COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2005AP2189

Cir. Ct. No. 2005CV314

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

AMY B. REARDON,

PETITIONER-RESPONDENT,

V.

DAVID O. BREAGER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed*.

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

¶1 NETTESHEIM, J. David Braeger appeals from an order granted in favor of his sister, Amy Reardon, enjoining him from contact with Amy or her

immediate family for two years. The sole issue is whether David's conduct that resulted in the injunction constitutes a "course of conduct" as contemplated by WIS. STAT. § 813.125 (2003-04),[1] the harassment injunction statute. We uphold the circuit court's conclusion that it does and affirm the order issuing the injunction.

FACTS[2]

¶2 Most of the facts are undisputed. On June 30, 2005, Amy, acting pro se, swore out a petition for a temporary restraining order against David accusing him of a verbal "harassing attack" on her the day before while she and her children were at the Milwaukee Country Club (the Club). Amy also filed a police report on the day of the incident. Its allegations largely mirror those of the petition.

¶3 At the hearing on the petition, Amy testified as follows. She was at the Club pool with her four young children when David came over to where she was lounging with her six-year-old son sitting next to her. David began calling her "such a liar" and a "psychotic bitch" or "you bitch"[3] and made "bizarre"

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Amy's "Statement of the Case and Facts Relevant to the Issues on Appeal" prompts a reminder to counsel that the facts must be set forth objectively; "spin" and argument are to be reserved for the argument section of the brief. *See* ***Arents v. ANR Pipeline Co.***, 2005 WI App 61 ¶5 n.2, 281 Wis. 2d 173, 696 N.W.2d 194, *review denied,* 2005 WI 136, 285 Wis. 2d 626, 703 N.W.2d 376.

[3] Throughout her brief, Amy misrepresents the hearing testimony. For example, she tacitly asserts, through page- and line-specific references, that the hearing testimony showed that David called her a "fucking psychotic bitch," when there was no testimony at the hearing that David used that particular vulgarity. She also states that the Reardon children now are so frightened of David that they sleep on the floor of their parents' bedroom. The citation she provides is to a statement by Amy's counsel, not Amy, and references only one child. For references to the record to be "appropriate," as mandated by WIS. STAT. § 809.19(1)(d), they also must be accurate.

statements about a funeral, which she presumed referred to the recent funeral of her and David's father. David did not threaten to hit her, but he was "very scary and very close to my face" and "was in such a rage I don't know what would have happened." Amy's son was "really scared" and asked if David was going to come back and kill her. Because all of her children were frightened by the incident, Amy prepared them to leave. The children had to pass where David was sitting to retrieve their towels. David said to the eight-year-old, "[H]i, Coco, you can talk to me,"[4] but she did not respond because she was frightened. As Amy and the children were leaving, the eleven-year-old daughter was hit by a tennis ball thrown, according to Amy's daughter, by "Aunt Lisa."[5] David later testified, however, that the ball was rolled, not thrown, and that it was he, not Lisa, who rolled it "gently and playfully" at his niece. Since the incident, Amy testified that the children are afraid of David: her six-year-old has asked twice more if David is "going to come and kill you," and the girls came running in the house one day, mistakenly thinking that David was outside.[6]

¶4 Other evidence at the hearing corroborated Amy's testimony. Alyson Yundt, the lifeguard on duty at the Club at the time of the incident, witnessed the event. Yundt testified that David was red-faced as he approached Amy. Although Yundt could not hear him at first, she could tell his comments

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[4] Amy also takes liberties with this testimony. In her brief, Amy characterizes the "hi, Coco" comment as "taunt[ing]" the girl when there was no evidence presented in that regard. Similarly, Amy asserts that the trial court "found that Braeger taunted Reardon's child," when the court made no reference at all to that incident.

[5] Lisa is David's and Amy's sister.

