COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2924 **Cir. Ct. No. 2010CV2646**

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

LAURA R. SCHWEFEL,

PETITIONER-RESPONDENT,

V.

GARY A. KRAMSCHUSTER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Gary A. Kramschuster, *pro se*, appeals from a circuit court order granting a harassment injunction against him and from an order denying Kramschuster's motion to dismiss the action for Laura R. Schwefel's failure to prepare a proposed order. For the reasons which follow, we affirm.

BACKGROUND

¶2 In February 2010, Schwefel filed a petition for a harassment injunction against Kramschuster. Schwefel alleged that she was a guardian ad litem appointed to represent Kramschuster's granddaughter in a paternity action between the child's parents and that since her appointment:

> Kramschuster has filed Wisconsin State Bar complaints against me, made complaints to the Sheriff of Waukesha County, and to the Chief Judge, and has filed two frivolous lawsuits against me. All of his complaints against me have been found to be meritless and have been dismissed. A man matching his description has been seen in the parking lot next to my car at my place of employment.

A court commissioner heard the petition on March 8, 2010, and issued the harassment injunction.

¶3 Kramschuster filed a motion, pursuant to WIS. STAT. § 757.69(8) (2009-10),[1] asking the circuit court to review the court commissioner's decision *de novo*. On May 18, 2010, the circuit court held a hearing on the motion and, following testimony from both Schwefel and Kramschuster, granted the injunction in an oral order.

¶4 Following the circuit court's oral order granting the injunction, Kramschuster filed a notice of appeal and a motion to suspend the injunction pending appeal. The circuit court denied the motion to suspend the injunction.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Upon receiving the notice of appeal, this court remanded the case back to the circuit court to permit the circuit court to enter a written order consistent with its May 18 oral order.

¶5 Kramschuster then voluntarily dismissed his appeal, and upon remand, filed a motion to dismiss on the grounds that Schwefel had failed to file a proposed order within thirty days following the May 18 hearing, as required by Milwaukee County Circuit Court Rule 3.57(A). Kramschuster alleged that Rule 3.57(C) mandated that the case be dismissed. The circuit court denied Kramschuster's motion to dismiss and entered a written order memorializing its May 18 order granting the injunction. Kramschuster now appeals those orders.

DISCUSSION

¶6 Kramschuster raises three claims on appeal: (1) the circuit court erred when it denied his motion to dismiss because Milwaukee County Circuit Court Rule 3.57(C) required dismissal for Schwefel's failure to submit a proposed order after the May 18 hearing; (2) the circuit court improperly denied Kramschuster an opportunity to call witnesses; and (3) the circuit court failed to properly set forth its own findings of fact. Because all of Kramschuster's claims are wholly without merit, we affirm.

I. The circuit court properly exercised its discretion when it denied Kramschuster's motion to dismiss.

¶7 Kramschuster first argues that the circuit court erred in denying his motion to dismiss after we remanded the case back to the circuit court to enter a written order memorializing its May 18 oral order. Kramschuster submits that Milwaukee County Circuit Court Rule 3.57(A) required Schwefel to file a

proposed order thirty days after the May 18 hearing, and when she failed to do so, Rule 3.57(C) required the circuit court to dismiss the action. Kramschuster is mistaken.

¶8 The application of local rules to circuit court cases falls within the wide discretion of the circuit court. *See* ***Kotecki & Radtke, S.C. v. Johnson***, 192 Wis. 2d 429, 447, 531 N.W.2d 606 (Ct. App. 1995). Accordingly, we will not reverse the circuit court's decision with respect to application of the local rules unless the circuit court erroneously exercised its discretion. ***Id.*** at 447-48. "To properly exercise its discretion, the [circuit] court's decision must be 'consistent with the facts of record and established legal principles.'" ***Id.*** (citation omitted).

¶9 Milwaukee County Circuit Court Rule 3.57 states, in pertinent part:

> A. All orders, certificates, and judgments, other than final judgments, *shall* be submitted to the judge … for signature not later than 30 days after the date on which the subject of the order is heard or was to be heard by the court. A proposed order embodying a ruling by the court *shall* be prepared and filed by the prevailing party.
>
> B. ….
>
> C. If a proposed order has not been filed as required by this rule, the objection and/or the case *may* be dismissed without further notice. Further proceedings may not be held in contested proceedings unless the dismissal is vacated.
>
> D. ….

(Emphasis added.)

¶10 Kramschuster argues that Milwaukee County Circuit Court Rule 3.57(A)'s use of the word "shall" required Schwefel, as the prevailing party

after the May 18 hearing, to file a proposed order memorializing the circuit court's order in her favor within thirty days of the hearing. Because Schwefel failed to do so, Kramschuster contends that Rule 3.57(C)'s use of the word "may" required the circuit court to dismiss the injunction petition when Kramschuster filed his motion to dismiss. His argument hinges on his contention that the rule's "use of the word 'may' is synonymous with 'shall.'"

