COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2361-FT **Cir. Ct. No. 2006CV150**

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

KAREN DAVIS,

PETITIONER-RESPONDENT,

V.

RON HEEG,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Ron Heeg appeals from a harassment injunction obtained by Karen Davis. We affirm the injunction in part, but also reverse in part and remand for further consideration.

¶2 Davis filed a petition for a harassment injunction against Heeg under WIS. STAT. § 813.125 (2005-06).[1] The court held a hearing and granted an injunction. In general, the evidence showed that Davis and the Heeg family are abutting property owners, and that Davis and Heeg had an ongoing dispute about Heeg's use of a driveway crossing Davis's property. The injunction prohibits Heeg from being on Davis's property or the driveway, and orders him to "stay at least 300 yards away" from the Davis property.

¶3 Heeg first argues that the evidence did not support granting an injunction because it failed to satisfy the statutory requirements. To obtain an injunction, the petitioner must establish that the respondent has engaged in either a specific type of actual, attempted or threatened physical abuse specified by WIS. STAT. § 813.125(1)(a), or engaged in a course of conduct or repeatedly committed acts which harass or intimidate another person and which serve no legitimate purpose, WIS. STAT. § 813.125(1)(b), and that the respondent has done so with intent to harass or intimidate. WIS. STAT. § 813.125(1), (4).

¶4 Heeg notes that the circuit court specifically identified four acts by Heeg as constituting harassment, including a loud discussion, calling Davis a "bitch," threatening to divert water onto Davis's property, and making a threat to put up a snow fence that would be ugly. Heeg argues that these acts were "singular in nature," rather than repeated acts or a course of conduct. Heeg's argument fails to recognize that a course of conduct is necessarily comprised of single acts; every course of conduct could be described as a series of singular acts.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

His argument gives us no basis to conclude that the court erred by finding Heeg's acts to be a course of conduct. Heeg also argues that Davis was an active participant in these events, but he does not explain why that fact matters.

¶5 Heeg argues that the evidence does not support a finding that he intended to harass or intimidate Davis, or that the acts lacked a legitimate purpose. He argues that his intent was instead to assert what he believed was his legal right to use the driveway. This argument fails because, as the circuit court noted, the four acts described above are not necessary to assert a legal right in a non-harassing manner.

¶6 In addition to those four acts, Davis argues that he did not intend to harass Davis in another incident she testified to, where he operated a tractor after dark, on the Heeg property but near Davis's residence. He argues that his intent was to perform farm work, not harass, and that it was unreasonable to conclude otherwise. We note that this incident occurred during the night, on a day that there was an oral confrontation between Heeg and Davis. Heeg does not explain why it would be unreasonable, in the context of these other events, to conclude that the tractor incident was harassment.

¶7 Heeg argues that the court erred by permitting Davis to testify about acts that were not originally described in her petition, namely, a threat to divert water onto Davis's property and Davis's testimony that she was afraid to attend church for fear of confrontation there with Heeg. Heeg argues that he was required to defend against these allegations without adequate notice. However, he does not explain what he would have done differently with more notice. Moreover, even if we were to agree with Heeg's argument and remove these acts

from consideration, three of the four acts the circuit court described as harassment would still exist to constitute a course of conduct.

¶8 Heeg next argues that the 300-yard restriction in the injunction is overbroad. He argues that this provision prevents him from using the Heeg property surrounding Davis's property, including a machine shed. He argues that a restriction barring him from being on Davis's property or using the disputed driveway is sufficient to prevent harassment. We agree that the injunction is overbroad.

¶9 In a harassment injunction, "[o]nly the acts or conduct which are proven at trial and form the basis of the judge's finding of harassment or substantially similar conduct should be enjoined." ***Bachowski v. Salamone***, 139 Wis. 2d 397, 414, 407 N.W.2d 533 (1987). Injunctive relief is to be tailored to the necessities of the particular case and, because injunctive relief is preventive, not punitive, the relief ordered may not be broader than equitably necessary. ***State v. Seigel***, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991). The scope of an injunction is within the sound discretion of the circuit court; "we may not overturn a discretionary determination that is demonstrably made and based upon the facts of record and the appropriate and applicable law." ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 495, 518 N.W.2d 285 (Ct. App. 1994).