[6] Amy also testified that the children call David "Uncle Big Mouth because he always is yelling at me or my husband."

were "very aggressive and intimidating." When Amy would not acknowledge David, he got louder "towering and leaning way over" Amy, getting close to her face and pointing his fingers at her. Yundt testified that she heard him call Amy a "selfish bitch" and say that Amy was embarrassing him in front of his friends and family. Yundt reported the incident to her boss, the head of the pool department. David acknowledged in his testimony that he was aware children were nearby and that he called Amy a "psychotic bitch." The Club suspended his privileges, after which David wrote a letter of apology to the executive committee. David also was cited for disorderly conduct as a result of the police report Amy filed.

¶5 The following facts, also drawn from the hearing testimony, give context to the situation. David and Amy are part of the Braeger family, which owns several car dealerships. Amy and her husband, Todd, themselves own at least one of the Braeger dealerships. A few years ago, David came to work for the family business. The alliance ended after only a few months, in part, apparently, because David and Todd did not see eye-to-eye. After that, David often telephoned Amy, "sort of desperate," evidently to ask for her intervention in his employment situation with the company. The calls got increasingly angry. David eventually left the business, ending up with a sizeable settlement.

¶6 The parties also testified about another episode that occurred at the Club about a year before the June 29 events leading to the petition. On the earlier occasion, David approached the table where Amy and Todd were having dinner and extended his hand to Todd. Amy testified that when Todd refused to shake it, David said "something ridiculous" and made a gesture with his arm, spilling wine all over the table and Amy in the process. David testified, however, that Todd's refusal to shake hands only prompted David to respond, "[Y]ou've got to get over it. This is ridiculous, it's gone on too long." David denied any knowledge of

knocking over a glass of wine, but also asserted that if it occurred it was accidental.

¶7 The circuit court rejected David's argument that the set of events on June 29 amounted only to an isolated incident. Instead, the court found that the series of acts on that day were intended to harass or intimidate and were sufficient to constitute a course of conduct. The court also noted, however, that even if the entire June 29 incident were considered a single act, a course of conduct still was demonstrated by the earlier clash between Todd and David at the Club. The court did not forgive Todd's refusal to shake David's hand, but stated that "that did not excuse … [David's] conduct after that." Accordingly, the circuit court concluded that Amy met her burden of establishing "reasonable grounds to believe" that David had violated WIS. STAT. § 947.013, such that an injunction could issue. *See* WIS. STAT. § 813.125(4)(a)3. David was ordered to avoid Amy's residence or any premises she may temporarily physically occupy, and to avoid initiating any conversation with, and to stay at least fifteen feet away from, Amy and/or her family for the next two years. David appeals.

STANDARD OF REVIEW

¶8 The parties sharply disagree on what standard of review to employ. David asserts that the circuit court's ruling merits de novo review because it requires applying undisputed facts to a statute. In other words, he does not contend that the events did not occur, only what their legal significance is. Amy lobbies for a far more deferential review, asking us to examine the circuit court's factual findings under a clearly erroneous standard.

¶9 Both parties, to a degree, are correct. To grant an injunction under WIS. STAT. § 813.125, the circuit court must find "reasonable grounds to believe

that the respondent has violated [WIS. STAT. §] 947.013." Sec. 813.125(4)(a)3. This presents a mixed question of fact and law. ***M.Q. v. Z.Q.***, 152 Wis. 2d 701, 708, 449 N.W.2d 75 (Ct. App. 1989). We will not set aside the circuit court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). We independently review the circuit court's conclusion, based on the established facts, whether such reasonable grounds exist. ***M.Q.***, 152 Wis. 2d at 708. Whether Amy has met her burden of proof also is a question of law, *see* ***Brandt v. Brandt,*** 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988), as is applying a statute to those facts which are undisputed. *See* ***Garcia v. Mazda Motor of Am., Inc.,*** 2004 WI 93, ¶7, 273 Wis. 2d 612, 682 N.W.2d 365. Our review entails yet one more step. Section 813.125(4)(a) provides that a judge *may* grant an injunction if certain conditions are satisfied, implying the exercise of discretion. *See* ***Kotecki & Radtke, S.C. v. Johnson,*** 192 Wis. 2d 429, 447-48, 531 N.W.2d 606 (Ct. App. (1995). Therefore, whether or not to finally grant an injunction is within the sound discretion of the circuit court, and our review ultimately is limited to whether that discretion was properly exercised. ***Pure Milk Prods. Coop v. National Farmers Org.,*** 64 Wis. 2d 241, 251, 219 N.W.2d 564 (1974).

