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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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LAURA HICKS,

Petitioner-Respondent,

Juneau County Case No. 22-CV-160

v.

Appeal No. 2023AP2003

ALEX KLINKER,

Respondent-Appellant.

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ON APPEAL OF JUDGMENT IMPOSING A  
HARASSMENT INJUNCTION UNDER WIS. STAT. §  
813.125 ENTERED IN THE JUNEAU COUNTY CIRCUIT  
COURT, THE HONORABLE STACY A. SMITH,  
PRESIDING

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REPLY BRIEF OF RESPONDENT-APPELLANT ALEX  
KLINKER

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STATE OF WISCONSIN  
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LAURA HICKS,

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ON APPEAL OF JUDGMENT IMPOSING A  
 HARASSMENT INJUNCTION UNDER WIS. STAT. §  
 813.125 ENTERED IN THE JUNEAU COUNTY CIRCUIT  
 COURT, THE HONORABLE STACY A. SMITH,  
 PRESIDING

---

BRIEF OF RESPONDENT-APPELLANT ALEX KLINKER

**ARGUMENT**

**I. CONTRARY TO HICKS’ ARGUMENT,  
 KLINKER WAS NOT OFFERED A  
 MEANINGFUL OPPORTUNITY TO BE  
 HEARD.**

“[W]hen the rights or interests of a person are sought to be affected by judicial or quasi-judicial decree, due process requires that the individual be given notice reasonably calculated to inform the person of the pending proceeding and to afford him or her an opportunity to object and defend his or

her rights.” *In Matter of Estate of Fessler*, 100 Wis.2d 437, 447, 302 N.W.2d 414, 419 (1981). “‘The fundamental requisite of due process of law is the opportunity to be heard.’ The hearing must be ‘at a meaningful time and in a meaningful manner.’” *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citations omitted). “The opportunity to be heard includes the right to “present a complete defense.” The right to present a complete defense, in turn, includes the right to offer the testimony of witnesses.” *Brown County v. Shannon R.*, 2005 WI 160, ¶65, 286 Wis. 2d 278, 706 N.W.2d 269.

Here, Mr. Klinker was called as the first and sole witness presented by *petitioner*. Not only was he not allowed to put on his own case, his counsel was prevented from fully examining him, as the circuit court cut off his examination after only four questions. Mr. Klinker was thus prevented from fully developing all of the evidence supporting his contention that his actions all were not intended to harass but instead to serve the legitimate purpose of protecting his child from exposure to drugs and drug users, and from testifying freely while being questioned by his own advocate. The denial of due process here was so complete, and so obvious, that it is difficult to imagine a more complete denial of due process short of entry of a permanent injunction against him without even notice of the proceedings. The undersigned counsel was unable to find a citable decision directly on point in the injunction context, but there is a published decision dealing with certiorari review procedures and minimum due process requirements in that context that *a fortiori* must apply here.

In *State ex rel. Kaufman v. Karlen*, 2005 WI App 14, 278 Wis.2d 332, 691 N.W.2d 879, the circuit court had dismissed Kaufman’s petition for a writ of certiorari on the merits “without consideration of the full record and briefs from the parties.” *Kaufman*, 278 Wis.2d 332, ¶4. The court had instead “chose[n] to decide the case on its merits based solely on Kaufman’s petition and attachments.” *Id.* at ¶9 (brackets added). This court reversed, at least in part because “Whether the court had before it all the documents that would have been contained in the return is unknowable.” *Id.* (brackets added). The court went on to state that “[t]his uncertainty is eliminated when the return is filed. Once a court chooses to consider a prisoner’s petition on the merits, *due process requires the court*

*to base its decision on a complete record of the proceedings below and on briefs submitted by the parties.” **Id.** (brackets and emphasis added).*

The circuit court here analogously decided to issue the injunction here without consideration of the full record – an impossible task in light of the court’s improper failure to allow Mr. Klinker to fully develop the record, and further issued the injunction without allowing Klinker to argue his position, and as such, as a matter of law, violated Klinker’s right to due process in the most fundamental possible way. **Id.** For that reason alone, the circuit court’s order must be reversed and remanded for a new hearing on the injunction.

This point is reinforced by numerous decisions of the appellate courts of Wisconsin holding that due process requires that a hearing involving a litigant’s substantial rights must provide the litigant with a meaningful opportunity to contest the allegations underlying any attempt to curtail such substantial rights. As but one example, this Court has held that even in the context of an ordinance barring anyone convicted of certain sexual offenses from living within 1000 feet of a school, anyone subjected to such an ordinance must be accorded the opportunity to contest the applicability of both criteria. **City of South Milwaukee v. Kester**, 2013 WI App. 50, ¶14, 347 Wis.2d 334, 830 N.W.2d 710 (holding that the fact that the subject of such an ordinance had an opportunity to challenge whether he had a qualifying conviction and whether he resided within 1000 feet of a school was sufficient to satisfy the requirements of procedural due process). Here, Klinker was denied the opportunity to do more than be adversely examined by the opposing party and very briefly examined by his own attorney before the hearing was concluded.