¶11 The circuit court disagreed with Kramschuster's interpretation of Milwaukee County Circuit Court Rule 3.57(C) and concluded that the rule's use of the word "may" gave the circuit court discretion over whether to dismiss the injunction based on Schwefel's failure to submit a proposed order. The circuit court is correct.

¶12 It is well-established in Wisconsin case law "that the word 'shall' is presumed mandatory when it appears in a statute," *see* ***Karow v. Milwaukee Cnty. Civil Serv. Comm'n***, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978), while "[t]he word 'may' in a statute is generally construed as permissive," *see* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2011 WI App 12, ¶9, 331 Wis. 2d 64, 793 N.W.2d 896 (Ct. App. 2010). "Where the legislature uses the words 'may' and 'shall' in the same or related sections of the statute, the presumption that 'may' is permissible and 'shall' is mandatory is strengthened because such use demonstrates the legislature was aware of the different denotations and intended the words to have their precise meanings." ***Id.***

¶13 Because the longstanding rule is that "shall" is mandatory and "may" is permissive, the circuit court did not err in concluding that it was not required to dismiss the injunction petition for Schwefel's failure to file a proposed

order. Milwaukee County Circuit Court Rule 3.57(C) only gave the circuit court the option to dismiss the case if it so chose, but the circuit court did not find Schwefel's failure to submit the proposed order warranted such a harsh penalty. Consequently, we conclude that the circuit court's order denying the motion to dismiss was a proper exercise of discretion.

II. The circuit court did not improperly deny Kramschuster an opportunity to testify or to call an expert witness.

¶14 Next, Kramschuster argues that he was improperly denied an opportunity to call an expert witness and that he was improperly denied an opportunity to testify on his own behalf. Generally, the admission or exclusion of evidence is a discretionary determination left to the circuit court that will be upheld if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. ***Lievrouw v. Roth***, 157 Wis. 2d 332, 348, 459 N.W.2d 850 (Ct. App. 1990). However, here, because we conclude that Kramschuster was not actually denied either opportunity, we affirm.

¶15 First, Kramschuster was not improperly denied an opportunity to present an expert witness. At the May 18 hearing, after Schwefel had testified and rested her case, the circuit court asked Kramschuster if he wanted to testify. Kramschuster responded that he had intended to call his granddaughter's psychologist as an expert witness, hoping she could testify by telephone, but that the witness was no longer available. The circuit court then asked Kramschuster if he had subpoenaed the witness. Kramschuster answered that he had not. Because Kramschuster's witness was not present, the circuit court asked Kramschuster if he wanted to testify. Kramschuster replied that he did and took the witness stand and

testified. Kramschuster did not raise the issue of his expert witness again. Nor did he object to continuing the hearing without his expert witness's testimony or file a motion to adjourn so that he could call the expert witness in the future.

¶16 Thus, Kramschuster did not actually ask the circuit court to allow his expert witness to testify. Rather, he merely told the court, belatedly, that he had thought about having the expert witness testify. Kramschuster did not notify either the circuit court or Schwefel of his intent to call an expert witness until the day of the hearing, and Kramschuster did not subpoena the expert witness or even have the expert witness present in the courtroom. Kramschuster did not move to adjourn the hearing to obtain the expert witness's testimony, nor did he object when the court moved on to his testimony. In short, Kramschuster failed to preserve this issue for appeal. For all of these reasons, the circuit court did not erroneously exercise its discretion.

¶17 Furthermore, even if Kramschuster's expert witness had been present, her alleged testimony was irrelevant to the resolution of the injunction petition. Kramschuster alleges that, had the expert witness been available and present, she would have testified that Kramschuster's granddaughter had "not yet achieved 'object consistency,' i.e., the ability to tolerate separation from her mother or grandparents for even a short period of time with someone she has previously identified as safe," and that the likely cause of her failure to achieve object consistency was due to "lengthy visits with her father away from home." While the expert witness's testimony may have some bearing on the paternity action for which Schwefel was appointed guardian ad litem, it is not relevant to the resolution of Schwefel's injunction petition. Because the evidence is

irrelevant, the circuit court would not have erred in prohibiting it, even had the expert witness been available to testify. *See* WIS. STAT. § 904.02.[2]

¶18 Second, Kramschuster's allegation that the circuit court denied him an opportunity to testify is refuted by the record. Following Schwefel's testimony, the circuit court asked Kramschuster, who was proceeding *pro se*, whether he wanted to testify or whether he simply wanted to make an argument. Kramschuster chose to testify and took the stand. The circuit court asked Kramschuster to limit his testimony to the allegations in Schwefel's injunction petition and Exhibit 1. Exhibit 1 set forth fifteen different actions upon which Schwefel based her petition.

