COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2089 **Cir. Ct. No. 2007CV1352**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CASSANDRA KEBBEKUS,

PETITIONER-RESPONDENT,

V.

BRIAN FEDRAN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 BROWN, C.J. Brian Fedran appeals from a harassment injunction forbidding him from having contact with Cassandra Kebbekus or from possessing firearms. He requests reversal on two grounds: that the circuit court improperly received and considered hearsay testimony at the injunction hearing

and that his actions with respect to Kebbekus do not meet the statutory definition of "harassment." Having examined the hearing transcript and the court's decision, we conclude that all testimony relied on by the court was properly admitted. We also conclude that the facts found by the trial court support its holding that Fedran repeatedly committed acts harassing to Kebbekus and that he did so intentionally. We therefore affirm.

¶2 Kebbekus and Fedran dated from December 2006 to March 2007. During their relationship, Kebbekus felt that Fedran was possessive of her, constantly asking her what she had done and with whom she had spoken when they were apart. On one occasion, Fedran had become suspicious because Kebbekus left her cell phone on at night as if expecting a call from her ex-boyfriend, who had called earlier. He had therefore driven past her subdivision at night, where he noted a pickup truck, which truck he described in detail to Kebbekus. After the two broke up, they remained in contact via telephone and occasional face-to-face meetings.

¶3 On April 28, 2007, a sheriff's deputy and a police officer came to Kebbekus' door and told her not to have contact with Fedran. The sheriff's deputy told her that Fedran had made disturbing statements at his workplace that caused concern for Kebbekus' and others' safety. Some time within the following week, Fedran came to Kebbekus' house intending to grout some tile that he had installed earlier. Kebbekus would not allow him inside, telling him that the sheriff had told her not to. According to Kebbekus, she also told him that she did not want to have further contact with him. Fedran testified that Kebbekus only asked him to leave but said that she "trusted [him]" and did not say "I don't ever want to talk to you again." Fedran told Kebbekus that he was going to the police department to get to the bottom of the situation. En route to the police station, Fedran called Kebbekus

and, according to Kebbekus, told her that "he should just take a shotgun and, you know, shoot himself and end it for everyone." In Fedran's version of events, he told Kebbekus that he should "take … my .357 and end it for myself." After this phone call, Fedran did not contact Kebbekus again.

¶4 The sheriff's deputy who had come to Kebbekus' home also testified at the hearing. The deputy stated that Fedran had come to the deputy's home on two or three occasions in April 2007 and had given her several license plate numbers of people who Fedran claimed were involved in supplying Kebbekus with "a date-rape drug." Fedran confirmed, in his testimony, that he had gone to the deputy's house "talking to her about medication concerns on [Kebbekus'] behalf."

¶5 Fedran also testified to driving past Kebbekus' home in the early morning hours, some time after the breakup, and noting a car parked in her driveway. He later told Kebbekus that he saw someone stay the night.

¶6 At the conclusion of the hearing, the circuit court made its ruling from the bench. The court specifically found that Fedran had threatened to kill himself in the telephone call with Kebbekus, which the court described as "an effort to make the petitioner hurt." The court found that Fedran had been suspicious during their relationship and "concerned throughout the relationship as to what the petitioner was doing when he wasn't around." The court also stated that "[t]he facts are clear that he was checking up on her, driving by, referencing the [pickup truck] that was parked outside; suspicious that her cell phone was left on …." The court also noted Fedran's talk with law enforcement officials about medications that he believed Kebbekus took, which the court called "indirect intimidation of … Kebbekus." In view of these incidents, the court held that

Fedran had engaged in a course of conduct harassing to Kebbekus and that there was clear and convincing evidence that he might use a firearm to cause physical harm or to endanger public safety. The court therefore entered an injunction barring Fedran from contacting Kebbekus or possessing firearms. Fedran appeals.[1]

