

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 No. 2016AP2409

Cir. Ct. No. 2016CV526

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SHARON TOWNE ZERNIA,

PETITIONER-RESPONDENT,

V.

JOHN ALLAN ZERNIA,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:
LYNN M. RIDER, Judge. *Affirmed.*

Before Sherman, Blanchard and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. John Allan Zernia appeals a harassment injunction issued to Sharon Towne Zernia.¹ John argues that the evidence did not support the injunction and the circuit court erred by allowing telephonic testimony at the injunction hearing. For the reasons set forth below, we conclude that the circuit court properly exercised its discretion to grant the injunction. We affirm.

¶2 On October 13, 2016, Sharon petitioned for a harassment injunction against John. The petition asserted that Sharon and John were divorced in August 2011, and that John had harassed Sharon by: (1) contacting the pastor of Sharon’s family’s church to discuss Sharon’s family’s support of Sharon during the divorce; and (2) placing a flyer containing negative allegations about Sharon on 110 cars at a Catholic school function.

¶3 The court held an injunction hearing on October 21, 2016. Sharon and John both testified, and their testimony was consistent as to the following. Sharon and John went through a contentious divorce that ended in August 2011. In fall 2015, John contacted the pastor at the church Sharon’s family attended, Pastor Brian Quade, and had several meetings with Pastor Quade to alert him to what John considered immoral conduct by Sharon’s family related to John and Sharon’s divorce. In October 2016, John distributed 110 copies of a flyer on cars at a Catholic school event making negative allegations about Sharon, including that Sharon had stolen items from John’s home, that Sharon was convicted at trial of false swearing, and that Sharon is a “sadly mentally ill mother.”

¹ Because the parties share a surname, we use their first names for clarity.

¶4 Sharon requested that the court allow Pastor Quade to testify telephonically as to his contacts with John. John objected to the telephonic testimony, arguing that Sharon had not filed a motion for telephonic testimony and that John had no advance notice of the request. *See* WIS. STAT. § 807.13(4)(b) (2015-16)² (“In any proceeding conducted by telephone ... [p]arties entitled to be heard shall be given prior notice of the manner ... of the proceeding.”). The court allowed Pastor Quade to testify telephonically over John’s objection. Pastor Quade testified that John contacted him and expressed his disappointment with the actions of Sharon’s family during John and Sharon’s divorce, and that John suggested that Pastor Quade discipline Sharon’s family or remove them from the congregation.

¶5 John testified that he contacted Pastor Quade because he believed Sharon’s family had acted immorally and he believed the church needed to be aware of their immorality. He testified that he distributed the flyers at the Catholic school function because he believed the Catholic community needed to be aware of what John viewed as immoral conduct. He testified that he did not intend to harass Sharon through those actions. Sharon testified that she was alarmed and had concerns for her safety after John placed the flyer on 110 cars at the school function.

¶6 At the conclusion of the hearing, Sharon argued that John had engaged in 110 separate acts of harassment by placing 110 fliers on separate cars, and that John had also harassed her by contacting Pastor Quade. John argued that

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

his actions were not intended to harm Sharon but, instead, were motivated by his religious beliefs, and served a legitimate purpose of expressing his beliefs about immorality and violations of Catholic Church doctrines. He argued that his placing the fliers on the cars at the school event was a single act, which alone would not constitute a course of conduct.

¶7 The court found that John’s contact with Pastor Quade, by itself, was not harassing. The court also found that John had acted with intent to harass Sharon. The court found that John’s distribution of the disparaging flyer on the cars at the school was intended to harm Sharon. The court found that there was no legitimate purpose to distributing harmful allegations about Sharon to people at a school event. The court therefore granted Sharon a harassment injunction against John. John appeals.

