COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2866 **Cir. Ct. No. 2014CV9546**

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

PETITIONER,

PETITIONER-RESPONDENT,

V.

PATRICK KOCHER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Patrick Kocher, *pro se*, appeals from an order of the circuit court that "reaffirmed" the family court commissioner's issuance of an injunction against Kocher, directing him to refrain from harassing petitioner. We affirm.

Background

¶2 Petitioner is attempting to divorce Kocher. A temporary order in the divorce case gives petitioner the exclusive use of the marital residence and directs Kocher to stay away.[1] Because of certain behaviors—including Kocher barricading himself in the house—petitioner previously obtained an injunction against Kocher; that injunction was issued for one year.

¶3 After the prior injunction expired, Kocher emailed petitioner on a Saturday and told her, "I will be going to my house now. As the TRO has expired once again. And the court order allows me to use the primary residence." Petitioner reminded him that the family court order, not the injunction, prevented him from coming to the house. Kocher replied to reiterate the language of the family court order, which he believes allows him into the residence.

¶4 Petitioner applied for a new injunction the following Monday. Following an injunction hearing, the court commissioner issued a four-year injunction. Kocher sought *de novo* review from the circuit court. After a hearing, the circuit court signed an order drafted by petitioner's attorney that "reaffirmed" the court commissioner's decision. Kocher appeals.

Discussion

¶5 We must first apparently clarify this case's procedural posture. Kocher requested a *de novo* hearing on petitioner's petition. "The commonly

[1] The divorce order is inartfully worded; it states petitioner "shall have temporary use of the primary residence of the parties and [Kocher] shall avoid and use the primary residence or hold same out as his primary residence."

accepted meaning of a *de novo* hearing is '[a] new hearing of a matter, conducted as if the original hearing had not taken place.'" ***Stuligross v. Stuligross***, 2009 WI App 25, ¶12, 316 Wis. 2d 344, 763 N.W.2d 241 (citation omitted; brackets in ***Stuligross***). In other words, the *de novo* hearing "is literally a new hearing, not merely a review of whatever record may have been made before the … court commissioner." ***Id.*** This means that the circuit court should not have simply "reaffirmed" the court commissioner's decision, it should have issued its own injunction or, minimally, incorporated the court commissioner's decision by reference and attached a copy of that decision to its own order. However, as neither party complains about the particular procedure employed, we decline to reverse on that basis.

¶6 A circuit court may issue an injunction ordering the respondent to avoid contact with the petitioner, avoid harassment of another person, avoid petitioner's residence, or a combination of remedies if, after a hearing, 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. (2013-14).[2] Harassment, as relevant to this case, 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).

¶7 On appeal, we review the circuit court's decision to grant a harassment injunction for an erroneous exercise of discretion. *See* ***Welytok v.***

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Ziolkowski, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. We do not review the court commissioner's decision directly.[3] *See* ***State v. Trongeau***, 135 Wis. 2d 188, 191-92, 400 N.W.2d 12 (Ct. App. 1986). We defer to the circuit court's findings of fact, like those regarding intent or purpose, and we will generally look for reasons to sustain the circuit court's exercise of discretion. *See* ***Welytok***, 312 Wis. 2d 435, ¶¶23-28.

A. Sufficiency of the Petition

¶8 Kocher makes multiple claims of error, which we group into three categories. First, he alleges that "[t]he petition must suffice the action," which is a challenge to the sufficiency of the petition for a temporary restraining order. He argues that a petition "must state 'when, where, what happened, and who did what to whom.'" Thus, he asserts that it is insufficient for petitioner to claim she is "'still afraid of him because of his irrational behavior[s] that have been displayed over six years.'"

¶9 "[D]ue process requires that the notice provided [by a petition] reasonably convey the information required for parties to prepare their defense and make their objections." ***Bachowski v. Salamone***, 139 Wis. 2d 397, 412, 407 N.W.2d 533 (1987). A petition that complies with WIS. STAT. § 813.125(5)(a) will satisfy due process. *See* ***Bachowski***, 139 Wis. 2d at 412. Kocher does not identify where he objected to the sufficiency of petitioner's petition in the circuit

[3] Petitioner is simply wrong when she claims Kocher is appealing from the court commissioner's decision and argues we should dismiss the appeal. Kocher's notice of appeal clearly identified that he was appealing the circuit court's decision. Consequently, the respondent's brief is practically useless to this court on appeal, as it addresses none of the merits of Kocher's claims.

court, nor does he identify how its alleged deficiency failed to provide him with adequate notice of petitioner's complaint. We note, however, that we have reviewed the petition and conclude it provides all of the details required by WIS. STAT. § 813.125(5): name of the alleged victim, name of respondent, that respondent has engaged in harassment with intent to harass or intimidate the petitioner, and information regarding related court proceedings.[4]

B. Sufficiency of the Evidence

¶10 Kocher makes a series of complaints that go to the sufficiency of the evidence to support the issuance of an injunction. First, he complains that petitioner alleged only one incident of harassment—his sending an email—and, relying on ***Bachowski***, he asserts that a single incident cannot constitute harassment.

