.) Based on the evidence, the circuit court found Aish repeatedly committed acts that intimidated and harassed Kindschy. (R.36:84; App.23:16-20.) It 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, and that those threats were specific to Kindschy. (R36:82-84; App.21:14-22:7, 23:1-22.) It further found that Aish used intimidation with intent to scare Kindschy into quitting her employment with Planned Parenthood. (R.36:85-89; App.24:4-28:7.) The circuit court's findings were based on testimony concerning Aish's words and conduct on three separate instances, which the court concluded "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; App.23:20-25.)

The circuit court next addressed whether Aish's conduct served any legitimate purpose under Wis. Stat. § 813.125, concluding that "it seems from the Court's review of the evidence presented that the purpose was to scare Ms. Kindschy." (R.36:85; App.24:15-18.) Further, the court found, "these scare statements were designed to get Ms. Kindschy to leave her employment or to stop doing what she was doing" or, alternatively, "to get Ms. Kindschy to adopt … Mr. Aish's religious beliefs." (R.36:86; App.25:11-18.) Explaining that there existed "differing opinions" on whether that purpose was legitimate, the

court explained that Aish thought they were "from the sense of saving the lives of unborn children and also [] from the religious perspective of saving Ms. Kindschy's soul." (R.36:86; App.25:21-25.) Although the court explained it "could see" Aish's viewpoint, "on the other hand, I can see Ms. Kindschy's position that this is not a legitimate purpose to use intimidation and scare tactics to get someone to leave their job, to get someone to change their religion." (R.36:87; App.26:6-10.) Weighing the two, the court concluded that although

> First Amendment rights [] are very guarded and very protected…to then say that Ms. Kindschy is to endure being intimidated with statements that make her have to even think about that she might be 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…
> 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's a legitimate purpose here.

(R.36:88-90; App. 27:23-28:7, 28:21-29:7.) 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 clinic at which she works (R.23; App.14-16; R.36:91-94; App.30:10-33:8.)

The court of appeals affirmed, engaging in a detailed analysis of the circuit court's factual findings and rejecting Aish's claim that his intimidating statements and conduct toward Kindschy were constitutionally protected protest.

In regard to the circuit court's factual findings, the court of appeals concluded correctly that the circuit court had found Aish "directed his comments toward Kindschy" and "intimidated Kindschy by repeatedly making threats to Kindschy and her family." (App.6

¶ 14.) Responding to Aish's argument that he had merely pointed out commonplace dangers to Kindschy, the court of appeals declared it "contrary to the record and the circuit court's findings," explaining

> Kindschy testified that she was scared of Aish as a result of the comments he made to her, not that she was suddenly fearful that she or her family might be the victim of some wholly unrelated accident. In fact, one of Kindschy's co-workers testified that Kindschy appeared bothered and scared, and she would head straight for her car "as quickly as possible" to avoid Aish. The record also shows that the Blair Clinic added a security guard and cameras to address Kindschy's concerns about Aish.

(App.7 ¶ 17.) In total, "this evidence established a pattern of repeated actions that frightened Kindschy." (App.8 ¶ 19.) The court of appeals also rejected Aish's assertion he was not "threatening or intimidating" in a single, short clip of video evidence presented at hearing,[1] with the court of appeals directing Aish to the numerous other, non-videotaped incidents which the circuit court had found to be threatening and intimidating due to Kindschy and her colleagues' credible testimony. (App.8 ¶ 18.)

Turning to the circuit court's finding that Aish's conduct served "no legitimate purpose," the court of appeals affirmed there is "no legitimate purpose in intimidating someone to get them to leave their job because the person making the intimidating statements does not agree with the victim's employment or the work that the victim's employer performs." (App.9 ¶ 22.) Noting Aish's simultaneous intent to "influence Kindschy to leave her employment and to proselytize," the court explained his argument "overlooked the circuit court's finding that he also intended to frighten Kindschy," and that "[h]arassing

[1] In his Petition for Review, Aish describes extensively a brief video clip of just one encounter between himself and Kindschy. (Pet. 6-7.) The court of appeals declined to include the video as unnecessary in the appellate record (1/15/21 Order), and therefore Aish's self-serving description of the video should be rejected.)

behavior cannot be transformed into nonharassing, legitimate conduct simply by labeling it as political protest." (App.10 ¶ 23.) Thus, Aish could not shield his conduct in the name of free speech. *Id*.

