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**DISTRICT IV**

April 30, 2020

*To*:

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Michael S. O'Grady

You are hereby notified that the Court has entered the following opinion and order:

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2019AP354 City of Portage v. Michael S. O'Grady (L.C. # 2018CV201)

Before Blanchard, Kloppenburg, and Graham, JJ.

**Summary disposition orders 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).**

Michael O'Grady, pro se, appeals a harassment injunction order granted to the City of Portage and multiple City of Portage officers and employees (collectively, "Portage"). O'Grady contends that he was denied constitutional rights in the injunction proceedings and in related criminal proceedings; that the circuit court erred by failing to provide detailed decisions as to each motion filed by O'Grady; that the petition for a harassment injunction was insufficient to confer jurisdiction on the circuit court; that the evidence was insufficient to sustain the harassment injunction; and that the harassment injunction statute, WIS. STAT. § 813.125 (2017-18), is

unconstitutional.[1] Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

In June 2018, Portage filed this harassment injunction action against O'Grady. The petition for a harassment injunction was signed by City of Portage Administrator Shawn Murphy. The named petitioners were the City of Portage and its officers and employees. Portage alleged that O'Grady had subjected the petitioners to repeated, uninvited actions that inflicted emotional harm and annoyance for no legitimate purpose. It alleged that O'Grady had, on dozens of occasions, pursued various frivolous complaints and legal actions against the City of Portage and its personnel. The petition was tried to the court on August 21 and August 22, 2018. The circuit court found that O'Grady had engaged in a course of conduct that harassed and intimidated the City of Portage and its employees and served no legitimate purpose, and issued the injunction.

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. We review a court's decision to grant a harassment injunction for an erroneous exercise of discretion. ***Board of Regents-UW Sys. v. Decker***, 2014

[1] To the extent that we do not specifically identify any arguments raised in O'Grady's brief, we deem those arguments too insufficiently developed to warrant a response. *See* ***State v Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (declining to address issues "so lacking in organization and substance that for us to decide [them], we would first have to develop them").

All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

WI 68, ¶19, 355 Wis. 2d 800, 850 N.W.2d 112. We will uphold the court's factual findings unless they are clearly erroneous. ***Id.***, ¶20. We independently review whether reasonable grounds exist to grant the injunction. ***Id.***

O'Grady argues that the circuit court erred by granting the harassment injunction in favor of Portage. He raises multiple arguments, organized under five main issues, based on the injunction and related criminal proceedings. Portage responds that only three of O'Grady's arguments are properly presented in this appeal. It contends that O'Grady failed to raise in the circuit court the remainder of the issues he raises on appeal, including arguments related to the criminal proceedings that would have been outside the scope of this injunction action, and that those issues are therefore not preserved for appeal.

O'Grady did not file a reply brief to contest Portage's argument that O'Grady failed to preserve all but three of the arguments raised in his brief. We therefore deem O'Grady to have conceded Portage's argument that O'Grady failed to preserve all but the three issues identified by Portage. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted may be deemed conceded). Moreover, "[i]t is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." ***In re Ambac Assur. Corp.***, 2012 WI 22, ¶22, 339 Wis. 2d 48, 810 N.W.2d 450 (quoted source omitted). "[T]he party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." ***Id.*** O'Grady has not met that burden here. Accordingly, we limit our discussion in this opinion to the three issues properly preserved for appeal.

As to the first issue properly preserved for appeal, O'Grady contends that the petition for a harassment injunction was insufficient to give the circuit court jurisdiction over the injunction proceedings for the following reason. O'Grady contends that the petition was defective because Murphy did not have authority to sign the petition; instead, O'Grady contends, only the mayor may sign a petition on behalf of Portage, and the City of Portage Common Council acted improperly by deciding in a closed session to authorize Murphy to sign the petition. O'Grady asserts that, because Murphy was not properly authorized to sign the petition, the petition did not give the court jurisdiction and the injunction order is therefore void, citing ***Neylan v. Vorwald***, 124 Wis. 2d 85, 97, 368 N.W.2d 648 (1985) (when a court acts without jurisdiction, its orders are void). We disagree.

As an initial matter, O'Grady has failed to present a developed argument with citation to facts in the record and supporting legal authority to establish that the petition was insufficient to confer jurisdiction upon the circuit court. We may decline to address inadequately-developed arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (declining to address issues "so lacking in organization and substance that for us to decide [them], we would first have to develop them").

As best we can tell, O'Grady's argument that Murphy did not have authority to sign the petition is premised on the proposition that the City of Portage did not have authority to allow its administrator, Murphy, to pursue a harassment injunction on its behalf. However, as Portage points out, cities have authority to make rules to conduct their local affairs. *See* ***Black v. City of Milwaukee***, 2016 WI 47, ¶2, 369 Wis. 2d 272, 882 N.W.2d 333 (explaining that "Article XI, § 3(1) of the Wisconsin Constitution, better known as the home rule amendment … gives cities and villages the ability to determine their local affairs and government," and that, therefore, "a city or

village may, under its home rule authority, create a law that deals with its local affairs," which "the Legislature has the power to statutorily override … if the state statute touches upon a matter of statewide concern or if the state statute uniformly affects every city or village" (quoted source omitted)). Portage argues that Murphy was appointed as the City of Portage's Chief Administrator and was authorized to commence this action, and that Portage's decision to appoint an administrator to pursue the injunction was permitted by home rule authority. Again, because O'Grady has failed to file a reply brief and thus has not refuted this argument, we deem O'Grady to have conceded Portage's argument. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109. Accordingly, we reject O'Grady's contention that the harassment injunction is void.