ANALYSIS

¶10 As we have stated, to grant an injunction under WIS. STAT. § 813.125, the circuit court must find reasonable grounds to believe that the respondent has violated WIS. STAT. § 947.013. A violation of § 947.013 occurs, inter alia, when the actor, with intent to harass or intimidate another person, "[e]ngages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose." Sec. 947.013(1m)(b). 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." Sec. 947.013(1)(a).

¶11 The thrust of David's appeal is that this is an unfortunate family dispute, that his actions do not constitute a "course of conduct" under WIS. STAT. § 947.013, and that using WIS. STAT. § 813.125 in a situation such as this goes beyond what the legislature intended. He contends that "the occasional public argument" is more properly covered by the disorderly conduct statute.

¶12 We first observe that David's and Amy's status as siblings does not move us one way or the other. One with even a passing knowledge of Biblical history—or Broadway musicals—should be familiar with Cain and Abel or with Joseph and his eleven brothers. Family ties have led to legendary conflicts.

¶13 Second, we reject David's notion that the issuance of a disorderly conduct citation sufficiently addressed the situation and allays Amy's concerns. In essence, David is arguing that, under the circumstances of this case, his disorderly conduct is off limits for purposes of the harassment statute. To the contrary, conduct directed at another that rises to the level of prosecutable disorderly conduct supports, rather than diminishes, a claim that the conduct also constitutes harassment.

¶14 More to the merits of this appeal, David relies on ***Bachowski v. Salamone,*** 139 Wis. 2d 397, 407-08, 407 N.W.2d 533 (1987), for the proposition that "single isolated acts do not constitute 'harassment'" under WIS. STAT. § 813.125(1)(b), and that an "immature, immoderate, rude or patronizing manner which annoys another is not enough." ***Bachowski,*** 139 Wis. 2d at 407-08 (citations omitted). We do not quibble with those statements. Nonetheless, we are

not persuaded by David's rendering of the evidence as isolated incidents of mere bothersome or annoying behavior.

¶15 Looking to a recognized dictionary, the supreme court observed that "harass" 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." ***Bachowski***, 139 Wis. 2d at 407 (citations omitted). WISCONSIN STAT. § 813.125(1)(b) further requires that the acts serve no legitimate purpose. "Whether acts or conduct are done for the purpose of harassing or intimidating … is a determination that must of necessity be left to the fact finder, taking into account all the facts and circumstances." ***Bachowski***, 139 Wis. 2d at 408.

¶16 We conclude that, while this case may tread fairly close to the line, it does satisfy the statutory definitions of "harassment" and "course of conduct." David angrily approached Amy at a pool where families congregated and began calling her offensive names in a loud voice. He leaned over her in a threatening manner and pointed his fingers in her face. The more she ignored him, the louder and angrier he became. His actions drew the attention of others in the area, including the lifeguard, a disinterested party who was concerned enough to report the confrontation to her supervisor. As the family left the pool area, a tennis ball, whether thrown or rolled, was aimed at and struck one of the children. Amy's children were frightened then, and remained frightened for some time afterward. We recall that, under WIS. STAT. § 947.013(1)(a), 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." (Emphasis added.)