Finally, the court of appeals addressed Aish's First Amendment concern that an injunction prohibiting his presence at the clinic while Kindschy is at the clinic effectively prevented him from protesting abortion at the clinic at all due to the limited schedule during which Planned Parenthood conducted counseling there. (App.11 ¶ 25.) Citing numerous state and federal First Amendment cases (discussed in greater detail *infra)*, the court of appeals concluded "it is well established that an individual's ability to protest is not unlimited," which also applies to anti-abortion protests. (App.11 ¶ 26.) Furthermore, the court explained, "[t]o be clear, Aish was not protesting at an abortion clinic. His efforts were not geared toward changing the minds of the general public or legislators." (App.11 ¶ 25.) Aish's specifically harassing conduct, separate from any alleged anti-abortion protest he carried out, was not public in nature. (App.12 ¶ 27.) "Rather, Aish was attempting to convince a private citizen to end her employment with a private organization, by making comments that instilled fear and trepidation. Aish's efforts were almost entirely personal—and not public—in nature." (*Id*.)

ARGUMENT

I. The court of appeals properly upheld the circuit court's factual finding that Aish's statements and conduct were intended to and did intimidate Kindschy, and that such targeted intimidation is not protected by the First Amendment.

Both the circuit court and the court of appeals strictly adhered to the line between speech protected by the First Amendment to the U.S.

Constitution and Art. I, § 3 of the Wisconsin Constitution, and speech and conduct that merely amounts to harassment under Wis. Stat. § 813.125.

The definition of harassment in Wisconsin is "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." Wis. Stat. § 813.125(1)(am)(4)b. The circuit court found Aish's statements and behavior on multiple occasions constituted harassment because it scared and intimidated Kindschy. (R.36:84; App.23:16-20.) The circuit court supported its finding with citation to testimony regarding Aish's veiled threats to Kindschy on February 25, 2020, that she "would be lucky if she made it home safely;" on February 18, 2020, that he hoped she "make[s] it home safely for another day or two" and adopts his views while she "still ha[s] time;" and on October 8, 2019, that "it won't be long before bad things will happen to [Kindschy] and [her] family." (R.36:82-83; App. 21:16-22:5.) Citing testimony that Aish was "loud and aggressive," the circuit court concluded "[t]hose types of things…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; App.23:9-10,16-20.)

Contrary to Aish's argument, the circuit court did not find Aish had engaged in harassment merely because Kindschy had found his statements "upsetting," "disturbing," or "offensive."(Pet. 14.) The court concluded that Aish specifically sought out and intimidated Kindschy with his words and physically-threatening proximity to her, and supported that finding with record evidence. Aish followed Kindschy and verbally accosted her, causing her to be worried about her personal safety. On October 8, 2019, he followed closely behind Kindschy all the

way to her car. (R.35:7.) While standing approximately three to four feet from her car, 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. (R.35:7, 27, 28.) The combination of Aish's words and his physical proximity to her frightened Kindschy, the court found. (R.35:7,10.)

At the time of the October 8, 2019 incident, Kindschy had known Aish as a protestor for six years. (R.35:10-11.) She 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. (R.35:11, 22, 29.) As a result, Kindschy was very frightened on October 8 not only by Aish's new pattern of physical proximity to her and his intimidating words, but by the stark change in his demeanor. (R.35:19.)

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. (R.35:12.) She saw him receive a ticket from a police officer. (*Id.*) She was scared of Aish's aggressive and angry behavior. (*Id.*) Aish approached her vehicle and said to her in an angry, cold, and loud tone "you have blood on your hands." (R.35:14.) 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." (R.35:16.)

On February 18, 2020, as Kindschy left work, Aish again followed her directly to her vehicle. (R.35:15.) Aish accused Kindschy

of being a liar. (R.35:15.) 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. (R.35:15, 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. (R.35:19.) Kindschy testified that she felt threatened by and scared of Aish. (R.35:12, 16-17, 19, 42.) The circuit court viewed Kindschy's testimony as credible and found these facts constituted a pattern of behavior intended to harass and intimidate Kindschy to fear for her personal safety. (R.36:80, 84; App.19:8-10, 19-21; App.23:16-20.)

Clearly, Aish's assertion that the circuit court "made no finding of any threats" is unfounded, based only on semantics. (Pet. 12.) The circuit court found Aish *had* threatened Kindschy where it found that his behavior and words were intimidating, directed solely at Kindschy, and contemplated her death or that of her family members. (R.36:81, 84; App.20:3-5, App.23:16-25.) On this point, Aish's Petition is imbued with the insinuation that because he claimed to espouse Christian views, he must have meant no harm and, thus, the circuit court should have found there was no actual threat to Kindschy. (*See, e.g.,* Pet. 13 (describing Aish's conduct as "urg[ing] people to turn to God, eschew sinful complicity in abortion, and immediately repent.").) However, this is contrary to the circuit court's findings that Aish's words and demeanor had escalated dramatically in the months leading up to the injunction, becoming aggressive, cold, and angry; accusing her of being a liar, and newly involved Aish following Kindschy to her car and even chasing her car. (R.35:14-16, 36:82, 83; App. 21:8-22:7.)This alarmed

Kindschy and stood in stark contrast to Aish's previous years of peaceful protest. (R.35:11, 19, 22, 29.)

