COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0735

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

THOMAS A. HIGBEE,

PLAINTIFF-RESPONDENT,

V.

GARY L. HIGBEE, SR.,

DEFENDANT-APPELLANT,

WINIFRED F. GABRYSIAK,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Brothers Gary L. Higbee, Sr. and Thomas A. Higbee operate separate businesses on the same property. Gary challenges a

harassment injunction entered against him and the trial court's refusal to grant him a temporary injunction based on business interference. We affirm the order of the trial court.

Gary and Thomas are parties to a land contract to purchase the commercial property from which they operate their businesses. Gary owns a two-third interest and Thomas a one-third interest. Each operates a business related to automotive service or sales. Thomas commenced this action in 1995 when a dispute arose about the placement of a metal safety post near the entrance to Gary's business. Thomas alleged that the post interfered with his business and he sought partition of the property. Gary filed a counterclaim seeking, among other things, an order prohibiting Thomas from using a certain service bay door and restricting Thomas to using only that portion of parking spaces which corresponds to his one-third interest in the property.

While the litigation was pending, the brothers' already strained relationship appeared to deteriorate further. On June 17, 1997, Thomas moved for an injunction prohibiting Gary from parking vehicles in front of the entrance to Thomas's business. The injunction was granted under § 813.125(1)(b) and (4), STATS., for a one-year period ending June 27, 1998. The order allotted five parking spaces on the north side of the property for the sole use of customers of Gary's businesses; it required Thomas to post a sign that his customers were not to use those spaces; it prohibited Gary, his suppliers, customers or employees from blocking the entrance to Thomas's business; and it imposed a fifteen-minute parking limit on all persons who might park in front of the doors of either business.

After Thomas's requested injunction was granted, Gary moved to enjoin Thomas from utilizing more than one-third of the premises. Gary alleged that Thomas's overuse was causing him economic loss. In the alternative, he sought a modification of the earlier injunction to permit his business additional parking on the northern side of the premises. An order was entered pursuant to § 813.125, STATS., enjoining Thomas from having any contact with Gary or his customers or visitors at the premises for a two-year period ending September 12, 1999. The earlier injunction against Gary was extended to June 27, 1999. Gary filed his appeal after entry of the final order denying his counterclaim and affirming the previous injunction orders. He does not appeal the denial of his counterclaim.

Gary first argues that the trial court lacked authority under § 813.125, STATS., to act on property rights by restricting Gary's parking. He also contends that the trial court effectively partitioned the property and that to do so in a manner contrary to the parties' relative economic contributions was an erroneous exercise of discretion. Gary argues that the trial court was obligated to enter an injunction that would only maintain the status quo—the parking arrangement as it had existed in the previous sixteen years. Finally, he claims that the court's "affirmation of the restraining orders in its final order [was] contrary to the evidence before it." Together the arguments are nothing more than a challenge to the sufficiency of the evidence to support the discretionary determination made.

The scope of an injunction is within the sound discretion of the trial court. *See* ***W.W.W. v. M.C.S.***, 185 Wis.2d 468, 495, 518 N.W.2d 285, 294 (Ct. App. 1994). This court "may not overturn a discretionary determination that is demonstrably made and based upon the facts of record and the appropriate and applicable law." ***Id.*** The trial court is given discretion to enjoin harassing and

intimidating conduct proven at trial and substantially similar conduct. *See* ***Bachowski v. Salamone***, 139 Wis.2d 397, 414, 407 N.W.2d 533, 540 (1987).

The trial court's findings will not be set aside unless clearly erroneous. *See* § 805.17(2), STATS. When the record shows that the evidence presented could have supported more than one inference, the reviewing court must accept the conclusion drawn by the fact finder. *See* ***W.W.W.***, 185 Wis.2d at 489, 518 N.W.2d at 292. It is the trier of fact, not the appellate court, which has the opportunity to hear and observe testimony. Thus, when a finding of fact is premised on the court's assessment of the competing credibility of the parties, we must give due regard to the trial court's opportunity to make this assessment. *See* ***Jacquart v. Jacquart***, 183 Wis.2d 372, 386, 515 N.W.2d 539, 544 (Ct. App. 1994).