¶17 Added to that, the June 29 episode represented an escalation of the prior encounter at the Club. The encounter approximately one year before began with David approaching the Reardons while they dined at the Club. Todd's refusal to shake David's hand may have demonstrated discourtesy or a reasoned decision to have nothing more to do with David. Whatever informed Todd's decision, the circuit court noted that "that did not excuse … [David's] conduct after that," indicating the court's rejection of David's testimony that he simply was trying to be friendly and the wine spilling incident, if it occurred, was a mere accident. When there is conflicting testimony, the court is the ultimate arbiter of the witnesses' credibility. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). If a circuit court does not expressly make a finding about the credibility of a witness, we must assume it made implicit findings on a witnesses' credibility when analyzing the evidence. ***Jacobson v. American Tool Cos.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). Such deference is appropriate because the court has the opportunity to observe first-hand the demeanor of the witnesses and gauge the persuasiveness of their testimony. ***Id.***[7]

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[7] The dissent would reverse on the grounds of plain error based on the trial court's sustaining an objection to a question following a sidebar conference. As the dissent sees it, the answer to the challenged question might have revealed evidence that David's conduct had a "legitimate purpose" under WIS. STAT. § 813.125(1)(b). The dissent concedes that this issue is waived and thus turns to the doctrine of plain error.

However, the dissent understates the degree of waiver as to this issue. In fact, this issue is waived on multiple levels and for multiple reasons. First, after the trial court's ruling sustaining Amy's objection to the question, David did not make any offer of proof as to what evidence the answer would have produced as required by WIS. STAT. § 901.03(a)(b). Second, David did not register any objection to the trial court's call for a sidebar conference. Third, David did not register any objection to the trial court's summary of the sidebar conference. Fourth, David has not raised any of these potential issues on appeal. Fifth, David has not sought appellate relief on the basis of plain error or any other claim of a miscarriage of justice.

(continued)

CONCLUSION

¶18 Most of the facts are undisputed. As to those that are in dispute, the circuit court was in a superior position to judge the witnesses' demeanor and credibility and, thus, the weight and persuasiveness of the evidence. Since we cannot say that the circuit court's findings are clearly erroneous, we are constrained to accept them. We uphold the circuit court's conclusions that the undisputed facts, and the disputed facts as resolved by the court, satisfy the statutory definitions of harassment and course of conduct. We also agree with the circuit court that Amy met her burden of demonstrating reasonable grounds to believe that David violated the harassment statute. Accordingly, we conclude that the issuance of the injunction represented a proper exercise of the circuit court's discretion.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

By sua sponte raising these issues and then deciding them, the dissent has taken on the role of both advocate and judge. However, we are cautioned to not act in such dual capacity. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). ("We cannot serve as both advocate and judge.") Equally troubling is that this procedure forecloses any opportunity for Amy to be heard on these new issues.

¶19 Snyder, P.J. (*Dissenting*). The issuance of a WIS. STAT. § 813.125 harassment injunction against any citizen is not to be taken lightly. As recognized by our supreme court: "The violation of an injunction issued under [§ 813.215] is a criminal offense. Substantial fines and imprisonment could result."[1] ***Bachowski v. Salamone***, 139 Wis. 2d 397, 414, 407 N.W.2d 533 (1987). To warrant an injunction under § 813.125, the complainant must show harassment, which, for purposes here, is defined as follows: "Engaging 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)(b) (emphasis added).

¶20 My quarrel with the majority opinion is this: it affirms a harassment injunction that is unsupported by any analysis of whether the course of conduct had a legitimate purpose.[2] The legitimate purpose portion of the analysis

[1] WISCONSIN STAT. § 813.125(7) provides as follows: "Whoever violates a temporary restraining order or injunction issued under this section shall be fined not more than $1,000 or imprisoned not more than 90 days or both." A conviction of violating § 813.125 may be counted for purposes of WIS. STAT. § 939.62 sentence enhancement, and a defendant may be convicted of violating the § 813.125 order (Class B misdemeanor) and guilty of WIS. STAT. § 947.013 (Class B forfeiture). *See* ***State v. Sveum***, 2002 WI App 105 ¶¶17, 31, 254 Wis. 2d 868, 648 N.W.2d 496 (violation of injunction is a crime and may be used to sentence defendant as a repeater; convictions for violation of § 813.125 injunction and for harassment contrary to § 947.013 do not violate right to be free from multiple punishments for same offense).

