COURT OF APPEALS
DECISION
DATED AND FILED

October 28, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP517 **Cir. Ct. No. 2008CV1430**

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

JOSEPH VAN DEN HEUVEL,

PETITIONER-RESPONDENT,

V.

TAMMY KRUTZ,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Tammy Krutz appeals an order granting Joseph Van Den Heuvel's petition for a harassment injunction. The resolution of this case

rested upon an implicit credibility determination, a matter within the circuit court's discretion. We conclude the "reasonable grounds" burden of proof under WIS. STAT. § 813.125 (2007-08)[1] has been satisfied and that the injunction was permissible in scope. We affirm.

¶2 Krutz and Van Den Heuvel have been neighbors for twelve discordant years. Their relationship calls to mind a line from Robert Frost's poem "Mending Wall": "Good fences make good neighbors." Van Den Heuvel testified that the problems largely stem from an easement Krutz has across his property.

¶3 Van Den Heuvel sought an injunction against Krutz pursuant to WIS. STAT. § 813.125. An addendum to the petition alleged that Krutz repeatedly has harassed him and called the police and that she has accused him of shooting at her house, shooting a cat, stalking her daughter, throwing rocks, poisoning her horses, getting dust on her horses while blowing grass off his driveway and that, when he listed his property for sale, Krutz harassed the realtor and prospective buyers.

¶4 A court commissioner granted a temporary restraining order (TRO) on August 29, 2008. Krutz moved pro se for de novo review of the TRO and asked for a harassment injunction against the Van Den Heuvels. Meanwhile, the court commissioner ordered the parties to undergo mediation. Van Den Heuvel moved for de novo review of that order because past mediation of the same issues failed to resolve their disputes or stop Krutz's harassment. The hearing on the mediation issue was adjourned until after Krutz's de novo review on the TRO.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

¶5 At the de novo hearing on Krutz's pro se motion, Van Den Heuvel testified further about the allegations of his petition for an injunction.[2] He also testified that Krutz has four video cameras trained on his house, one at his bedroom window; that Krutz called the sheriff about once a month; and that she called both the health department and the DNR eight times, none of which led to citations. He testified that he witnessed Krutz "yell at" prospective buyers who came to view the property and that one of them told him they "won't be interested in looking at it after that." Finally, he testified about an incident involving Krutz's husband, Jeffrey. Van Den Heuvel claimed Jeffrey threw the realty sign onto Van Den Heuvel's garbage heap and Jeffrey claimed Van Den Heuvel threw the sign at him. Police charged Van Den Heuvel with disorderly conduct.

¶6 The realtor, Tiffany Holtz, testified that while driving to Van Den Heuvel's property for a showing, she passed the prospective buyers on the road, leaving. Holtz said Krutz approached her car, asked her to stop and told her the "buyers were on her property and she [was] going to call the cops and give [the buyers] citations." Krutz denied speaking to Holtz or the prospective buyers, but testified that "two people" who were "very rude and very scary" drove onto her property and a woman "started laughing at [her]."

¶7 The Van Den Heuvels' babysitter testified that in 2004 she was taking a walk with the children on the road in front of Krutz's house. The children were on their bicycles. When the eight-year-old's tire accidentally went onto the gravel apron of Krutz's driveway, Krutz ran toward the children "yelling at" them

[2] The court did not recognize Krutz's pro se motion as a motion for an injunction because it was not in proper form. *See* WIS. STAT. § 813.125(5).

to "get the hell off of her property." She testified that the children still are afraid of Krutz. Krutz denied the incident.

¶8 Krutz's husband testified that he did not know why the police investigated Van Den Heuvel about shooting a cat because "we never said it was [he] that did it." Krutz's son testified that in his opinion the problems between Van Den Heuvel and his mother "go[] both ways."

¶9 The court found that Van Den Heuvel met his burden of proving that Krutz engaged in harassment with intent to harass or intimidate him. *See* WIS. STAT. § 813.125(4)(a)3. It ordered an injunction, effective for four years, *see* § 813.125(4)(c), forbidding Krutz from virtually all contact with Van Den Heuvel and contact with or harassment of any realtors or prospective buyers involved in the sale of the Van Den Heuvel property. Krutz appeals.