As to O'Grady's second argument, O'Grady contends that the evidence presented at the injunction hearing did not support the injunction. O'Grady asserts that the evidence established that O'Grady's conduct was protected by the First Amendment, and was undertaken with the legitimate purpose of seeking to restrain government corruption and criminal conduct. He also argues that the testimony by City of Portage employees as to their reactions to O'Grady's conduct, and to O'Grady's failure to pick up documents after he made public records requests, did not support the finding that O'Grady's conduct comprised harassment.

Portage responds that the evidence was sufficient to support the circuit court's determination that O'Grady engaged in behavior supporting a harassment injunction as authorized by WIS. STAT. §§ 813.125(1)(b) and (4)(a)3—that is, a course of conduct that harassed or intimidated Portage and served no legitimate purpose, with the intent to harass or intimidate. Portage points to evidence at the hearing that O'Grady asserted false allegations of wrongdoing against employees through his repeated, meritless public records requests and legal actions against Portage, which caused the employees to feel fearful and intimidated.

We conclude that the evidence was sufficient to support the injunction. The circuit court found that O'Grady filed repeated meritless public records requests and legal actions against the City of Portage and its employees that harassed or intimidated them, with the intent to harass or intimidate. O'Grady makes no challenge to the court's factual findings that O'Grady engaged in that conduct. Rather, O'Grady contends that his conduct was protected by the First Amendment and served the "legitimate purpose" of exercising his First Amendment rights. However, the court found that O'Grady's conduct was intended to harass, and served no legitimate purpose. "[C]onduct or repetitive acts that are intended to harass or intimidate do not serve a legitimate purpose." ***Decker***, 355 Wis. 2d 800, ¶38 (quoted source omitted). Thus, O'Grady "cannot shield his harassing conduct from regulation by labeling it" as serving a legitimate purpose. ***Id.*** Rather, "[i]f [the defendant's] purpose was even in part to harass …, his conduct may be enjoined under WIS. STAT. § 813.125." ***Id.*** Accordingly, O'Grady's actions, though legal, supported the injunction.

O'Grady's contention that the evidence did not support the circuit court's finding that O'Grady's conduct harassed or intimidated City employees is unavailing. "'[H]arass' means 'to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger,' and 'intimidate' means 'to make timid or fearful.'" ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶35, 312 Wis. 2d 435, 752 N.W.2d 359 (quoted source omitted). Accordingly, O'Grady's assertion that the City of Portage employees' testimony about their feelings of fear and intimidation was insufficient to support the requirement that O'Grady's conduct harassed or intimidated them fails. Whether conduct harassed or intimidated a petitioner is a question for the fact-finder to decide. ***Id.***, ¶¶33-38. Here, the court found, based on the evidence at the injunction hearing, that O'Grady's conduct harassed and intimidated City of

Portage employees. O'Grady has provided no legal authority nor basis in the record to upset the court's findings. We also note, again, that O'Grady failed to file a reply brief to refute Portage's argument as to why the evidence at the injunction hearing was sufficient to support the injunction, and we therefore deem him to have conceded that argument. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109. We conclude that the court relied on the facts in the record in reaching its factual findings, which established reasonable grounds to believe O'Grady had harassed Portage with the intent to harass. Accordingly, the court properly exercised its discretion by granting the injunction. *See* ***Welytok***, 312 Wis. 2d 435, ¶¶23-25.

Finally, O'Grady argues that WIS. STAT. § 813.125 is unconstitutional, contending that he was denied due process and that his First Amendment rights of free speech and to petition the government were violated when the circuit court granted the injunction. We disagree.

At the outset, we note that O'Grady bears the burden to overcome the strong presumption that WIS. STAT. § 813.125 is constitutional. *See* ***State v. Borrell***, 167 Wis. 2d 749, 762, 482 N.W.2d 883 (1992) (person attacking statute has the burden to overcome strong presumption that statutes are constitutional). We conclude that O'Grady has not met that burden here.

As Portage points out, the Wisconsin Supreme Court has held that the procedure required under WIS. STAT. § 813.125 provides sufficient due process to satisfy constitutional requirements. ***Bachowski v. Salamone***, 139 Wis. 2d 397, 406-13, 407 N.W.2d 533 (1987). In ***Bachowski***, the court "conclude[d] that compliance with the requirements of [§] 813.125(5)(a) … provide[s] adequate notice" to satisfy due process. ***Id.*** at 412. O'Grady has not established that due process requires additional notice or procedures other than provided by § 813.125.

Additionally, as Portage points out, the Wisconsin Supreme Court has also held that First Amendment rights may be restricted by harassment restraining order. *See* ***Decker***, 355 Wis. 2d 800, ¶¶1-3, 45. The ***Decker*** court explained that First Amendment rights are not absolute. ***Id.*** at 45. Rather, the court explained, those rights "can be restricted when [a person] engages in harassment with the intent to harass or intimidate." ***Id.*** O'Grady has not shown that WIS. STAT. § 813.125 unconstitutionally infringes on the First Amendment. Moreover, we deem O'Grady's failure to file a reply on this point as a concession that Portage's arguments that WIS. STAT. § 813.125 is constitutional, are correct. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*