COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP295 **Cir. Ct. No. 2013FA3711**

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

NICOLE MARIE THOMAS,

PETITIONER-RESPONDENT,

V.

KORRY ARDELL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Korry Ardell appeals the circuit court's order upholding a domestic abuse injunction that Nicole Thomas initially obtained against him before a court commissioner. Ardell argues that: (1) the court commissioner's initial injunction decision was based on insufficient evidence;

(2) the circuit court "erroneously found that the commissioner found Thomas more credible than Ardell"; (3) the court erred by refusing to consider Thomas's failure to respond to Ardell's requests for admissions; (4) the court erred in refusing to admit Thomas's personal phone records; (5) the court misunderstood the time line of pertinent events; and (6) the court improperly relied on a public records request made by Ardell as a basis for the injunction. We reject these arguments and affirm.

Background

¶2 Thomas alleged in her petition for a domestic abuse injunction that Ardell called her and threatened to kill her on May 23, 2013, after Ardell lost a separate circuit court case relating to a public records request seeking employment records relating to Thomas. Thomas further alleged that Ardell was in a vehicle parked outside her home the next morning.[1]

¶3 The court commissioner granted an injunction, and Ardell moved for a de novo hearing before the circuit court.

¶4 Thomas testified at the de novo hearing that Ardell called her on May 23, 2013, saying something to the effect of "You're dead," and that Ardell was parked outside Thomas's home the next morning. Thomas described a history

[1] Thomas's petition does not expressly refer to the date of May 23, 2013, as the date of the call, nor does the petition allege that the separate court case was related to Ardell's public records request. However, it is apparent from the subsequent proceedings and from the parties' briefing that the parties agree that these are the pertinent allegations. For example, Ardell states in his briefing that "Ms. Thomas's petition alleges that Mr. Ardell called and threatened her on May 23, 2013," and that the case referenced in Thomas's petition "involves a public records request Ardell made with the Milwaukee Board of School Directors … for Thomas's attendance and disciplinary records."

of threatening and otherwise harassing conduct by Ardell, including past threatening phone calls. Thomas said that Ardell's harassment "never stopped" for the last seven years, except for a time when Ardell was in custody for violating a previous injunction Thomas had obtained against him.

¶5 Ardell also testified at the de novo hearing. He denied calling Thomas on May 23, 2013. In addition, Ardell said that he was out of town on the morning Thomas claimed he was parked outside her apartment. Ardell offered copies of Thomas's phone records as proof that he did not call Thomas on May 23 and copies of receipts as proof that he was out of town the next morning.

¶6 The circuit court found that Thomas's testimony was more credible than Ardell's testimony and determined that Thomas's phone records were inadmissible. The court concluded that Thomas demonstrated reasonable grounds for the injunction. In the course of explaining its reasoning, the court found that Ardell used his public records request to "continue[] to pursue [Thomas] through her employer." The court issued a final order upholding the injunction on December 10, 2013.[2]

¶7 We reference additional facts in our discussion below.

Discussion

¶8 The domestic abuse injunction statute provides that the court or commissioner granting an injunction must find "reasonable grounds to believe that

[2] Ardell filed his notice of appeal on February 5, 2014. We subsequently granted two requests by Ardell and one request by Thomas for extensions of time to meet briefing deadlines. The briefing was completed on September 5, 2014.

the respondent has engaged in, or based upon prior conduct of the petitioner and the respondent may engage in, domestic abuse of the petitioner." *See* WIS. STAT. § 813.12(4).[3] "'Domestic abuse'" is defined to include

> any of the following engaged in by … an adult against an adult with whom the individual has or had a dating relationship …:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> ….
>
> 6. A threat to engage in the conduct under subd. 1., 2., 3., or 5.

Section 813.12(1)(am).