¶10 Now represented by counsel,[3] Krutz challenges the injunction's underpinnings and scope. To grant an injunction under WIS. STAT. § 813.125, the circuit court must find "reasonable grounds to believe" that a person has engaged in harassment. *See* § 813.125(4)(a)3; *see also* ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359, *review denied*, 2008 WI 122, 314 Wis. 2d 70, 758 N.W.2d 90 (WI Jul. 28, 2008) (No. 2007AP347). This

[3] We remind counsel to use the parties' names, rather than party designations of "Petitioner-Respondent" and "Respondent-Appellant." *See* WIS. STAT. RULE 809.19(1)(i). We also note that Van Den Heuvel's pro se respondent's "brief" was filed late and falls well short of the statutory requirements. *See* WIS. STAT. RULE 809.19(3). We urge self-represented litigants to seek out some of the many resources available to assist with an appeal. One such is the Wisconsin Court System's "Guide to Appellate Procedure for the Self-Represented," available at http://wicourts.gov/about/pubs/appeals/docs/proseappealsguide.

determination presents a mixed question of fact and law. ***Welytok***, 312 Wis. 2d 435, ¶23. We will not set aside the court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). We independently review the court's conclusion as to whether based on the established facts such reasonable grounds exist and whether Van Den Heuvel has met his burden of proof. *See* ***Welytok***, 312 Wis. 2d 435, ¶23. Finally, discretion also comes into play because § 813.125(4)(a) provides that a judge "may" grant an injunction if certain conditions are satisfied. *See* ***Kotecki & Radtke, S.C. v. Johnson***, 192 Wis. 2d 429, 447-48, 531 N.W.2d 606 (Ct. App. 1995). An erroneous exercise of discretion in the context of an injunction occurs when the circuit court fails to consider and make a record of the factors relevant to its determination, considers clearly irrelevant or improper factors, or clearly gives too much weight to one factor. ***School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n***, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). It also may be found where the circuit court made an error of law. ***Id.***

¶11 Krutz first contends that the circuit court improperly admitted hearsay evidence upon its erroneous belief that "this is small claims court so some hearsay is allowed." The court permitted Holtz to testify that her managing broker told her that Krutz called the real estate office twice saying that Holtz was a liar, and that she understood the prospective buyers no longer were interested because of Krutz's confrontation. Krutz argues that the court made an error of law because small claims procedure does not govern WIS. STAT. § 813.125 proceedings.

¶12 In a case tried by the court, the admission of improper evidence is harmless unless it clearly appears that but for its admission the finding probably would have been different. ***State v. Mullis***, 81 Wis. 2d 454, 461, 260 N.W.2d 696 (1978). The babysitter and Holtz testified about their encounters with Krutz. Van

Den Heuvel testified that he witnessed Krutz confront the prospective buyers while they were on his property, and about other incidents over the years. In the face of this admissible evidence, the hearsay about the purported calls to Holtz's superiors was not essential to the court's decision to issue the injunction. Any error in applying the relaxed rules of small claims procedure was harmless.

¶13 Krutz next claims the court erroneously "excluded" "best evidence," a DVD allegedly depicting her encounter with Holtz. Krutz told the court she had "a DVD that shows the incident of the realtor and the incident that they are talking about where I—." At that point the court stated it was due at a swearing-in ceremony in thirteen minutes and if the matter was not completed by then, the parties would have to return. Whether to admit a demonstrative videotape into evidence is a discretionary decision on which we defer to the circuit court. ***State v. Peterson***, 222 Wis. 2d 449, 453, 588 N.W.2d 84 (Ct. App. 1998). We affirm discretionary determinations if the trial court applied the correct law to the facts of record and reached a reasonable result. ***Id.***

¶14 The court did not "exclude" the DVD; it managed its schedule, *see* WIS. STAT. § 906.11(1), and Krutz did not ask the court to admit it into evidence or seek to continue the matter. Further, the record is silent as to whether Krutz had properly prepared to go forth with the DVD—*i.e.*, that she had given advance notice to the court so the appropriate equipment could be set up or to opposing counsel. *See* ***Lease America Corp. v. Ins. Co. of N. America***, 88 Wis. 2d 395, 400, 276 N.W.2d 767 (1979). We see no erroneous exercise of discretion.