¶11 "[I]t is clear that *single isolated* acts do not constitute 'harassment' under the statute." ***Bachowski***, 139 Wis. 2d at 408 (emphasis added). But Kocher did not send just a single email on that Saturday.[5] His first email was sent at 6:03 a.m., telling petitioner he "will be going to my house now." He then sent a follow-up message at 7:28 a.m., reiterating he "will be going to my house now," and another message at 8:35 a.m., stating that if petitioner did not "bring any issues forward," he would "move forward with setting a date to return to my house."

[4] Kocher cites no authority for his belief that the petitioner cannot introduce evidence at the injunction hearing if that evidence was not pled in the petition. If that were true, no hearing would ever be required, as all evidence would have to be presented in the petition.

[5] Even if we were talking about a single email, though, it was clearly not an isolated act. Petitioner testified at the hearing with the court commissioner, and petitioner's attorney later summarized for the circuit court, about Kocher's pattern of behavior. The email, even if we consider only the 6:03 a.m. message, was a continuation of that behavior.

¶12 Second, Kocher takes issue with the circuit court's consideration of prior incidents, including those recited in the prior injunction case, in its determination of whether he was engaging in harassment. He asserts in conclusory fashion that the prior incidents "are Res Judicata."

¶13 The decision of whether acts or conduct are meant to harass or intimidate is "left to the fact finder, *taking into account all of the facts and circumstances*." ***Id.*** at 408 (emphasis added). Kocher provides no contrary authority to suggest prior behavior cannot be considered in determining whether a respondent has engaged in a "course of conduct."

¶14 Further, under the doctrine of *res judicata*, which is also known as claim preclusion, "'a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994) (quoted source omitted). Claim preclusion requires identity between parties, identity between causes of action, and a final judgment on the merits in a court of competent jurisdiction. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879.

¶15 We perceive Kocher to be invoking *res judicata* because the prior injunction was reversed on appeal. However, the previous injunction was summarily reversed after petitioner, by her counsel, refused to file a respondent's brief, despite an order from this court. That result is "a sanction *without a consideration on the merits*." *See* ***Raz v. Brown***, 2003 WI 29, ¶18, 260 Wis. 2d 614, 660 N.W.2d 647 (emphasis added). As a result, there is no final judgment on the merits, so claim preclusion is inapplicable, and the prior incidents could be considered.

¶16 Third, Kocher additionally contends that his contact with petitioner was for a legitimate purpose. The only evidence of a legitimate purpose comes from proceedings before the commissioner, where Kocher had tried to argue that his email—"I will be going to my house now. As the TRO has expired once again."—was merely meant to signal to petitioner that he wanted to come retrieve his property. Given that none of Kocher's emails say anything about retrieving property, we conclude the circuit court could properly determine that Kocher's contact served no legitimate purpose and, thus, constituted harassment.

¶17 Finally, Kocher complains that WIS. STAT. § 813.125 regulates only acts, not speech, and he contends that his email was constitutionally protected speech. Assuming without deciding that Kocher's email is speech, it is clearly not protected speech. *See* ***Bachowski***, 139 Wis. 2d at 411 ("The intent requirement and the phrase 'no legitimate purpose' make clear that protected expression is not reached by the statute."). Sufficient evidence supports issuance of the injunction.

C. Other Due Process Violations

¶18 Finally, Kocher also complains there were due process violations beyond the allegedly inadequate petition. First, he claims due process was violated when he was not allowed to call petitioner's attorney as a witness, and when the circuit court did not allow him to present evidence at the hearing.

¶19 Kocher wanted petitioner's attorney to be a witness, in part because he believed the attorney would then be disqualified from representing petitioner. While Kocher asserts petitioner's attorney was a witness because he copied her in

on the emails, he cites no authority for his proposition that he should be allowed to manipulate petitioner out of her right to counsel of her choice.[6]

¶20 Kocher also claims a due process violation because, he says, he was not allowed to present evidence to the circuit court. The record shows that, after petitioner's attorney summarized the case, the circuit court asked Kocher, "Anything else you want to add about the commissioner's decision?" Kocher answered the court at length. He does not, however, indicate that he asked to present witnesses[7] and was rebuffed, nor does he indicate what witnesses would have been called or what they might have said in their testimony. We are therefore unconvinced that due process was violated.

By the Court.—Order affirmed.

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

[6] Kocher also attempted to secure the guardian *ad litem*'s testimony in the same way. The guardian refused to respond to Kocher's defective subpoena. Kocher does not offer any law to suggest the guardian was wrong to do so.

[7] By "witnesses," we mean those other than petitioner's attorney and the guardian *ad litem*, whose testimony we are not persuaded could have been compelled in the manner or for the reasons Kocher suggests.