COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2006AP1723
2006AP1724

Cir. Ct. Nos. 2006CV1207
2006CV1208

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2006AP1723

JAMES B. ROGERS,

PETITIONER-RESPONDENT,

V.

PAUL G. PENKALSKI,

RESPONDENT-APPELLANT.

NO. 2006AP1724

MICHAEL S. LARSEN,

PETITIONER-RESPONDENT,

V.

PAUL G. PENKALSKI,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed in part and reversed in part*.

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 HIGGINBOTHAM, P.J. Paul Penkalski, appearing pro se, appeals orders granted in favor of James Rogers and Michael Larsen, enjoining Penkalski from contacting Rogers and Larsen for two years, and denying his motions for reconsideration.[1] Penkalski contends that Rogers and Larsen filed falsified petitions for temporary restraining orders (TROs), and that Rogers gave false testimony at the hearing, causing the court commissioner and the circuit court to err in issuing the TROs and the injunctions, respectively. Penkalski argues that the evidence was insufficient in both cases to warrant the issuance of an injunction. Finally, he asserts that, even if the evidence was sufficient to support the injunctions, the injunctive orders were overly broad in scope.

¶2 We conclude that the petitions state reasonable grounds on which to issue TROs, and that, in Larsen's case, the circuit court's factual findings supporting the issuance of the injunction were not clearly erroneous. However, we conclude that its findings in Rogers' case were clearly erroneous, and that the record fails to reveal an alternate factual basis on which to sustain the injunction. We further conclude that the evidence was sufficient in Larsen's case for a reasonable trier of fact to find the elements necessary to support the issuance of

[1] This matter involves two separate appeals, Nos. 2006AP1723 and 2006AP1724, arising from separate actions brought by Rogers and Larsen, respectively. We ordered these appeals consolidated for disposition.

the injunction, but that the Larsen injunction was overly broad in scope. Accordingly, we affirm in part and reverse in part.[2]

BACKGROUND

¶3 Paul Penkalski was a member of the University of Wisconsin Hoofer Sailing Club ("Hoofers") and the Wisconsin Union until his removal from these organizations in August 2005 and September 2005, respectively. Michael Larsen is a member of Hoofers and was president of the club until mid-2005. James Rogers is the Outdoor Programs Coordinator for the Wisconsin Union at UW-Madison, and in that capacity has advised student leaders including Larsen.

¶4 Larsen and Rogers filed separate temporary restraining order (TRO) petitions against Penkalski on April 13, 2006. The petitions allege that, following Penkalski's removal from Hoofers and the Wisconsin Union, University officials instructed Penkalski to cease contact with Hoofers and Union leaders and to stay away from Union premises. The petitions further allege that Penkalski repeatedly violated this instruction by sending frequent emails to Rogers and Larsen, and by showing up at Larsen's apartment door on one occasion.

¶5 A court commissioner granted temporary injunctions on both petitions. On April 18, 2006, the circuit court held hearings on the petitions, taking testimony from Penkalski and the respective petitioner in each case. At the conclusion of the hearings, the court issued harassment injunctions effective until April 18, 2008, in both cases. Penkalski requested a rehearing on the petitions.

[2] The injunctions in these cases were effective until April 18, 2008. Because the injunctions are no longer in effect, further proceedings before the circuit court are unnecessary.

The circuit court denied the request without a hearing. Additional facts are provided in the discussion section as necessary.

DISCUSSION

¶6 On appeal, Penkalski challenges the injunctive orders on several grounds. He argues that Larsen and Rogers falsified their petitions, and that Rogers gave false testimony at the hearing, causing the court commissioner and the circuit court to err in issuing the TROs and the injunctions, respectively. He maintains that his conduct toward Larsen and Rogers was not harassment within the meaning of WIS. STAT. § 947.013 (2005-06),[3] and that the evidence was insufficient in both cases to warrant the issuance of an injunction. Finally, he asserts that even if the evidence was sufficient to support the injunctions, the injunctive orders were overly broad in scope.[4] We address each of these arguments in turn.

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

[4] Penkalski makes a number of additional arguments that we decline to address for various reasons. He contends that the injunctions amount to cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. We do not address this argument because it is insufficiently developed. ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375.

Penkalski also suggests that he was denied due process by the circuit court's request that he "just summarize" the contents of documents that he sought to introduce into evidence. However, the record shows that Larsen did not protest when the court requested that he summarize the documents. Penkalski has therefore waived his right to raise this issue on appeal. *See* ***State v. Davis***, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996).