¶7 Fedran first complains that the circuit court allowed, over objection, various testimony that it should have excluded as hearsay. In particular, Fedran points to two portions of the hearing record. Fedran cites the sheriff's deputy's statement that Fedran "had past problems breaking up with girlfriends" as being without foundation and also likely hearsay. Fedran also calls into question the sheriff's deputy's testimony about the disturbing or threatening statements that Fedran allegedly made in his workplace. The deputy received this information from a neighbor, who was Fedran's boss and who had, in turn, heard about the comments from Fedran's coworkers. The court had earlier allowed Kebbekus to testify as to these same statements (the sheriff's deputy had passed them on to her when she came over to tell Kebbekus not to have contact with Fedran). At the time of Kebbekus' testimony, the court stated that it would allow Kebbekus to relay her conversation with the deputy not for the truth of the matters asserted by the deputy, but to explain why Kebbekus then sought the injunction.

¶8 Fedran concedes that allowing Kebbekus to testify about her conversation with the sheriff for the limited purpose just described does not

[1] Kebbekus did not file a respondent's brief in this appeal. This court may in its discretion summarily reverse the circuit court if we determine that the respondent has abandoned the appeal, acted egregiously or acted in bad faith. ***Raz v. Brown***, 2003 WI 29, ¶18, 260 Wis. 2d 614, 660 N.W.2d 647. We decline to do so in this case.

constitute the admission of hearsay. However, Fedran alleges that the court "accepted all the testimony without limitations later in the proceedings." Having studied the record, in particular the portion cited by Fedran for this proposition, we do not see any indication that the trial court decided to accept Kebbekus' testimony for anything other than the limited purpose the court originally described. However, in the deputy sheriff's subsequent testimony we do note that there are several layers of potential hearsay involved, and no hearsay exception that clearly applies. The court did not state that it was limiting this testimony to any particular purpose and, further, we can think of no particularly relevant purpose for which it could be admitted, other than the truth of the matter asserted.

¶9 However, it is not clear from the transcript whether the circuit court was explicitly overruling Fedran's objections at various points or simply allowing the witnesses to testify and saving admissibility decisions for later. Of course, in a jury trial, offers of proof and arguments over admissibility are conducted outside the presence of the fact finder. But clearly this procedure does not pertain where, as here, the arbiter of admissibility is *also* the fact finder. Perhaps this is part of the reasoning behind the rule that, in bench trials, "the stringent rules in respect to possible prejudicial error applicable to jury trials are not appropriate." ***State v. Mullis***, 81 Wis. 2d 454, 461, 260 N.W.2d 696 (1978). "In a case tried by the court the admission of improper evidence is to be regarded on appeal as having been harmless, unless it clearly appears that but therefor the finding would probably have been different." ***Id.*** (citation omitted).

¶10 Thus, even accepting that the court here allowed the deputy sheriff to testify to inadmissible hearsay, we would not reverse unless the court actually considered and relied upon this inadmissible evidence in issuing the injunction. Looking to the court's oral ruling, we see that the court specifically noted each

piece of testimony it was relying on to make its findings. Fedran's alleged statements in the workplace, as well as his alleged past problems breaking up with girlfriends, go completely unmentioned.[2] The court's ruling thus demonstrates that the disputed testimony was not a factor in the court's decision to issue the injunction. Any error in allowing the testimony is therefore harmless. *See* ***id.***

¶11 Fedran also submits that, evidentiary issues aside, his conduct does not constitute harassment under WIS. STAT. § 813.125 (2005-06).[3] The circuit court found that Fedran had engaged in a course of conduct harassing to Kebbekus, placing this case under the second prong of the definition of "harassment" found at § 813.125(1)(b): "Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." Fedran also claims that the court did not (and could not) find his harassment to be intentional, as required by § 813.125(5)(a)3.