The truncated examination allowed by the court before it terminated the hearing failed to satisfy the basic proposition that “...litigants must be given their day in court. Access to the courts is an essential ingredient of the constitutional guarantee of due process.” **Piper v. Popp**, 167 Wis. 2d 633, 644, 482 N.W.2d 353 (1992); *see also* **Armstrong v. Manzo**, 380 U.S. 545, 552 (1965) (“A fundamental requirement of due process is ‘the opportunity to be heard.’ It is an opportunity which must be granted at a meaningful time and in a meaningful manner.”

(citation omitted)); *see also State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Court of Milwaukee Cty.*, 2017 WI 26, ¶5, 374 Wis. 2d 26, 892 N.W.2d 267 ("The Wisconsin Constitution requires the state to provide a judicial system for the resolution of disputes. Access to state courts for conflict resolution is thus implicit in the state constitution."); *Penterman v. Wis. Elec. Power Co.*, 211 Wis. 2d 458, 474, 565 N.W.2d 521 (1997) ("The right of access to the courts is secured by the First and Fourteenth Amendment[s]. It entitles the individual to a fair opportunity to present his or her claim. Such a right exists where the claim has a 'reasonable basis in fact or law.' Judicial access must be 'adequate, effective, and meaningful.'" (footnote and citations omitted) (quoted sources omitted)).

Further, as to his offer of proof, Klinker argued what the court would allow him to: that he was concerned about ongoing drug use around the parties' mutual child, that he was concerned that the courts weren't assisting him in terminating that drug use, and that he therefore felt the need to take matters into his own hands, including by way of offering Exhibits 2 and 3, the results of drug tests he would have testified to having obtained at his own expense using hair from himself and his son. He attempted to submit Exhibit 1 to the court in support of that argument, R11: 1-11, and he testified to his reasons for believing that Hicks continued to subject their mutual child to drug use and drug sales while the child was in her care. (R14: 19-22). The circuit court clearly did not believe that this constituted a legitimate purpose, and as such, cut off any further questioning or argument. (R14: 21-22). This was error. Klinker is entitled to a new hearing as a result of the circuit court's utter failure to adhere to the most basic requirement of due process, that he be given a meaningful opportunity to be heard.

**I. DURING THE HEARING, JUDGE SMITH DEMONSTRATED OBJECTIVE BIAS AGAINST KLINKER, AND AS SUCH, REVERSAL AND REMAND IS REQUIRED FOR THIS ADDITIONAL REASON, AND FURTHER, JUDGE SMITH MUST RECUSE HIMSELF FROM THIS MATTER.**

“The right to an impartial judge is fundamental to our notion of due process.” *Miller v. Carroll*, 2020 WI 56, ¶15, 392 Wis.2d 49, 944 N.W.2d 542 (citation omitted). “We presume that a judge has acted fairly, impartially, and without bias.” *Id.*, ¶16. The party asserting judicial bias bears the burden of overcoming the presumption by showing bias by a preponderance of the evidence. *Id.* If the presumption is rebutted, the result is a due process violation, and such an error is “structural and not subject to a harmless error analysis.” *Id.* “Whether a circuit court’s partiality can be questioned is a matter of law that we review independently.” *State v. Goodson*, 2009 WI App 107, ¶7, 320 Wis.2d 166, 771 N.W.2d 385.

“Objective bias can exist in two situations: (1) where there is an appearance of bias; and (2) where objective facts demonstrate that a judge treated a party unfairly.” *State v. Marcotte*, 2020 WI App 28, ¶17, 392 Wis.2d 183, 943 N.W.2d 911. “The appearance of partiality constitutes objective bias when a reasonable person would conclude ‘that the average judge could not be trusted to hold the balance nice, clear, and true under all the circumstances.’” *Id.* (citation omitted). Where the appearance of bias “reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs.” *Id.* (citation omitted).

Actual bias occurs when “there are objective facts demonstrating that . . . the trial judge in fact treated [the defendant] unfairly.” *State v. McBride*, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994) (citation omitted). “[T]he appearance of bias offends constitutional due process principles whenever a reasonable person — taking into consideration human psychological tendencies and weaknesses — concludes that the average judge could not be trusted to ‘hold the balance nice, clear and true’ under all the circumstances.” *State v. Gudgeon*, 2006 WI App 143, ¶24, 295 Wis. 2d 189, 720 N.W.2d 114. Whether the partiality of a trial court can be questioned is a matter of law that we review de novo. See *Goodson*, 320 Wis. 2d 166, ¶7.