¶15 Krutz next argues that the court wrongly concluded there were reasonable grounds for the injunction because the record does not support a finding of harassment. Rather, she contends the evidence shows only isolated acts

of limiting trespassers on land to which she has a legal right such that there was not established a "course of conduct" that "serve[s] no legitimate purpose."

¶16 Here, "harassment" means "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." WIS. STAT. § 813.125(1)(b). "[S]erv[ing] no legitimate purpose" means with the intent to harass or intimidate rather than for a purpose that is protected or permitted by law. *See* ***Bachowski v. Salamone***, 139 Wis. 2d 397, 408, 407 N.W.2d 533 (1987); *see also* § 813.125(4)(a)3. The fact finder necessarily determines intent, *see* ***Bachowski***, 139 Wis. 2d at 408, because the nature of intent requires proof by circumstantial evidence and inference. *See* ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 489, 518 N.W.2d 285 (Ct. App. 1994). If more than one inference may reasonably be drawn from the established facts, we must accept the one drawn by the circuit court. ***Id.***

¶17 The court's conclusion that an injunction was warranted implicitly was driven by a determination that Van Den Heuvel and his witnesses were more credible than Krutz's. A circuit court acting as the finder of fact is the ultimate arbiter of witness credibility. ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981). We defer to the circuit court in both its express and implicit credibility determinations. *See* ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). The court also implicitly drew the inference that Krutz intended to harass or intimidate by the constant videotaping, which Van Den Heuvel testified was "miserable … absolutely devastating," the repeated calls to official agencies and the confrontations with Holtz, the prospective buyers and with Van Den Heuvel's children, who remain afraid of her. That inference is reasonable, *see* ***Bachowski***, 139 Wis. 2d at 407-08, and we must accept it.

¶18 Lastly, Krutz challenges the scope of the injunction which ordered Krutz to cease and avoid harassing Van Den Heuvel; avoid his residence and any premises he temporarily occupies; and cease and avoid contact with and harassment of realtors and prospective buyers involved with the sale of his property. It also prohibited Krutz from contacting Van Den Heuvel or causing anyone other than his attorney or law enforcement officers to contact him, including "face-to-face or in[-]person contact, conversations with [him], contact at [his] home or work, in public places, by telephone, in writing, by electronic communication or device or … by any other means." Krutz contends the injunction is overbroad because the record does not support prohibitions against contact with Van Den Heuvel, his residence or premises he temporarily occupies. She also argues that the four-year term, when added to the TRO, in fact exceeds four years, violating WIS. STAT. § 813.125(4)(c).

¶19 Injunctions must be specific as to the prohibited acts and conduct so the person being enjoined knows what conduct to avoid. *See* ***Bachowski***, 139 Wis. 2d at 414. Only the acts or conduct proved at trial and which form the basis of the harassment finding should be enjoined. *See* ***id.*** Still, the scope of an injunction is within the circuit court's sound discretion. ***W.W.W.***, 185 Wis. 2d at 495. Our review is limited and, since the exercise of discretion is critical to the court's functioning, we generally look for reasons to sustain such rulings. ***Id.***

¶20 There was credible testimony of the parties' contentious history involving the easement, the video cameras, the calls to official agencies and that Krutz's actions went beyond Van Den Heuvel to others. The injunction is sufficiently specific. The TRO issued on August 29, 2008, was in effect until the November 19, 2008, de novo hearing. *See* WIS. STAT. § 813.125(3)(c). An injunction may be ordered for a term of four years—until November 19, 2012, just

as this one was. *See* § 813.125(4)(c). The record supports the scope of the injunction, including the maximum term.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.