¶12 In ***Bachowski v. Salamone***, 139 Wis. 2d 397, 407, 407 N.W.2d 533 (1987), our supreme court construed WIS. STAT. § 813.125(1)(b) to require "more than mere bothersome or annoying behavior." The court consulted a dictionary to determine that to "harass" means "to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger." ***Id.***

[2] Fedran notes that the circuit court, at one point in its oral ruling, referred to "the rest of the testimony in this matter" as being "concerning to the court." Fedran implies that this means the court considered all of the testimony, including inadmissible hearsay, in reaching its decision. In context, however, it appears that the circuit court was not referring to *all* of the testimony it had heard, but rather to testimony other than that about the phone call on which Fedran threatened to kill himself. In its subsequent discussion, the court refers to the specific conduct of Fedran's that it is relying on in granting the injunction and, as we have said, does not mention the alleged workplace comments.

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

It further noted that the statute requires more than a single isolated act; rather the behavior found to be harassing must be "repeated acts" or a "course of conduct." ***Id.*** at 407-08. Finally, the acts complained of must "serve no legitimate purpose"; whether this condition is met is a question for the fact finder. ***Id.*** at 408.

¶13 Fedran first argues that his actions simply were not harassing to Kebbekus. As we have noted, the trial court based its finding of harassment on: Fedran's phone call to Kebbekus in which he suggested he should take a gun and "end it"; Fedran's contacting of law enforcement regarding people that he stated were supplying Kebbekus with a "date-rape drug"; Fedran's suspiciousness about Kebbekus' activities during the time that they were dating; and Fedran's driving past Kebbekus' house, noting nearby vehicles, and describing them to her, once during their relationship and once after the relationship ended.

¶14 Fedran acknowledges that our standard of review requires us to uphold the circuit court's discretionary decision unless the court failed to exercise its discretion or there was no reasonable basis for the trial court's decision. ***Wester v. Bruggink***, 190 Wis. 2d 308, 317, 527 N.W.2d 373 (Ct. App. 1994). Further, we must uphold factual findings of the trial court unless they are clearly erroneous. ***State v. McDowell***, 2004 WI 70, ¶31, 272 Wis. 2d 488, 681 N.W.2d 500. Nevertheless, Fedran's argument on this point consists largely of recasting his actions as innocent conduct. For example, while the trial court found Fedran's contacting law enforcement about Kebbekus' alleged drug use to be a form of "indirect intimidation," Fedran argues that it is more reasonably viewed as an act of concern for Kebbekus' well-being. Fedran notes that it is unclear how Kebbekus learned of his conversations with law enforcement and states that he did not tell her about them. Therefore, he argues, the conversations cannot have been intimidating to her. But of course, Kebbekus *did* find out about it (as one might

well have suspected she would). Much of human conduct can be interpreted in different ways in different contexts by different observers. We will not, based on the cold paper record before us, overrule the trial court's reasonable view that Fedran's contacting the police about Kebbekus' alleged drug situation was intimidating to Kebbekus.[4]

¶15 Further, we conclude that the trial court was reasonable in characterizing Fedran's actions as a "course of conduct." There can be no serious argument that Fedran's string of potentially intimidating and vexing behaviors constitute only a "single isolated" act. *See* ***Bachowski***, 139 Wis. 2d at 407-08.

¶16 Fedran finally argues that the circuit court did not find that his harassment was intentional, as WIS. STAT. § 813.125(5)(a)3. requires. It is true that the circuit court did not explicitly make such a finding on the record. Nevertheless, we will assume a circuit court implicitly makes those findings necessary to support its decision, and we accept those implicit findings if they are supported by the record. ***Town of Avon v. Oliver***, 2002 WI App 97, ¶23, 253 Wis. 2d 647, 644 N.W.2d 260. Intent may be inferred from conduct. *See* ***State v. Cydzik***, 60 Wis. 2d 683, 697, 211 N.W.2d 421 (1973). The circuit court found that Fedran had engaged in a pattern of behavior including direct and indirect intimidation of Kebbekus. We conclude that this pattern of behavior is sufficient to support the inference of an intent to harass.