¶9 There is no dispute as to the applicable standards of review. We uphold the circuit court's factual findings in support of the injunction unless those findings are clearly erroneous. ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. However, whether the facts as found are sufficient to show reasonable grounds for an injunction is a question of law that we review de novo. ***Id.*** The parties agree that the ultimate decision to grant an injunction is a discretionary one for the circuit court. *See* WIS. STAT. § 813.12(4)(a) (stating that the circuit court "may" grant an injunction if the court finds reasonable grounds for the injunction).

[3] All references to the Wisconsin Statutes are to the 2011-12 version, the version that applied at all pertinent times here.

1. Sufficiency Of Evidence For Court Commissioner's Decision

¶10 Ardell argues that the court commissioner's decision to issue the injunction was based on insufficient evidence. However, when a party requests a de novo hearing, as Ardell did here, the circuit court retries the case anew. As we explained in ***Stuligross v. Stuligross***, 2009 WI App 25, 316 Wis. 2d 344, 763 N.W.2d 241, the de novo hearing is "literally a new hearing," not simply a review of the court commissioner record:

> The commonly accepted meaning of a *de novo* hearing is "[a] new hearing of a matter, conducted as if the original hearing had not taken place." BLACK'S LAW DICTIONARY 738 (8th ed. 2004). A *de novo* hearing requires a fresh look at the issues, including the taking of testimony (unless the parties enter into stipulations as to what the testimony would be). The hearing is literally a new hearing, not merely a review of whatever record may have been made before the … court commissioner.

Id., ¶12. Accordingly, the court commissioner's hearing and decision have been replaced by the circuit court's de novo hearing and decision based on that de novo hearing. Challenging the court commissioner's decision now makes no sense. Thomas essentially makes this point in her responsive brief, and Ardell implicitly concedes the issue by failing to address it in his reply brief. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in reply brief to an argument made in respondent's brief may be taken as a concession).[4]

[4] To the extent that Ardell may be arguing that the court commissioner erred in other respects, we decline to address those arguments for the same reasons.

2. Circuit Court's Finding Regarding Credibility

¶11 Ardell argues that the circuit court "erroneously found that the [court] commissioner found Thomas more credible than Ardell." The circuit court's view of the commissioner's credibility findings does not matter. As we have seen, the court commissioner's decision has been replaced.

¶12 If Ardell means to argue that the circuit court, in making its own credibility findings, erred by relying on the court commissioner's credibility findings, the argument has no merit. The circuit court's decision makes clear that the court relied on its own, independent credibility determinations based on the testimony and other evidence before the court at the de novo hearing. Ardell points to nothing in the circuit court's decision showing that the circuit court instead deferred to the court commissioner.

¶13 In his reply brief, Ardell expands his argument, asserting more broadly that the circuit court's reliance on the record before the court commissioner resulted in a "fundamentally flawed" de novo hearing. As we understand it, Ardell argues that the circuit court failed to conduct a true de novo hearing as ***Stuligross*** requires.

¶14 We normally do not consider arguments raised for the first time in a reply brief, *see* ***A.O. Smith Corp. v. Allstate Insurance Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998), and we reject the argument for that reason. Nonetheless, we choose to explain why the expanded argument raised in Ardell's reply brief lacks merit. The argument is really comprised of two sub-arguments, neither of which persuades us.

¶15 First, Ardell appears to be arguing that a comment by the circuit court demonstrates that the court did not conduct a proper de novo hearing because the court misunderstood the nature of a de novo hearing. Ardell points to the circuit court's comment that the scope of the de novo hearing had a "very confined purpose" and was limited to "appealing" the court commissioner's decision. We agree that these words and others, read in isolation, suggest a misunderstanding of the nature of the de novo proceeding. However, the full record demonstrates that the circuit court understood the nature of the proceeding. For example, the court explained in the presence of both parties:

> The case has to be tried. It's just not a discussion. A trial requires testimony, records and any evidence either one of you want to put before the court.
>
> Although you [Thomas] have received an injunction, under Wisconsin's law when the appeal is made to this case, it's as if it never occurred. The injunction stays in place unless and until some court changes it, but the presentation has to be made again just as it was made below. That's Wisconsin's law.