To issue the injunction, the court had to find "reasonable grounds" to believe that the respondent violated § 947.013, STATS., which prohibits harassment. *See* § 813.125(4)(a)3, STATS. Harassment includes a course of conduct or repeated commission of acts meant to harass or intimidate, and which serve no legitimate purpose. *See* §§ 813.125(1)(b), 947.013(1m)(b). "'Harass' means to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger." ***Bachowski***, 139 Wis.2d at 407, 407 N.W.2d at 537. Intent may be established by circumstantial evidence and inferred from the acts and statements of the person, in view of the surrounding circumstances. *See* ***W.W.W.***, 185 Wis.2d at 489, 518 N.W.2d at 292. Contrary to Gary's contention, irreparable harm need not be shown to obtain a harassment injunction.

Here, the trial court found that the status quo between the parties was not working and that the situation was escalating. Indeed, earlier in the action, the trial court judge had personally visited the property and given instructions on what attempts should be made to informally resolve problems with parked cars blocking entrances. Jean Higbee, Thomas's wife, testified that she had asked Gary to move a vehicle that she believed to be blocking the service door. She described Gary's reaction, which included his coming into her office and yelling enough to frighten Jean's six-year-old son, who was also present. The trial court explicitly found that Jean's testimony was credible. It can be inferred from Gary's reaction that he intentionally parked in a manner for the purpose of harassing Thomas. Gary contends that the trial court ignored the testimony of the one neutral witness, a parking enforcement agent, who opined that on the one occasion he was called to the property, Gary's parked car did not obstruct the service entrance to Thomas's business. The trial court was free to reject that testimony. There was evidence that on more than one occasion Gary parked vehicles in a manner which blocked the service door of Thomas's business. Thomas produced a list of vehicles that had blocked the door over a two-month period.

In short, "[t]he court was presented with an adequate explanation of the type of conduct sought to be enjoined. It was aware of specific instances of harassing behavior.… The identification of the offensive conduct was sufficiently precise to satisfy the standards for issuance of equitable relief." ***State v. Sarlund***, 139 Wis.2d 386, 394, 407 N.W.2d 544, 547-48 (1987). The scope of the injunction was narrowly tailored to prohibit the offensive conduct and was a proper exercise of discretion. *See* ***W.W.W.***, 185 Wis.2d at 497-98, 518 N.W.2d at 295. We affirm the injunction.

Gary argues that the trial court's refusal to hear his motion for a temporary injunction under § 813.03, STATS., based on economic loss, was an erroneous exercise of discretion. At the September 12, 1997 hearing, the trial court stated that it would not consider the motion for a temporary injunction based on economic loss because the trial on Gary's counterclaim, alleging the same type of overuse and business interference, was already set at the end of October 1997. "The general control of the judicial business before it is essential to the court if it is to function. 'Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.'" ***Latham v. Casey & King Corp.***, 23 Wis.2d 311, 314, 127 N.W.2d 225, 226 (1964) (quoted source omitted). Since Gary's counterclaim encompassed the same allegations as the motion for a temporary injunction, and mutual harassment injunctions had been entered against Thomas and Gary to prevent errant parking and contact between the parties, Gary was not prejudiced by the trial court's refusal to hear the request for a temporary injunction. We will assume in the absence of a transcript of the trial on Gary's counterclaim that his claim of overusage and entitlement to more parking were fully litigated and properly denied. *See* ***Streff v. Town of Delafield***, 190 Wis.2d 348, 353 n.2, 526 N.W.2d 822, 824 (Ct. App. 1994) (in the absence of a transcript, we assume that every fact essential to sustain the trial court's decision is supported by the record).

Thomas moves to have the appeal declared frivolous and for an award of costs and attorney's fees. *See* RULE 809.25(3), STATS. In order to find an appeal frivolous, we must find that the appeal was used or continued in bad faith, solely for the purposes of harassing or maliciously injuring Thomas. *See* RULE 809.25(3)(c)1. Alternatively, we must conclude that Gary or his attorney

knew, or should have known, that the appeal "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." RULE 809.25(3)(c)2. Although the record demonstrates that this case was precipitated by an absence of brotherly love, we cannot determine on the existing record that the appeal was proceeded upon in bad faith solely to harass or maliciously injure Thomas. We decline to declare Gary's arguments wholly without a reasonable basis in law or equity. Even if we were to declare the appeal frivolous, we would exercise our discretion to not award costs and attorney's fees for the reason that we would not visit these parties on the trial court once more or prolong what has already been protracted litigation.

By the Court.—Order affirmed.

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