[4] Nor will we reverse the trial court simply because Fedran can point to various intimidating and harassing acts that he did *not* commit. It may be true, as Fedran states, that he did not threaten to harm anyone Kebbekus was dating, nor contact her after she asked him not to (with the exception of the phone call on which he threatened to "end it"). It is up to the trial court, not this one, to weigh the evidence and determine which facts are most significant.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶17 SNYDER, J. (*dissenting*). The issuance of a WIS. STAT. § 813.125 harassment injunction against any citizen is not to be taken lightly. As recognized by our supreme court, "[t]he violation of an injunction issued under [§] 813.125 is a criminal offense. Substantial fines and imprisonment could result." ***Bachowski v. Salamone***, 139 Wis. 2d 397, 414, 407 N.W.2d 533 (1987); § 813.125(7). In addition, as here, the court may order that a citizen be denied the otherwise constitutional possession and use of his legal firearms. Sec. 813.125(4m)(a). Because Cassandra Kebbekus concedes, in abandoning this appeal, that the record does not support Brian Fedran's acting in a course of harassing conduct, and because affirming the order leaves Fedran with the stigma of an unnecessary restrictive court order, without any further need, reason or purpose, I dissent. This court should accept Kebbekus' appellate concession and reverse the injunction order.

¶18 On January 11, 2008, this court issued an order acknowledging that Kebbekus would not file a respondent's brief. Kebbekus' failure to file a respondent's brief reflects her lack of any need for further court impositions upon Fedran's rights as a citizen, tacitly concedes that the trial court erred in granting the harassment injunction, *see* ***State ex rel. Blackdeer v. Levis Twp.***, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993), and allows this court to assume that the respondent concedes the issues raised by the appellant, ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶19 The reversal of the harassment injunction order based upon a failure to participate in the appeal process requires our exercise of discretion. Our exercise of discretion is subject to the same standard of review as applied in the trial court, and turns upon whether this court "has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898 (citation omitted).

¶20 In exercising our discretion, we first examine the relevant facts in the record. The record facts support Kebbekus' concession that the harassment order was issued in error. The request for injunctive relief was not her idea or based upon any perceived need on her part. Kebbekus was unaware that she was, or even might be, in need of a harassment injunction until April 28, 2006, when a sheriff's deputy and a police officer showed up at her doorstep and told her that she should get one. Those facts are memorialized in the following hearing testimony:

> THE COURT: I'm going to allow Ms. Kebbekus to testify regarding the conversations with the Mukwonago police and sheriffs to further inform the court as to why she did what she did in this matter—perhaps not for the truth of the matter, but to determine why she did what she did in this matter. So, Ms. Kebbekus, can you tell me what the—who talked to you? Is it someone from the Mukwonago Police Department, or is it from the Waukesha Sheriff, or who?
>
> KEBBEKUS: Both.
>
> THE COURT: Do you recall who from the Mukwonago Police Department?
>
> KEBBEKUS: No, I don't. I don't have his car[d].
>
> THE COURT: Was it an officer?

KEBBEKUS: Yes, I might have it in my purse.

THE COURT: You can obtain that.

(Accomplished.)

KEBBEKUS: This chair. Steve Ladue, L-A-D-U-E, lieutenant.

THE COURT: And what did Lieutenant Ladue tell you?

KEBBEKUS: He substantiated what the sheriff was saying, about their concern for me and Brian's welfare.

THE COURT: All right. And then did someone there, am I getting—am I surmising correctly someone from the Sheriff's Department had talked to you prior to Lieutenant Ladue speaking to you?

KEBBEKUS: No, they came at the same time.

THE COURT: All right, and do you recall who from the Sheriff's Department came to see you?

KEBBEKUS: Yes. Deputy Febray.