Here, the circuit court demonstrated in several different ways that it “in fact treated [Mr. Klinker] unfairly,” and thus actual bias is present, requiring reversal and remand. First, of

course, there is the fact that the circuit court unfairly deprived Mr. Klinker of his right to put on a case in his own defense by issuing the injunction prior to said case taking place; in fact, the circuit court did not even allow a full and fair examination of Mr. Klinker by *his own counsel*, relying entirely on its view that there could be no legitimate purpose for Mr. Klinker to continue to try to protect his child from what the court obviously viewed as fictional drug use by the petitioner around said child. The court's remarks following its acceptance of Exhibits 2 and 3 show this clearly, and bear repeating in full:

Maybe -- okay. So Keith is the child? I'm going to allow it for what its worth which isn't anything because as far as *I know the way Mr. Klinker acts he could have been the one giving the child some drugs as far I know. You know, if you are harassing and you're trying to get somebody in trouble, you could be the one setting up the child in this way.* There is no evidence except for the fact that the child has drugs. She, he's even testified that she has had clean drug results, *she's never been arrested, never been convicted.* He has other options in this case. He could have went to the family court and proven a case through family court. This is not one of these areas that he can continue harassing her by doing these activities. He was warned, he was its in a court order, he's disregarding that as you said he's not in for contempt but he's dang close to getting a criminal charge if the DA does it off of stalking because he does not have a right to enforce any of his views on her. So I am granting the motion for harassment injunction. Now I'm give me a minute and I'm going to fill it out.

(R14: 23-24). The circuit court continued in this vein shortly thereafter:

This court find that there's by far clear and convincing evidence that there's harassment injunction needs to be held. I'm going to say its borderline on the stalking issue under 813.125 but its clear that he has engaged in a course of conduct or repeatedly committing acts which harass or intimidate the person or which serve no legitimate purpose. It came out of his own mouth. I didn't need to hear anything else because he already hit all the issues of conduct and a course of conduct meaning repeated conduct where he admitted that he was sending messages, he admitted to calling her, he admitted to doing these things and there was no legitimate reason that I can see for a lot of the comments. He could have brought a motion

if he was really fearful that she was using drugs, but all the courts heard today was there is no evidence of her using drugs or has any issues. She hasn't been arrested, she hasn't been and again I kind of almost -- where I was getting a little bit frustrated was he was even dictating to [petitioner] on what kind and how she should do a drug test and its only if he says its through the hair follicle. Well, I've been a -- I was a prosecutor for 16 years and I've been a judge now for four, a little over four, we don't even give people that normally that unless they give some kind of evidence that they've been arrested especially or convicted I would say where we think that they need to be checked on a regular basis. [Petitioner] there is no evidence of it. I hope she's not using drugs, but there is no evidence of it and she's had at least two clean tests that's been testified to through your client. I'm a -- so that's the reason for the rational for this order.

(R14: 27-28).

Two things are abundantly clear here: (1) the circuit court clearly harbored the belief that if a person has neither been charged with or convicted of a drug offense, they simply cannot be a drug user, dealer, or otherwise associated with such persons, which given the sheer number of citizens per police officer in the world cannot be the fact; and (2) the circuit court was not going to credit any evidence that Mr. Klinker could have produced to try to convince it that he did in fact have a legitimate purpose for badgering petitioner to stop using drugs around their child.

This is so because, for instance, the circuit court prejudged and in fact disregarded the text messages Mr. Klinker sought to introduce as Exhibit 1, which were offered to show the reason why he believed he needed to continue to get after petitioner to stop using drugs around their child, and further, the circuit court *sua sponte* made up a reason not to believe the hair follicle test results presented by Mr. Klinker as Exhibits 2 and 3, and without any evidence to support the proposition, blithely assumed that Mr. Klinker must have actually poisoned his own child with methamphetamine to somehow “get” petitioner.

Further evidence of actual bias lies in the fact that the circuit court cut off testimony and issued the injunction because it had effectively made up its mind as to what the facts

were without fully hearing them and more importantly, without permitting Mr. Klinker the opportunity to be heard in a meaningful fashion. The presumption that judges are neutral, fair, and impartial has been rebutted here, and as such, this Court should reverse and remand with instructions that Judge Stacy A. Smith is to recuse himself from any further proceedings in this matter. *See Goodson*, 320 Wis. 2d 166, ¶18 (remedy for actually biased tribunal is reversal and remand for a new hearing before a different judge).

Hicks argues that Klinker waived any argument that the trial court was biased against him, objectively or otherwise, by failing to raise that issue at the original hearing. He did not do so, however, because by the time it was apparent that the court was in fact biased against him as noted above, the hearing was already concluded by the court. Raising an objection as to the trial court's bias at that point would have been futile, and futile objections are not required to be made. *See State v. Matson*, 2003 WI.App. 253, ¶32, 268 Wis.2d 725, 674 N.W.2d 51.

### CONCLUSION

For the reasons discussed above, Mr. Klinker respectfully requests that this court reverse the circuit court's judgment entering the injunction at issue here against him and remand the matter back to the circuit court for a new injunction hearing with instructions that Judge Stacy A. Smith shall recuse himself from any further involvement in such proceedings.

Respectfully submitted May 12, 2023:

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,767 words.

Dated May 12, 2023:

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**CERTIFICATE OF COMPLIANCE  
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated May 12, 2023:

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