And, as we have indicated, the court heard testimony from both parties, allowed Ardell to offer other evidence and made rulings on that evidence, and made findings including credibility determinations.

¶16 Second, Ardell appears to be arguing that the circuit court did not conduct a true de novo hearing because the court sometimes read from the transcript of the court commissioner hearing, and because the court prevented Ardell from questioning Thomas about whether she objected to the presentation of phone records at *that* hearing. Regardless whether the circuit court committed any error in this regard, Ardell does not explain how the circuit court's approach prevented him from fully defending against Thomas's allegations. Indeed, Ardell does not present any argument explaining how *any* real or perceived procedural

irregularity at the de novo hearing prevented him from presenting his defense or otherwise affected his substantial rights. *See* WIS. STAT. § 805.18(2) ("No judgment shall be reversed or set aside … for error as to any matter of pleading or procedure … unless … it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment ....").

3. Requests For Admissions

¶17 Relying on the statutory provision addressing requests for admissions, WIS. STAT. § 804.11(1)(b), Ardell argues that the circuit court erred by refusing to consider Thomas's failure to respond to Ardell's requests for admissions. According to Ardell, Thomas's failure to respond to the requests constitutes binding admissions, including admissions that Thomas received no call from Ardell on May 23, 2013; that Thomas did not see Ardell outside her home on May 24, 2013; and that Ardell "committed no acts of domestic abuse after (if at all) July 9, 2008." We are not persuaded.

¶18 First, Ardell's argument is insufficiently developed, and we reject it on that basis. Although it is true that WIS. STAT. § 804.11(1)(b) sets forth a general rule deeming requests for admissions to be admitted in the absence of a timely denial, the rule is not absolute. Rather, a court has discretion to relieve a party from an admission. *See* ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, ¶25, 252 Wis. 2d 426, 643 N.W.2d 98 ("The decision to allow relief from the effect of an admission is within the trial court's discretion."). As we shall see, one reasonable view of the record is that the circuit court effectively determined that, under the circumstances here, Thomas should not be held to any admissions that may have been made pursuant to § 804.11. However, our point is that Ardell does not fully discuss the topic. Rather, in a single paragraph comprised of a few

sentences, Ardell simply asserts that Thomas's failure "cannot be ignored." This is insufficient.

¶19 Second, our review of the record discloses that there was good reason for the circuit court to decline to hold Thomas to any admissions that might have been inferred from the absence of a response to Ardell's requests for admissions. Thomas correctly points out that Ardell did not serve the requests on Thomas until after the circuit court granted Ardell's request, over Thomas's objection, to continue the de novo hearing for other purposes. Ardell then sought to use the requests as support for a motion to dismiss three days before the continued hearing. The circuit court ruled that the motion to dismiss was untimely, and declined to address the motion on that basis. Ardell acknowledges that his motion was untimely, but does not explain why this circumstance is insufficient for the circuit court to reject his request to hold Thomas to her alleged admissions. Under the circumstances, the circuit court could have reasonably concluded that absence of a response to the requests for admissions should not be treated as binding admissions.

¶20 Given all of the circumstances, Ardell's limited argument does not persuade us that his requests for admissions were proper, let alone that the circuit court erred by refusing to consider them as support for a motion to dismiss.

4. Phone Records

¶21 Ardell argues that the circuit court erred in refusing to admit Thomas's personal phone records. Appellate courts review a circuit court's decision to admit or exclude evidence for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will

uphold the circuit court's ruling if there is a rational basis for the circuit court's decision. ***Id.***, ¶29.

¶22 At the de novo hearing, Ardell sought to introduce Thomas's cell phone records in an attempt to show that Ardell did not call Thomas on May 23, 2013, as Thomas asserted. Ardell acknowledges that the records show several calls to Thomas from different phone numbers on the afternoon of May 23, 2013. He asserts, however, that he may have been able to use the records to demonstrate that he could not have been the caller from those numbers.