THE COURT: And I believe you mentioned his name before, and it's your understanding that Deputy Febray is an acquaintance of Brian's?

KEBBEKUS: Yes, she is the neighbor of Brian's ex-boss.

THE COURT: All right, and what did the Sheriff's Department inform you?

KEBBEKUS: That Brian was saying something special was going to happen at work May 3rd or 4th, right in that time, I can't remember the exact date, and that it was going to be significant to everyone.

….

THE COURT: And [Ladue and Febray] informed you to take some action?

KEBBEKUS: Yes.

THE COURT: And what action did they inform you to take?

> KEBBEKUS: To have no contact, *and then to get the restraining order*. (Emphasis added.)
>
> ….
>
> DEFENSE COUNSEL PAYNE: And you filed this action in the second week of May—May 11th, is that correct?
>
> KEBBEKUS: Correct, at the—*at the encouragement of the sheriff*. (Emphasis added.)

¶21 In addition, the facts are that Kebbekus personally accomplished the invocation of a no contact understanding with Fedran, as recommended by the law enforcement officers on April 28, 2006, by simply telling Fedran that she wanted no further contact with him:

> KEBBEKUS: Brian showed up at my door, wanting to know if I wanted help with the tile that he had put in for me, and I said "no." I wouldn't open my door to him. He was wondering why. I said *that the sheriff had told me not to*—(Emphasis added.)
>
> MS. PAYNE: Objection.
>
> KEBBEKUS: *It's what the sheriff*—(Emphasis added.)
>
> THE COURT: I'm going to allow it.
>
> KEBBEKUS: *Had told me not to have contact with Brian*, and so I did not open my door. Brian then left. He said he was going to the police department to get to the bottom of this. And he calls me on his way to the police department, telling me that he should just take a shotgun and, you know, shoot himself and end it for everyone. (Emphasis added.)
>
> THE COURT: All right. Did you even have any contact after that date with [Brian?]
>
> KEBBEKUS: No, I did not.
>
> THE COURT: Have you ever told Brian that you do not want to have contact with him?
>
> KEBBEKUS: Yes, definitely.
>
> THE COURT: And when?

> KEBBEKUS: On the day that he visited after the sheriff had been there, so approximately, you know, four to seven days. Roughly seven days.
>
> THE COURT: And since that time, he's not contacted you, though; correct?
>
> KEBBEKUS: Correct.
>
> ….
>
> DEFENSE COUNSEL PAYNE: You told him you didn't want any more contact with him after the first week in May; correct?
>
> ….
>
> KEBBEKUS: Yes.
>
> PAYNE: And he didn't contact you again after that first week in May; is that correct?
>
> KEBBEKUS: Correct, yes.

¶22 In her Petition, Kebbekus established May 5, 2007, as the last day of her contact with Kedran. She filed the officer's requested petition on May 11, six days later. On July 19, 2007, Kebbekus testified that Fedran had faithfully honored her request of no contact that she imposed seventy-three days earlier. Ninety-eight days later, at the August 13, 2007 hearing, Fedran was still in compliance with Kebbekus' May 5 request that he not contact her. This factual record, consistent with Kebbekus' concession in failing to defend the order in this appeal, fully supports Fedran's appellate position that the issuance of the harassment injunction was in error, unnecessary, and should be reversed. Kebbekus obtained full compliance from Fedran in terminating her relationship with Fedran on her own terms and did so with her initial request.

¶23 The August 13 trial court decision acknowledged that the harassment proceeding was precipitated by the visiting police officers on April 28, 2007,

rather than by any perceived need for government protection by Kebbekus and, further, that Fedran had honored and complied with Kebbekus' May 5, 2007 directive that he have no further contact with her:

> THE COURT: What the court does find is that the parties were dating from December of '06 through approximately late March of 2007. At some point in late March to early April of 2007,[1] Ms. Kebbekus was paid a visit by the law enforcement, who essentially told her to be wary. After that, she asked Mr. Fedran not to contact her anymore, and her testimony was that he has not contacted her anymore since that time.