The court of appeals agreed that Aish's words and conduct met the Wis. Stat. § 813.125 definition of harassment, noting that it "will not second-guess [the circuit court's] credibility determinations." (App.6 ¶ 14.) In response to Aish's argument that his threats of death or bodily harm merely drew Kindschy's attention to commonplace, known dangers with "no explicit or suggested causal relationship" to him, the court of appeals was firm that the record and circuit court's findings indicated otherwise. (App.7 ¶ 17.) Kindschy's testimony and that of her colleagues indicated that Kindschy was scared of Aish as a result of his threats to her, and that the clinic had hired a security guard and cameras to address those safety concerns. (*Id*.) The court of appeals further noted that the circuit court had found Kindschy's and her colleagues' testimony regarding other encounters to outweigh the short clip of video evidence presented at hearing. (*Id*. 8 ¶ 18.)

Citing *Snyder v. Phelps*, 562 U.S. 443 (2011), Aish argues that because his harassing, intimidating conduct was purportedly done in the name of anti-abortion protest, it was speech on a matter of public concern and therefore subject to special protection. (Pet. 13.) However, the circuit court was clear that it was not Aish's words in general protest of abortion that constituted harassment, but his repeated "statements of 'bad things happening to you and your family' and 'you're lucky if you make it home safe,'" directed singularly at Kindschy and while following her to her car and standing in close proximity to her, that met the definition of harassment under Wis. Stat. § 813.125. (R.36:82-84; App. 21:8-23:20.)

Snyder does not hold to the contrary. In that case, protesters displayed subjectively offensive signs such as "God Hates Fags" and "Thank God for Dead Soldiers" outside a military funeral, 562 U.S. at 448. Although offensive and distasteful, the U.S. Supreme Court held the signs were nonetheless the "expression of an idea" protected by the First Amendment. *Id*. at 458. Notably, there was no record of threats or intimidation made against the plaintiff, nor fear for life or limb by those attending the funeral. *Id*. at 449.

In contrast, in this case the circuit court found that Aish's previously peaceful years of protected anti-abortion protests outside the Planned Parenthood clinic escalated into harassment when he invoked veiled threats of death or bodily harm to Kindschy and her family, which intimidated and scared her and caused the clinic to increase its security measures in response. (R.35:14-16, 36:82, 83; App. 21:8-22:7.) It was not Aish's words protesting abortion, a topic of public concern, nor his religious views that served as a basis of the circuit court's finding of harassment. Instead, the court focused narrowly on the statements that threatened death or bodily harm to Kindschy and her family. (R.3684; App.23:16-20.) That Aish may have made those specific threats—directed to Kindschy alone, in a loud and aggressive manner, and repeatedly over the course of months—because he opposes abortion in general or wishes others to adopt his religious views does not recast them as statements on a matter of public concern.

Furthermore, the court of appeals did not hold that speech is only a matter of public concern when directed at the general public or legislators, as Aish contends. (Pet. 15.) Instead, the court used that language to highlight the fact that the object of Aish's intimidating statements was Kindschy—and Kindschy alone. (App.11 ¶ 27.) It noted

that Aish's intimidating statements to Kindschy, even if claimed in the spirit of anti-abortion sentiment, targeted a private individual at her private place of employment that was not an abortion clinic. (*Id.*) His efforts were, indeed, "almost entirely personal," in stark contrast to the *Snyder* circumstances. (*Id.*)

Aish's reliance on select language from *Bible Believers v. Wayne County, Michigan*, 805 F.3d 228 (6th Cir. 2015), is similarly unavailing. The speech at issue in that case was a series of signs conveying pro-Christian, anti-Muslim messages to attendees of an Arab festival. *Id.* at 238. Like in *Snyder*, there was no record evidence that the protesters engaged in a pattern of conduct singling out individuals with express or implied threats of death or bodily harm, or that the onlookers to the protest feared for their safety; to the contrary, the crowd aggressively heckled the protesters. *Id.* at 238-240.

In short, Aish's citations to lofty First Amendment language do not save him from the facts and findings of the circuit court in this case, nor the long-held distinction between protected speech and Wis. Stat. § 813.125 harassment. None of the cited cases condone individualized threats and intimidation similar to Aish's, in the name of free speech. The circuit court and court of appeals strictly adhered to this Court's precedent that intimidation is not protected by the First Amendment simply because, as Aish contends, the targeted intimidation of a single individual purportedly springs from the harasser's desire to persuade his victim to adopt his views on a matter he states is of public concern.