Penkalski also makes a series of arguments for the first time on appeal. These include that he was denied due process by being denied the opportunity to examine and respond to evidence presented at the hearings; the circuit court erroneously concluded that WIS. STAT. § 813.125 applies to e-mail communications; and Larsen's petition was incomplete and service of the petition failed to meet the requirements of § 813.125. As a general rule, we do not address
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1. Alleged Falsification of Petitions and Testimony

¶7 We construe Penkalski's argument that Larsen and Rogers caused the court commissioner to err in issuing the TROs by falsifying the TRO petitions as a challenge to the sufficiency of the allegations stated in the TRO petitions. We construe his argument that the allegedly falsified TRO petitions and falsified hearing testimony of Rogers caused the circuit court to err in issuing the injunctions as a challenge to the court's factual findings and credibility determinations supporting the injunctions. We consider first Penkalski's challenges to the allegations in the TRO petitions.

a. Sufficiency of the TRO Petition Allegations

¶8 A person seeking an injunction against another person must first petition a judge or court commissioner for a TRO. *See* WIS. STAT. § 813.125(4). A petition for a TRO must provide the name of the victim, the name of the respondent, and allege that the respondent "has engaged in harassment with intent to harass or intimidate the petitioner." WIS. STAT. § 813.125(5). Before the judge or court commissioner may issue a TRO, he or she must find that there are "reasonable grounds to believe that the respondent has violated s. 947.013,"[5] the harassment statute. ***State v. Sveum***, 2002 WI App 105, ¶27, 254 Wis. 2d 868, 648 N.W.2d 496 (*quoting* WIS. STAT. § 813.125(3)(a)2.[6]). After a TRO is issued, a

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issues raised for the first time on appeal, ***Greene v. Hahn***, 2004 WI App 214, ¶21, 277 Wis. 2d 473, 689 N.W.2d 657, and we decline to do so here.

[5] WISCONSIN STAT. § 947.013(1m) provides that a person "[w]hoever, with intent to harass or intimidate another person … [e]ngages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose" is subject to a Class B forfeiture for harassment.

[6] WISCONSIN STAT. § 813.125(3) provides, in relevant part:

(continued)

circuit court may hold a hearing to determine whether an injunction of up to four years is warranted. Sec. 813.125(4).

¶9 Whether the facts alleged in a TRO petition constitute reasonable grounds upon which to issue a TRO is a question of law that we review de novo. *See* ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶22, 302 Wis. 2d 185, 734 N.W.2d 375 (appellate courts review de novo whether a set of facts meets the legal standard necessary to issue an injunction).

¶10 We discuss the specific falsehoods Penkalski alleges later when addressing the factual findings supporting the injunction. Presently, we confine our consideration of Penkalski's challenge of the TROs to whether the petitions allege reasonable grounds to support the issuance of the orders, regardless whether the allegations contained in the petition are true, because the decision to grant a TRO is based on the facial allegations contained in the petition. *See* WIS. STAT. § 813.125(5).

¶11 We conclude that both petitions allege reasonable grounds to believe that Penkalski violated WIS. STAT. § 947.013 by intentionally engaging in a course

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> TEMPORARY RESTRAINING ORDER. (a) A judge or circuit court commissioner may issue a temporary restraining order ordering the respondent to cease or avoid the harassment of another person, to avoid the petitioner's residence, except as provided in par. (am), or any premises temporarily occupied by the petitioner or both, or any combination of these remedies requested in the petition, if all of the following occur:
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> 1. The petitioner files a petition alleging the elements set forth under sub. (5)(a).
>
> 2. The judge or circuit court commissioner finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.

of conduct that harassed Larsen and Rogers and which served no legitimate purpose. Larsen's petition alleges that Penkalski "was instructed to have no contact" with him four times in August and September 2005 after Penkalski was removed from Hoofers, and that Penkalski sent at least 30 emails to him after the first no contact instruction was made. The petition further alleges that, on April 9, 2006, Penkalski visited Larsen's apartment "claiming to be verifying [his] address for a law suit." Larsen averred that Penkalski's continued email contact and the recent visit to his home were unwelcome, and that he felt threatened by these contacts. These allegations state reasonable grounds on which to believe that Penkalski harassed Larsen within the meaning of § 947.013, and we therefore conclude that the court commissioner did not err in issuing the TRO.