¶24 In spite of the above record and findings, the trial court found it necessary to grant the harassment injunction, as well as to impose the firearm restriction. Kebbekus did request a firearms restriction in her petition but took no position in regard to such a restriction at the hearing.

¶25 Fedran also raises the issue of the inappropriate admission of hearsay evidence. The majority concedes that Febray's testimony involves inadmissible hearsay:

> However, in the deputy sheriff's subsequent testimony we do note that there are several layers of potential hearsay involved, and no hearsay exception that clearly applies. The court did not state that it was limiting this testimony to any particular purpose, and further, we can think of no particularly relevant purpose for which it could be admitted, *other than the truth of the matter asserted*. (Emphasis added.)

Majority, ¶8.

[1] It is undisputed that the law enforcement visit to Kebbekus was on April 28, 2007, well after the period referenced by the trial court in its findings.

¶26 The majority opinion concludes that because the hearsay rule applies differently in trials to the court than it does in jury trials that, even though the trial court allowed inadmissible hearsay into the record over Fedran's objections, the admission is harmless error. Majority, ¶¶9-10. The majority opinion cites to ***State v. Mullis***, 81 Wis. 2d 454, 260 N.W.2d 696 (1978), in support of its harmless error conclusion.

¶27 The ***Mullis*** court prefaced the language relied upon in the majority opinion as follows: "While evidence that is not admissible in a jury trial is equally inadmissible in a trial to the court … this court views the situation as distinct." ***Id.*** at 461. ***Mullis*** specifically addressed the admissibility of portions of a document that "plac[ed] before the court the operative fact that Mullis' driver's license had, as a matter of fact, been revoked by the Administrator of the Division of Motor Vehicles." ***Id.*** Limiting its application to the ***Mullis*** situation, the court concluded that "[t]he hearsay [evidence] admittedly contained in other portions of the [otherwise admissible] Administrator's certificate was largely irrelevant and harmless beyond a reasonable doubt." ***Id.*** It did so while noting that because the foundational document involved "does not purport to narrate matters which would be subject to cross-examination or disproof thereby." ***Id.*** Here, the admitted hearsay evidence was of a nature that required subjection of the evidence to cross-examination if Fedran was provided his full exercise of trial advocacy. I disagree that ***Mullis*** paints with the broad brush the majority opinion suggests or that ***Mullis*** stands for a carte blanche rule that courts can ignore rules of evidence over properly stated objections at court trials. If it does, in fairness to all parties, it should not.

¶28 As to the weight of Fabry's testimony, it should have none. Fabry testified that as a law enforcement officer she never filed an incident report

concerning her visit to Kebbekus with the other police officer, even though she stated that the visit to Kebbekus was prompted by her "duty to act [as an officer] on information I had received." The information that Fabry received from others and acted upon in her visit to Kebbekus as a law enforcement officer, is the crux of the hearsay problem posed by Fedran at trial and in this appeal.

¶29 Fedran was careful to preserve his evidentiary objections concerning hearsay, and double hearsay, as indicated during Fabry's testimony:

> KEBBEKUS: What precipitated you coming to my home on April 28th?
>
> FABRY: Several days earlier, my neighbor, Todd Gillette—
>
> DEFENSE COUNSEL PAYNE: Objection, hearsay.
>
> THE COURT: Well, let's—did you go to Ms Kebbekus's home as part of your duties as a law enforcement officer?
>
> DETECTIVE FABRY: I believe it was a duty to act on information I had received.
>
> THE COURT: All right, I'm going to allow her to testify. Go ahead. Go ahead.
>
> FABRY: Prior to that date, my neighbor, Todd Gillette, came to my house with information he had received—
>
> MS. PAYNE: Your honor, I'm going to object. Now this is double hearsay.
>
> THE COURT: That's fine, ma'am, you can object all you want, but I'm going to listen to it.