¶8 A circuit court may grant a harassment injunction if the court “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” includes “[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.” Sec. 813.125(1)(am)2. Whether to grant an injunction is within the circuit court’s discretion. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. We will uphold the circuit court’s factual findings unless they are clearly erroneous. *Id.* Whether those findings meet the legal standard for issuing an injunction is a question of law that we decide independently. *Id.*

¶9 John contends that the circuit court did not have reasonable grounds to believe that John had engaged in harassment with intent to harass Sharon. He

argues that he did not intend to harass Sharon, pointing to his testimony that he acted out of his religious convictions rather than an intent to harm Sharon. He also argues that the court found that John's contacts with Pastor Quade were not harassing, leaving only John's actions at the school, and that the single incident at the school was not a "course of conduct." See *Bachowski v. Salamone*, 139 Wis. 2d 397, 407-08, 407 N.W.2d 533 (1987) (holding that "single isolated acts do not constitute 'harassment' under [WIS. STAT. § 813.125(1)(b)]"). John further asserts that his desire to express his beliefs based on his religious convictions provided a legitimate purpose for his actions. See *Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶¶42-45, 355 Wis. 2d 800, 850 N.W.2d 112 (recognizing the constitutional right to freedom of speech, and that First Amendment concerns may be implicated when public expressions are restricted); *Welytok*, 312 Wis. 2d 435, ¶30 (conduct that serves a legitimate purpose is not harassment). We disagree.

¶10 We disagree with John's assertion that the distribution of the 110 flyers on cars at the school event amounted to a single incident. Rather, we agree with Sharon that each time John placed a flyer on a car at the school event constituted its own act, and that those acts amounted to a course of conduct. See *id.*, ¶25 (explaining that 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" (quoted source omitted)).

¶11 We also reject John's contention that he lacked the requisite intent to harass. The court found that John acted with the intent to harass Sharon, and we have no basis to disturb that factual finding. See *id.*, ¶26 (explaining that a party's intent is a question of fact). The circuit court was entitled to infer from the evidence of John and Sharon's contentious divorce and the disparaging content of the flyer that John intended to harm Sharon by distributing the flyer on cars at the

school event and, thus, intended to harass her. *See id.*, ¶¶26, 35 (explaining that “[i]ntent is a fact that must be inferred from the acts and statements of the person, in view of the surrounding circumstances” and that “harass” means “to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger” (quoted sources and internal quotation marks omitted)).

¶12 We also disagree with John’s contention that his acts served a legitimate purpose. John’s assertion of his constitutional rights to freedom of speech and religion does not immunize his conduct if it is harassing in nature. *See Board of Regents*, 355 Wis. 2d 800, ¶45 (holding that constitutional right to freedom of speech is not absolute, and may be restricted when conduct is harassing). Here, the circuit court found that John’s acts of placing the disparaging letter on 110 cars served no legitimate purpose. “[W]hether conduct serves a legitimate purpose is a determination that must of necessity be left to the fact finder, taking into account all the facts and circumstances.” *Welytok*, 312 Wis. 2d 435, ¶30 (quoting *Bachowski*, 139 Wis. 2d at 408). The court considered John’s argument that his conduct served the legitimate purpose of expressing his religious beliefs and found that, taking into account all of the facts and circumstances, the acts were not done for any legitimate purpose. The evidence at the hearing, including the contentious nature of the divorce and the disparaging content of the letter, supports the circuit court’s finding. We have no basis to disturb that finding.

¶13 Because the circuit court found that John’s acts of contacting Pastor Quade were not harassing, we need not address whether the court erred by allowing Pastor Quade to testify telephonically. We conclude that the other evidence at the injunction hearing, including the testimony as to the contentious nature of the divorce and as to John’s acts of placing the flyer on 110 cars at the

school function, was sufficient to support the circuit court’s findings and satisfy the statutory requirements. The circuit court found that John’s actions at the school were “[b]y far the most concerning,” that they were done with the intent to harm Sharon, and that they served no legitimate purpose. The court therefore properly exercised its discretion to grant the injunction. Thus, even without Pastor Quade’s testimony, we would uphold the injunction. We therefore need not reach the issue of whether that testimony should have been excluded. *See* WIS. STAT. § 805.18(2) (providing that “[n]o judgment shall be reversed ... for error as to any matter ... unless in the opinion of the court ... it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse ... the judgment”). We affirm.

By the Court.—Order affirmed.

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