[2] The majority contends that David does not raise the issue of "legitimate purpose" in this appeal. It emphasizes the "degree of waiver" demonstrated by David on this issue. Majority at ¶17 n.7. I agree that David had the opportunity to raise and argue the issue; however, the record demonstrates that David presented evidence, or attempted to present evidence, relevant to the WIS. STAT. § 813.125(a)(b) "legitimate purpose" requirement but was precluded from doing so. Furthermore, the court of appeals is an error correcting court, vested with discretionary power to reverse when we believe the controversy has not been fully tried, or for plain error. WIS. STAT. §§ 752.35 and 901.03(4). We may also apply a rule of law not argued by the parties. *See* ***State v. Olson***, 127 Wis. 2d 412, 419, 380 N.W.2d 375 (Ct. App. 1985) (the parties' agreement on legal issues does not bind the appellate court).

(continued)

preserves the constitutionality of WIS. STAT. § 813.125. Our supreme court has held:

> [T]he requirements of an intent to harass *and the absence of any legitimate purpose* for the acts, render the harassment provision of sec. 813.125, Stats., sufficiently precise to carry fair warning to the citizenry….
>
> ….
>
> It is clear from [§ 813.125], that chronic, deliberate behavior, *with no legitimate purpose* designed to harass another person is proscribed by the statute. We conclude that the legislature has defined the conduct proscribed by [§ 813.125] with sufficient specificity to meet constitutional requirements with respect to vagueness.
>
> We reject [the defendant's overbreadth] argument that [§ 813.125] has a chilling effect on free speech. The intent requirement *and the phrase "no legitimate purpose"* make clear that protected expression is not reached by the statute. *See* Model Penal Code sec. 250.4 comment 6 at 371-72.

Bachowski, 139 Wis. 2d at 410-11 (emphases added).

¶21 The majority opinion states that the "sole issue is whether David's conduct that resulted in the injunction constitutes a 'course of conduct' as contemplated by WIS. STAT. § 813.125 … the harassment injunction statute." Majority at ¶1 (footnote omitted). The definition of harassment in § 813.125(1)(b), however, includes the requirement that the course of conduct or

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The majority also concludes that this court would be acting as both advocate and judge to consider the "legitimate purpose" element of harassment. Majority at ¶17 n.7. While I agree that this court is not to act as an advocate, I dispute the majority's conclusion that the dissent is advocacy. Rather, the dissent objects to the trial court's determination of harassment without addressing all of the statutory elements of the offense. It is our discretionary power to reverse that allows us to correct such an error. "A discretionary power of reversal (as opposed to a discretionary power of review) is compatible with doing justice in the individual case … [and] is also a limitation compatible with the fact that the court of appeals does not declare or develop the law." ***State v. Schumacher***, 144 Wis. 2d 388, 408, 424 N.W.2d 672 (1988).

acts harass or intimidate a person and "serve no legitimate purpose." The sole appellate issue must, therefore, be restated to include the full definition of statutory harassment.

¶22 At trial, evidence regarding the purpose of the two encounters was presented. With regard to the earlier incident, where David approached Amy and her husband while they were dining at the Milwaukee Country Club, David testified that when he approached Amy, he said, "I wanted to come up and see how you're doing." He extended his hand to Amy's husband, who "did not say go away or anything, he just sat there," and at that point David said, "God, you've got to get over it. This is ridiculous, it's gone on too long."

¶23 In his testimony, David admitted that he was ashamed of his conduct in the more recent poolside incident. He explained that he had submitted a letter of apology to the Club for the incident, stating, "I was protecting my dad's name." David clarified that purpose in answering a later inquiry from Amy's counsel, stating that "[Amy's] made numerous heinous and false accusations against my father and my mother, and it hurts quite a bit." This testimony, elicited by Amy's counsel questioning David adversely, raises an issue of a potentially legitimate purpose for David's conduct other than the intent to harass.