¶30 The most revealing problem with Fabry's testimony is apparent in the following record:

> DEFENSE COUNSEL PAYNE: So, it's your testimony that the reason you went to talk to [Kebbekus] is because someone told someone who told someone who told your neighbor that Brian had said something was going to happen on May 2nd; is that a correct synopsis?

> FABRY: It was a worker at Gillette's Auto Body, so it was secondhand only.

¶31 As noted above, under the order Fedran has been denied his citizen's right to possess his personal, legal firearms for hunting, or for any other legal purpose. In order to impose the firearm restriction, the court must determine "on clear and convincing evidence … that the respondent may use a firearm to cause physical harm to another or to endanger public safety." WIS. STAT. § 813.125(4m)(a).

¶32 The record does not support a finding that Fedran ever used, or threatened to use, a firearm to cause physical harm to another, or to endanger the public safety. If a firearm threat of potential harm to others in the community clearly and convincingly exists, it would support the issuance of an injunction and the firearm restriction. It does not exist here.[2] Kebbekus did not testify as to any need for such a restriction, and the record evidence does not clearly and convincing support the firearm restriction.

¶33 This court has previously addressed the problem of a respondent's failure to participate in the appeal process: "[T]he Court of Appeals … is a fast-paced, high-volume court [and] [t]here are limits beyond which we cannot go in overlooking these kinds of failings…. [F]or us to decide [their] issues, we would first have to develop them. We cannot serve as both advocate and judge," ***State v.***

[2] The factual evidence as to a firearm consists of Kebbekus testifying that Fedran, shortly after being told that he could have no more contact with her, called on his cell phone and told her "that he should just take a shotgun and, you know, shoot himself and end it for everyone." Fedran's record response was, "I didn't say shotgun, I didn't say any gun—but I said, basically, my .357 and end it for myself, so you wouldn't have to worry about your children being taken away from you …."

Pettit, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), by independently developing a litigant's argument, ***Gardner v. Gardner***, 190 Wis. 2d 216, 239 n.3, 527 N.W.2d 701 (Ct. App. 1994).

¶34 The majority opinion in a footnote discounts our obligation to remain a neutral, impartial reviewing judicial body. Majority, ¶6 n.1. In doing so, the majority has independently developed the Kebbekus response to the Fedran appeal and has acted as an advocate for Kebbekus in addition to deciding the merits of Fedran's appeal. Fedran, like any other user of our court system, is entitled to a full and fair appellate proceeding. He did not get one here. The previous admonitions expressed in ***Pettit*** and ***Gardner*** cannot be ignored and should not be violated.

¶35 The relevant law is that the failure of Kebbekus to file a respondent's brief provides the grounds for reversal of the trial court order as challenged by Fedran's appellate arguments. *See* WIS. STAT. RULE 809.83. We should exercise our discretion and reverse the order. The relevant facts indicate that Kebbekus was unaware that she was in need of a court order until law enforcement officers told her she was in such need. The officers based their advice to Kebbekus upon hearsay statements from third parties, and those parties never testified at the harassment hearings. WISCONSIN STAT. § 813.125 cannot be read as a tool for the use of law enforcement officers rather than citizens with a protective need for government intervention in their private associations, and the courts should be wary of efforts of government manipulation in citizen relationships.

¶36 Kebbekus told Fedran to leave her alone. Fedran did so. The majority wrongly holds that Fedran should be subjected to the further stigma and

burden of an existing harassment order, especially as to the restriction on his right to possess and use his own legal firearms. The record lacks any valid basis to reject Kebbekus' abandonment of her expressed need for the continuance of a restrictive order involving Fedran where the relationship between Kebbekus and Fedran was terminated voluntarily. I would reverse and vacate the WIS. STAT. § 813.125 order.