¶12 Rogers' petition alleges that Penkalski continued to send him emails concerning his removal from Hoofers and the Wisconsin Union after Penkalski was directed by university officials to refrain from contacting him. Rogers' petition further alleges that Penkalski's contacts with other persons regarding the dispute over his removal from Hoofers and the Union had become more intrusive, including a visit to Larsen's apartment door. These allegations state reasonable grounds on which to believe that Penkalski harassed Rogers within the meaning of WIS. STAT. § 947.013. We therefore conclude that the court commissioner did not err in issuing the TRO.

b. Factual findings and credibility determinations supporting the injunctions

¶13 We turn now to Penkalski's argument that alleged falsehoods contained in Rogers' and Larsen's petitions, and alleged false hearing testimony by Rogers, caused the circuit court to issue the injunctions based on erroneous factual findings and credibility determinations. A circuit court's findings of fact

may not be disturbed unless they are clearly erroneous. WIS. STAT. § 805.17(2). A determination of a witness's credibility will not be overturned on review unless the witness's testimony is shown to be incredible as a matter of law. *See* ***Hallin v. Hallin***, 228 Wis. 2d 250, 258-59, 596 N.W.2d 818 (Ct. App. 1999).

¶14 We conclude that the circuit court's factual findings relevant to Larsen's case were not clearly erroneous. However, in Rogers' case, we conclude that a factual finding essential to the circuit court's injunctive order is lacking support in the record and, therefore, the circuit court's order was based on a clearly erroneous finding of fact.

¶15 With regard to Larsen's petition, Penkalski maintains that the following statements contained therein are false: (1) "I [Larsen] have not been a club leader since 9-1-2005"; (2) "[Penkalski] sent out a threatening and harassing email to hundreds of club members containing a photo he took of me [Larsen] and several statement[s] suggesting ways to undermine or directly threaten the safety of myself and all club members"; and (3) There was a "clear increase in the seriousness" of Penkalski's harassing behavior over time.

¶16 The circuit court made no explicit findings concerning these statements. However, by issuing the injunction, the circuit court implicitly rejected any claim that Larsen falsified his petitions in a manner material to the factual basis for the injunctive orders. Moreover, Penkalski admitted that he had sent approximately thirty emails to Larsen following his termination from the sailing club in August 2005. The record indicates that these emails were unwelcome, and violated an instruction of the Hoofers' Board of Captains issued on August 1, 2005, that Penkalski cease contacting Larsen. We therefore conclude that the court's findings in Larsen's case were not clearly erroneous.

¶17 With regard to Rogers' petition, Penkalski contends that the petition falsely asserts that Penkalski had been directed by university officials "not to correspond" with Rogers. Penkalski argues that Rogers then testified falsely by reasserting this statement at the petition hearing.

¶18 The circuit court concluded that the injunction in Rogers' case was justified because Penkalski had violated requests to cease emailing Rogers. The court found that Rogers had "proven … that grounds exist to issue the injunction based on [Penkalski] contacting [Rogers] via e-mail after [Penkalski] was instructed not to do so." The court also found that the injunction was warranted because of Penkalski's contacts with Rogers "after [Penkalski] w[as] asked not to [contact him] because it served no legitimate purpose."

¶19 Rogers made two assertions in testimony that Penkalski contacted him after being asked not to do so. In the first instance, Rogers testified that "[o]n August 5 and August 29[, 2005,] [Penkalski] was told to have no further contact with many people, including me." This testimony is contradicted by an attachment to Rogers' petition. The August 5 and August 29 communications to which Rogers refers are letters bearing these dates from Wisconsin Union Director Mark Guthier to Penkalski. Only the August 29 letter is contained in the record. However, the content of the August 5 letter is revealed in the August 29 letter, which declared its purpose was "to clarify several points" of the "letter of August 5, 2005, that may have been misunderstood …." The August 29 letter refers to a no-contact request in the August 5 letter that was limited to "Hoofers and Union Council members." Rogers was a member of neither Hoofers nor Union Council, and he is not in any way referred to in the August 29 letter. Thus, we must conclude that the August 5 and August 29 communications to which

Rogers refers in his testimony did not include a request that Penkalski refrain from contacting him.