¶10 In the present case, the circuit court's original oral pronouncement of the terms of the injunction did not include the 300-yard restriction on Heeg's use of the Heeg property. That restriction was imposed only after Heeg's attorney sought clarification that Heeg was still permitted to occupy that property. The court did not give an explanation for the restriction. Heeg's attorney disputed the

fairness of such a provision, but the court did not change its decision, although it also did not offer a specific reason for the restriction.

¶11 We cannot say, based on this record, that the 300-yard restriction was "demonstrably" made and based upon the facts of record and the appropriate and applicable law. *See* ***id.*** The record contains no explanation for the restriction. However, we generally look for reasons to sustain discretionary rulings. ***Id.*** Doing so in this case, we conclude that the 300-yard restriction is overbroad under any reasonable view of the evidence.

¶12 For a restriction on Heeg's use of the Heeg property to be sustained, there would have to be a finding that he engaged in harassment from that property, across the property line. The only conduct testified to that could arguably be understood as harassment occurring on the Heeg property was the tractor incident. Even if that act is found to be harassment, the 300-yard restriction is far more restrictive than necessary to prevent the same or substantially similar conduct. *See* ***Bachowski***, 139 Wis. 2d at 414. The court's current restriction applies in all seasons, at all times of day, and to all activities on a large strip of Heeg property that extends for the entirety of the Heeg-Davis property line and includes a working shed of some sort. To be sufficiently narrow, in light of the fact that the court was restricting Heeg's use of property that Heeg has legitimate reasons to be using, the injunction must permit him to continue reasonable, non-harassing uses. Even Davis herself appeared to concede as much during the hearing, because when she was asked whether she was seeking to enjoin Heeg from farming the field next to her house, she replied "no."

¶13 The ***Bachowski*** decision's application of the law to the facts is instructive in our own case. There, the circuit court enjoined Salamone from

having "any contact" with the petitioner. ***Id.*** The supreme court concluded that this language was overbroad because it could proscribe conduct which "simply would not constitute harassment under the statute, e.g., saying good morning to Mr. Bachowski or his family." ***Id.*** In the same way that Salamone still is permitted to say "good morning" even though there is a harassment injunction, Heeg should still be able to make legitimate, non-harassing uses of private property he is legitimately associated with.

¶14 On appeal, Davis responds to Heeg's argument by asserting that complying with the 300-yard restriction should not be a problem for Heeg because Heeg does not own the property in question. Davis asserts, as did the circuit court, that somebody else would be available to perform the same work. However, Davis does not provide us with any legal authority for the proposition that an injunction must be sustained if the respondent is able to comply with it. Rather, the test is as described above, that the injunction may not exceed the scope of the acts proven by the petitioner to be harassment, or substantially similar acts. The respondent's ability to comply would come into play only after that test is satisfied, for the purpose of measuring equitable considerations.

¶15 Furthermore, as far as we can tell, the testimony does not clearly state whether the property is owned by Heeg himself, Heeg's relatives, or a Heeg corporation. However, the point is irrelevant. Whoever the titular owner is, the fact appears undisputed that Heeg himself continues to perform legitimate, non-harassing work on the property, whether as an owner or as an invitee of the owner. No basis has been shown to prohibit that use at reasonable times and in reasonable manners. Therefore, we reverse as to the 300-yard restriction.

¶16 We also make an additional observation regarding the 300-yard restriction. As we read the court's oral pronouncement, the restriction applied only to Heeg's use of the Heeg property. However, the written order, possibly prepared by counsel for Davis, states that Heeg "must stay at least 300 yards away from petitioner's property." The written restriction includes not only the Heeg property, but also Heeg's use of Highways 10 and Y. The trial court's injunction shows Heeg's address as 11521 Highway 10. This element raises additional issues about overbreadth and the constitutional right to travel. Any modified injunction issued by the circuit court on remand should be sure to clarify this point.[2]

¶17 In summary, we reverse the injunction as to the 300-yard restriction, but affirm it in all other respects. On remand, the circuit court shall reconsider the scope of this restriction; remove it or modify it in a manner that complies with the standards described above; and, if some form of the restriction remains in place, provide an explanation of why this restriction is appropriate.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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

[2] We also note that at the beginning of Heeg's reply brief, he describes a number of factual assertions in Davis's brief that are not supported by the record. We agree that many of them are not in the record. We are limited to the record that was before the circuit court, ***State v. Parker***, 2002 WI App 159, ¶12, 256 Wis. 2d 154, 647 N.W.2d 430, and we have disregarded assertions not supported by the record.