¶24 Interestingly, when David's counsel attempted to expound on the topic, the following exchange occurred:

> [David's counsel]: And what do you mean by protecting your dad's name?
>
> [David]: My sister Amy has - -
>
> [Amy's Counsel]: Objection. I'd like to approach the bench, your Honor.
>
> (Bench conference)

THE COURT: Objection sustained.

Amy's counsel never stated any basis for the objection upon the record. After some intervening testimony, the circuit court returned to the above ruling:

> THE COURT: While we're at it here, let the record indicate that there was a sidebar conference between court and counsel for both sides wherein the issue was argued as to whether or not the conduct of the deceased, the person who has been referred to in these proceedings as deceased, was relevant to these proceedings. The Court ruled that *it was not under any theory that was being propounded, including motive or legitimate purpose***.**

Thus, as David embarked on a possible explanation for his conduct, the trial court ruled that the evidence was not "relevant" under any theory that was being propounded, including the theory of "legitimate purpose."

¶25 Generally, we will not reverse a trial court's evidentiary decision unless the trial court erroneously exercised discretion or based its decision on an erroneous view of the law. *See* ***State v. Eison***, 194 Wis. 2d 160, 171, 533 N.W.2d 738 (1995). Here, however, an unrecorded sidebar conference resulted in a ruling that deprived David the opportunity to present evidence of a potentially legitimate purpose for his poolside conduct.[3] Appellate review is better served by following the WIS. STAT. § 901.03(1)(a) procedure of stating objections and the grounds for the objection on the record. ***State v. Munoz***, 200 Wis. 2d 391, 402, 546 N.W.2d 570 (Ct. App. 1996). If a matter is significant enough to invite appellate review it is too important to subject to a remote, unrecorded summation process. ***Id***. When

[3] Generally, a sidebar conference is a discussion between the judge and the attorneys over an evidentiary objection that is conducted outside the jury's hearing. *See* BLACK'S LAW DICTIONARY, 1414 (8th ed. 2004). The purpose for an unreported sidebar conference in a trial to the court without a jury is, at best, a mystery. At worst, it was a procedure used to deny David the opportunity to introduce evidence relevant to a potentially legitimate purpose for his conduct.

a sidebar conference is not on the record, as here, it is essential that the subsequent on-the-record comments repeat or summarize the arguments and confirm exactly what was presented to the trial court at the time of its ruling. *See* ***id.*** at 403. The record is insufficient to allow appellate review of the theory of admissibility that David argued, the grounds for the objection by Amy's counsel, the arguments presented to the circuit court, and the basis for the ruling.[4]

¶26 The majority concludes that, "while this case may tread fairly close to the line, it does satisfy the statutory definitions of 'harassment' and 'course of conduct.'" Majority at ¶16. Unfortunately, this case does not satisfy the ***Bachowski*** requirement that David's conduct be measured against the phrase "no legitimate purpose," where evidence of an alternative purpose for the poolside and previous tableside encounters was before the fact finder.

¶27 We have been precluded from a full review of the objection to the evidence, the arguments and presentations made to the circuit court, and the basis for the circuit court's ruling that the evidence was not relevant to a legitimate purpose analysis. In the face of a WIS. STAT. § 813.125 requirement to consider

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[4] It is noteworthy that the subject was initially raised during David's adverse examination by Amy's counsel, it was then excluded based on Amy's counsel's nonspecific objection, and the circuit court then ruled that the evidence was not relevant in terms of the theory of "legitimate purpose." The legitimate purpose requirement of WIS. STAT. § 813.125 prevents the unconstitutionally overbroad application of the law.

legitimate purpose as an alternative to harassment, the supreme court's directive in ***Bachowski***, and the lack of this record to address the evidence, and unreported attempt of David to submit evidence, of a legitimate purpose, I would reverse the issuance of the injunction. I dissent.