¶20 Second, Rogers alluded to "earlier references, earlier direction not to have communication" after being asked whether Penkalski had been told to refrain from contacting him before March 24, 2006. (It is undisputed that after March 24 Penkalski ceased all contact with Rogers.) Our review of the entire record, including copies of Penkalski's emails to Rogers submitted as attachments to Rogers' petition, failed to uncover a single instance in which Penkalski was told by anyone, including Rogers himself, to refrain from contacting Rogers. It is evident from the emails that Rogers was not the focus of Penkalski's contacts with University officials. Of the forty-plus emails Rogers submitted with his petition, only seven were addressed to Rogers directly, while the rest were copied to Rogers and did not evince an intent to harass him.[7] There is no evidence in the submissions to support the general assertion that, prior to March 24, 2006, University officials directed Penkalski to cease contacting Rogers, or that Rogers ever told Penkalski to stop contacting him.[8]

¶21 For the foregoing reasons, we therefore conclude that the court's finding that Penkalski was instructed not to contact Rogers prior to March 24, 2006, is clearly erroneous. Because this finding was essential to the basis for the

[7] We do not mean to suggest that emails copied to another person will never constitute harassment as long as the sender puts the recipient's email address in the "cc" line instead of the "to" line. The relevant inquiry is whether the email evinces an intent to harass the recipient. In this case, the emails copied to Rogers do not evince an intent to harass Rogers.

[8] This is in contrast to the emails Larsen submitted with his petition, which show that Larsen repeatedly asked Penkalski to stop contacting him. Moreover, as a member of Hoofers, Larsen was included in the group of persons Guthier directed Penkalski to refrain from contacting in the August 5 and August 29 letters.

court's order, and no other basis for the order is apparent from the record,[9] we must conclude that the circuit court erred in ordering the injunction against Penkalski in Rogers' case.

¶22 Penkalski's remaining arguments pertain to the injunctions in both the Larsen and Rogers cases. However, because we have concluded that the Rogers injunction cannot be sustained for the reasons discussed above, there is no need to consider whether it is infirm for additional reasons. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (when resolution of one issue is dispositive of entire case, additional issues need not be addressed). In the sections that follow, we therefore address only the Larsen injunction in considering Penkalski's arguments about the sufficiency of the evidence and the scope of the injunctions.

2. Sufficiency of the Evidence Supporting the Larsen Injunction

¶23 Penkalski appears to contend that the evidence was insufficient to support the circuit court's injunctive order in Larsen's case. Penkalski argues that many of his contacts with Larsen served a legitimate purpose, and therefore were not harassment within the meaning of WIS. STAT. § 947.013(1m). When reviewing a challenge to the sufficiency of the evidence supporting an injunctive

[9] As noted earlier, Penkalski's contacts with Rogers were exclusively by email, and, of the forty-plus emails Rogers submitted with his petition, only seven were addressed to him directly, while the rest were messages to others on which Rogers was copied. Of the seven addressed to Rogers directly, two appear to be open records requests that were also addressed to the records custodian, UW Attorney Ben Griffiths, while two others are in response to an email Rogers copied to Penkalski regarding vandalism to Hoofers' property. Only three emails, dated September 18, 19 and 21, 2005, respectively, are pointed in tone. However, we conclude that these messages are insufficient to sustain a harassment injunction against Penkalski, and merit no further discussion.

order, we review the evidence in the light most favorable to the order. *See* ***State v. Lalor***, 2003 WI App 68, ¶13, 261 Wis. 2d 614, 661 N.W.2d 898. We will not overturn an order unless the evidence is so insufficient in probative value and force that no reasonable trier of fact could have found the elements necessary to support the issuance of an injunction. ***Id.***

¶24 As noted, WIS. STAT. § 947.013(1m) penalizes "[w]hoever, with intent to harass or intimidate another person … [e]ngages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose." "'Harass' means to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger. 'Intimidate' means 'to make timid or fearful.'" ***Bachowski v. Salamone***, 139 Wis. 2d 397, 407, 407 N.W.2d 533 (1987) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1031, 1184 (1961)). A "course of conduct" is "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." Sec. 947.013(1)(a).

¶25 Penkalski contends that his visit to Larsen's apartment door was made to verify Larsen's home address for the purpose of filing a law suit against him, a legitimate purpose that is by definition not harassment under WIS. STAT. § 947.013(1m). The circuit court made no finding concerning the purpose of Penkalski's visit to Larsen's apartment door. However, Larsen confirms Penkalski's account that the reason for the visit was to verify Larsen's address for litigation purposes. Moreover, there is no evidence that Penkalski was

confrontational or belligerent toward him during the visit.[10] We therefore conclude that the visit to Larsen's apartment door was not harassment as defined by § 947.013(1m).