II. The court of appeals properly upheld the circuit court's finding that Aish's intimidating statements and behavior served no legitimate purpose protected by the First Amendment.

Aish seeks to make this case about expressing his opinions on abortion, but neither the circuit court nor the court of appeals accepted that red herring, and neither should this Court.

The circuit court found that Aish's purpose for harassing and intimidating Kindschy was "to scare Ms. Kindschy" and cause her to quit her employment with Planned Parenthood and possibly to get her to adopt his religious views. (R.36:85; App.24:17-18.) 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.36:89; App.28:17-22.) 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.36:89-90; App.28:23-29:7.) 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.36:85-89, 95; App.24:14-28:12.) The court explicitly rejected Aish's assertion that his actions were done out of concern for Kindschy's spirituality. (R.36:89; App.28:9-12.)

Contrary to Aish's argument, the circuit court did not find that Aish's purpose was "saving the lives of unborn children and also from – from the religious perspective of saving Ms. Kindschy's soul by sharing the gospel" and that such a purpose is not legitimate. (Pet. 17.) Instead, the circuit court articulated its understanding of why given his "strong

religious beliefs," Aish might have considered his own behavior legitimate, but that his freedom to express religious beliefs does not require another person to endure repeated, targeted intimidation, intended to scare her and causing her to fear for her or her family's safety. (R.36:86; App.26:2-11.) If Aish's position were adopted, anyone purporting to hold strong religious beliefs or any belief on matters of public concern could specifically target and harass judges, politicians, police officers, or any public or private figure with veiled threats and targeted scare tactics—all in the name of "protest."

Like the circuit court, the court of appeals saw through Aish's attempt to blanket his intimidating words and conduct in the name of anti-abortion protest, holding "[h]arassing behavior cannot be transformed into nonharassing, legitimate conduct simply by labeling it as political protest." (App.10 ¶ 23.) Citing *Bd. of Regents-UW Sys. v. Decker,* 2014 WI 68, 355 Wis. 2d 800, 850 N.W.2d 112, the court flatly rejected the notion that "conduct done with both the purpose of protesting and the purpose of harassing cannot constitute harassment." (*Id*.) Likewise, in *Bachowski v. Salamone*, this Court declared "the zone of conduct regulated by [Wis. Stat. § 813.125] is clear… It is not directed at the exposition of ideas but at oppressing repetitive behavior which invades another's privacy interests in an intolerable manner." 139 Wis. 2d 397, 411, 407 N.W.2d 533, 539 (1987) (emphasis added). Aish's repetitive, intimidating behavior, directed solely at Kindschy and causing her to fear for her and her family's safety, went beyond mere protest and invaded her privacy interests in this intolerable manner.

The court of appeals decision is firmly in line with longstanding precedent of both Wisconsin and federal courts holding that right to protest, including the right to protest abortion, is not unfettered. *Hill v.*

Colorado, 530 U.S. 703 (2000) (upholding 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); *American Life League v. Reno*, 47 F.3d 642 (4th Cir. 1995) (upholding the constitutionality of 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); *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 restricted distribution of literature in airport terminal); *Frisby v. Schultz*, 487 U.S. 474, 486, 108 S.Ct. 2495 (1988) (upholding local ordinance prohibiting picketing before or about the residence or dwelling of any individual).

In sum, both the circuit court and the court of appeals correctly declined to transform Aish's directed harassment and intimidation of Kindschy into protected anti-abortion protest--as much as Aish may have believed his words and conduct toward Kindschy were furthering his cause. His conduct was harassment serving no legitimate purpose and was properly enjoined.

CONCLUSION

There is no reason for this Court to grant the petition for review. The matter was correctly decided with the application of well-settled principles of constitutional law. Therefore, the Petitioner-Respondent, Nancy Kindschy, respectfully requests that this Court deny the Petition for Review.

Respectfully submitted this 25th day of April, 2022.

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CERTIFICATION BY ATTORNEY

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ 809.62(4); 809.19(8)(b), (bm) and (c) for a response to a petition for review produced with a proportional serif font. The length of this response is 4,304 words.

I further certify that the content of the electronic copy of the response to the petition for review is identical to the content of the paper copy of the response to the petition for review.

I further certify that a copy of this certificate has been served with the paper copies of this response to petition for review filed with the Court and served on all opposing parties.

Dated this 25th day of April, 2022.

Electronically signed by: Diane M. Welsh

Diane M. Welsh