¶19 During his testimony, Kramschuster responded at length to each of the allegations listed in Exhibit 1. The circuit court only interrupted to ask clarifying questions and otherwise left Kramschuster to defend himself against each of the allegations set forth by Schwefel. Kramschuster was also permitted to reference several letters that were attached to prior motions he had filed with the circuit court.

¶20 Accordingly, the record is clear that Kramschuster was allowed to testify and did so. Additionally, when directed to limit the scope of his testimony to the allegations of the injunction petition, Kramschuster made no objection.

[2] In his reply brief, Kramschuster mentions the circuit court's order to quash his subpoena of the director of the Wisconsin Office of Lawyer Regulation. It is unclear from his brief whether he claims the circuit court's order to do so was in error. However, even if Kramschuster intended to raise the issue in his reply brief, we need not address it because we do not address issues raised for the first time in a reply brief. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

Only when he finished addressing each of the fifteen actions in Schwefel's petition, did Kramschuster ask to make a "presentation." The circuit court advised him that his testimony to that point had been his presentation. Kramschuster responded that he had "other things" that he wanted to bring forward such as his claim that Schwefel was harassing him to "maintain her position of going after my daughter and granddaughter." The circuit court informed Kramschuster that a counter-injunction claim was not before the court and proceeded to let the parties make their closing arguments.

¶21 Kramschuster now argues that the circuit court prohibited him from testifying and from presenting evidence demonstrating that his acts "had [a] legitimate purpose." He goes on to list in detail the evidence the circuit court allegedly prevented him from presenting, all of which is either irrelevant to the resolution of Schwefel's injunction petition, *see* WIS. STAT. § 904.02 ("Evidence which is not relevant is not admissible."), or is cumulative of Kramschuster's testimony, *see* WIS. STAT. § 904.03 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the … needless presentation of cumulative evidence."). Significantly, other than generally requesting to present clearly irrelevant evidence that Schwefel was harassing him, Kramschuster did not detail for the circuit court the additional evidence he wished to present. Thus, the circuit court did not erroneously exercise its discretion in limiting Kramschuster's testimony to evidence relevant to the injunction petition.

III. The circuit court properly set forth its findings of fact in its oral order and did not err in adopting the court commissioner's findings *nunc pro tunc* in its written order.

¶22 Finally, Kramschuster contends that the circuit court erroneously exercised its discretion because it did not set forth its own findings of fact in its

final written order, instead, choosing to adopt the court commissioner's findings *nunc pro tunc*. Kramschuster's argument is completely without merit.

¶23 We review a circuit court's decision whether to grant a harassment injunction for an erroneous exercise of discretion. ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. "We may not overturn a discretionary determination that is demonstrably made and based upon the facts of record and the appropriate and applicable law. Also, because the exercise of discretion is so essential to the [circuit] court's functioning, we generally look for reasons to sustain discretionary rulings." ***Id.***, ¶24 (citation omitted).

¶24 "A judge or circuit court commissioner may grant an injunction ordering the respondent to cease or avoid the harassment of another person," if, among other things, following a "hearing, the judge or court commissioner finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." WIS. STAT. § 813.125(4)(a)3. Harassment, as relevant here, is defined as "[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).

¶25 Here, the circuit court's order granting the harassment injunction was "demonstrably made and based upon the facts of record and the appropriate and applicable law." *See* ***Welytok***, 312 Wis. 2d 435, ¶24. The circuit court held a hearing on May 18 at which both Kramschuster and Schwefel testified and at which both submitted exhibits relevant to the injunction petition. At the conclusion of the hearing, the circuit court granted the harassment injunction, explaining its reasoning at length. The circuit court found, among other things, that Schwefel's testimony was more credible than Kramschuster's; that

Kramschuster continued to file complaints with the Wisconsin Office of Lawyer Regulation against Schwefel even after being told the complaints were meritless; and that Kramschuster interfered with Schwefel's role as guardian ad litem even after the sheriff and the court commissioner directed him not to intervene. With respect to the court commissioner's decision, the circuit court stated: "The injunction by Commissioner Sturm was not only warranted, it was the right decision. So I'm affirming that decision. It's here for a hearing [d]e [n]ovo of course. I've heard the testimony on a fresh basis, but the injunction will continue as it is in all respects."

¶26 The circuit court held a hearing, evaluated the testimony, and explained its reasoning for granting the injunction at length during the May 18 hearing when issuing its oral order. That the circuit court adopted the court commissioner's decision and her reasoning *nunc pro tunc* in its final written order is irrelevant.

By the Court.—Orders affirmed.

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