¶26 Nonetheless, we conclude that the unwelcome emails to Larsen are a sufficient basis on which to support the injunction against Penkalski. In an August 1, 2005 email, Larsen, acting in his capacity as a Hoofers' leader, informed Penkalski of the Hoofers' Board of Captains' decision to terminate his membership, and instructed him to cease contact with Larsen and other persons associated with Hoofers. The next day, Penkalski contacted Larsen twice by email to protest the Board's action, telling Larsen: "You must deal with this at once. I want to sail on Thursday (8/4)." Larsen emailed Penkalski to reiterate that further attempts to contact him would be unwelcome. Penkalski emailed back: "You are getting yourself into serious trouble." In the following days, Penkalski continued to send emails to Larsen regarding the termination of his membership, to which Larsen responded by renewing his no-contact request. In an email to Larsen dated September 15, 2005, Penkalski stated: "**I have the right to contact anyone i choose, so long as i have a legitimate reason for doing so**…. Clear?" A September 29, 2005 email from Penkalski to Larsen states: "Have my sailing privileges been reinstated yet?? I'd like to sail this weekend. I assume that by now you've realized the extent of your wrongdoing." On December 16, 2005, Penkalski emailed Larsen regarding whether Larsen planned to testify against Penkalski in a legal proceeding: "Have you been called to testify against me …?

[10] We note, however, that Larsen was clearly upset by the visit. He reported the incident to the Madison Police Department, and states in the petition that given "the clear increase in the seriousness from him coming to my apartment, I most definitely feel both harassed and threatened by Paul (he very literally scares me)."

.... (If so, do you like the thought of having to go to court to do that..? Do you think it will do anyone any good? Is looking forward to that in any way a distraction from your studies?)"

¶27 Penkalski admits that the tone of some of these emails "may have seemed inflammatory." It is undisputed that the emails were unwelcome and that they were sent after Penkalski had exhausted his available remedies under the Hoofers' rules to challenge the termination of his membership. Given these facts, we conclude that a reasonable trier of fact could find that these emails were not sent for any legitimate purpose, and that they represented a course of conduct that was intended to harass Larsen.

¶28 Penkalski asserts that he had stopped emailing Larsen regularly well before Larsen sought the injunction. Penkalski notes that Larsen sent Penkalski an email dated April 4, 2006, thanking Penkalski for not contacting him recently. While this evidence may argue against the issuance of an injunction, it does not demonstrate that, on the record before the circuit court, no reasonable trier of fact could have found the elements necessary to support the issuance of an injunction.

3. Scope of the Larsen Injunction

¶29 Penkalski contends that, even if the evidence was sufficient to support the issuance of the Larsen injunction, the scope of conduct enjoined by the injunction was overly broad. The scope of a harassment injunction lies within the sound discretion of the circuit court. ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 495, 518 N.W.2d 285 (Ct. App. 1994). We will uphold a discretionary determination if it is demonstrably made and based upon the facts of record and the appropriate and applicable law. ***Id.***

¶30 Injunctions issued under WIS. STAT. § 813.125 "must be specific as to the acts and conduct which are enjoined." ***Bachowski***, 139 Wis. 2d at 414. "Only the acts or conduct which are proven [to the fact finder] and form the basis of the judge's finding of harassment or substantially similar conduct should be enjoined." ***Id.***

¶31 We note that the circuit court's hand-written order directed Penkalski to "avoid [Larsen's] residence and any premise temporarily occupied by [Larsen]" and specified that Penkalski have "No e-mail[] or cc of email[][,] no contact at all" with Larsen "except thru counsel! or mail for legal action—filed—is OK."

¶32 Because it is undisputed that Penkalski's harassment of Larsen was confined to email contact, we conclude that the circuit court's order enjoining Penkalski to "avoid the residence and any premises temporarily occupied by the petitioner/victim" was overly broad. As explained earlier, the intent of Penkalski's contact with Larsen at his residence was to verify Larsen's address for litigation purposes, and was not harassment under WIS. STAT. § 947.013(1m). Larsen alleged no other incidents of face-to-face contact by Penkalski. We therefore conclude that the circuit court's injunctive order in Larsen's case was overly broad.

CONCLUSION

¶33 In sum, we conclude that the petitions state reasonable grounds on which to issue TROs, and that, in Larsen's case, the circuit court's factual findings supporting the issuance of the injunction were not clearly erroneous. However, we conclude that its findings in Rogers' case were clearly erroneous and that no alternate factual basis exists in the record to support the issuance of the injunction.

We further conclude that the evidence was sufficient in Larsen's case for a reasonable trier of fact to find the elements necessary to support the issuance of an injunction, but that the Larsen injunction was overly broad in scope. Accordingly, we affirm in part and reverse in part.

By the Court.—Orders affirmed in part and reversed in part.

Not recommended for publication in the official reports.