¶23 The circuit court refused to admit the phone records, reasoning that they were hearsay and that Ardell failed to call a witness who could testify as to their veracity and significance. The circuit court rejected Ardell's attempt to rely on the hearsay exception for records of regularly conducted activity, WIS. STAT. § 908.03(6).[5]

[5] WISCONSIN STAT. § 908.03 provides:

> **Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ….
>
> **(6)** RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

¶24 Ardell does not dispute that the phone records are hearsay. Rather, as we understand it, he argues that the circuit court should have admitted the records under the hearsay exception because he submitted a "written certification" that complies with WIS. STAT. § 909.02(12), thus obviating the need for a live witness.[6] We are not persuaded.

¶25 As Thomas points out, a written certification under WIS. STAT. § 909.02(12) must be made by the records "custodian or other qualified person." We fail to see, and Ardell fails to explain, how the document that Ardell relies on as his "written certification" meets this requirement. The document is a "declaration" that contains a single, ambiguous statement by the declarant on this topic. The declarant states that "I am acting *in behalf of* the custodian of records of the business named in the subpoena [that business being Thomas's cell phone carrier], *or* I am otherwise qualified as a result of my position with the business named in the subpoena" (emphasis added). Ambiguity arises, in part, because of the "or"—we cannot tell from the declaration whether the declarant is claiming to be acting "in behalf of" the custodian or is claiming to be an "otherwise qualified" person. If the declarant is merely "acting in behalf of" a custodian, that is insufficient. As to whether the declarant is otherwise a "qualified" person *within the meaning of the statute*, the declaration provides nothing more than a bald assertion, and Ardell provides no authority showing that that is enough. Without more explanation, Ardell fails to convince us that the circuit court erroneously

[6] To the extent Ardell means to make other arguments regarding the admissibility of the phone records, we consider those arguments too undeveloped to warrant attention. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

exercised its discretion by refusing to admit the phone records based on this declaration.

5. Time Line Of Pertinent Events

¶26 Ardell argues that the circuit court misunderstood the time line of pertinent events and, as a result, reached a wrong conclusion or engaged in erroneous fact finding. As far as we can tell from Ardell's briefing, this "time line" argument relates only to Thomas's allegation that Ardell parked outside Thomas's home on May 24, 2013; it does not relate to Thomas's allegation that Ardell called and threatened to kill her on May 23, 2013. Thus, even assuming the circuit court misunderstood the time line as Ardell asserts, it would not matter. As we have said, Thomas testified about the May 23 phone call and about Ardell's history of threatening and otherwise harassing conduct. Therefore, even without the May 24 parking incident, the evidence easily justified the injunction issued by the circuit court.

6. Public Records Request

¶27 Ardell explains that he filed his public records request with Thomas's school district employer in an attempt to "clear his name" and to determine whether Thomas had "ma[de] false accusations against him during work hours" or had "perjured herself on work time." The circuit court considered Ardell's request as part of its decision, finding that Ardell used the request to "continue[] to pursue [Thomas] through her employer." Ardell argues that the circuit court improperly relied on his public records request as a basis for granting the injunction.

¶28 We have difficulty understanding the legal underpinnings of Ardell's argument. He appears to contend that his First Amendment rights and his statutory right to request public records were violated by the circuit court's consideration of his public records request or his motive for that request. If this is what Ardell means to argue, we reject the argument for two reasons.

¶29 First, Ardell cites no authority for the proposition that a public records request, or the motive for that request, cannot serve as one of several factors to support an injunction. The circuit court did not conclude, and we do not conclude, that there were reasonable grounds for the injunction based solely or even primarily on Ardell's public records request. Rather, as the circuit court found, the request is one of many means by which Ardell sought to harass Thomas.

¶30 Second, even if we disregarded Ardell's public records request, there is ample evidence supporting the injunction. As we have explained, it was enough that the circuit court credited Thomas's testimony about the May 23 phone call threat as well as Thomas's other testimony about Ardell's prior threatening and harassing conduct.

Conclusion

¶31 For the reasons stated above, we affirm the circuit court's order upholding the domestic abuse injunction against Ardell.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.