**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**January 10, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-0401** **Cir. Ct. No. 01-CV-27**

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

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**THERESA FRANKIEWICZ,**

**PETITIONER-RESPONDENT,**

**V.**

**RICHARD T. BUERGER,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. Richard T. Buerger appeals the circuit court's issuance of a harassment injunction. For the following reasons, we affirm.

## *Background*

¶2 In January of 2001, Theresa Frankiewicz filed a petition for a temporary restraining order and an injunction, seeking to have Buerger restrained from, among other things, e-mailing, calling or talking to her. In a handwritten letter attached to the petition, Frankiewicz indicated that she and Buerger were employed at the same company. She alleged that she and Buerger initially had a friendly work relationship. Frankiewicz ended the relationship due to "excessive attention" from Buerger. Frankiewicz indicated in the letter that Buerger vandalized her car and that he repeatedly e-mailed her, quoting threatening statements Buerger made in some e-mails. Frankiewicz also indicated that Buerger was causing her immense stress and that she was afraid of him.

¶3 At a hearing on the petition, the court informally questioned both Frankiewicz and Buerger. The court also reviewed printed e-mail messages, the majority of which were sent by Buerger to Frankiewicz. The court indicated to the parties that it was going to mark the printed e-mail messages as an exhibit. Neither party objected. At the close of the hearing, the court granted Frankiewicz's request for an injunction. The court ordered that Buerger was not to have any contact with Frankiewicz, except for indirect contact at work for work-related purposes, and he was not to be within 1000 feet of Frankiewicz outside of work. Buerger appealed.

## *Discussion*

¶4 On appeal, Buerger makes the following two arguments: (1) the circuit court erred in granting the injunction because no evidence was presented that would establish harassment; and (2) the injunction must be vacated because it is overbroad. We consider each argument in turn.

*1. Insufficient Evidence to Establish Harassment*

¶5 Our standard of review on this issue requires us to reverse only if the evidence, viewed in the light most favorable to the harassment injunction, is so insufficient in probative value and force that no reasonable trier of fact could have found the elements necessary to support issuance of the injunction. *See* ***State v. Pletz***, 2000 WI App 221, ¶¶6-7, 239 Wis. 2d 49, 619 N.W.2d 97.

¶6 WISCONSIN STAT. § 947.013(1m)(b) (1999-2000)[1] penalizes "[w]hoever, 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." To "harass" means "to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger." ***Bachowski v. Salamone***, 139 Wis. 2d 397, 407, 407 N.W.2d 533 (1987). To "intimidate" means "'to make timid or fearful.'" ***Id.*** (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1184 (1961)).

¶7 Buerger asserts that no sworn testimony was presented to support the harassment petition and no other evidence established that he harassed Frankiewicz. More specifically, Buerger asserts that Frankiewicz did not testify that she felt personally harassed or intimidated by the e-mails, the e-mails themselves do not establish harassment, and there is no evidence that Buerger intended to harass Frankiewicz.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶8 The hearing on Frankiewicz's petition was admittedly an informal one. Nevertheless, it is apparent from the record that the circuit court considered as evidence the statements made by the parties at the hearing, the assertions made by Frankiewicz in her petition and accompanying letter, and the printed e-mail messages. Buerger did not object to the form of the hearing. Nor did he object to the court's consideration of the parties' statements and the e-mail messages as evidence.[2] Accordingly, Buerger has waived any objection to the admissibility of the evidence considered by the court. *See* ***State v. Damon***, 140 Wis. 2d 297, 300, 409 N.W.2d 444 (Ct. App. 1987) (failure to make a timely objection to the admissibility of evidence waives that objection).

¶9 Moreover, Buerger did not indicate in any way at the hearing that he disputed the facts as they were presented in Frankiewicz's letter accompanying her petition or in the e-mail messages. Indeed, as far as the circuit court was aware, there existed no factual dispute between the parties. Accordingly, we will review the petition and accompanying letter, the parties' statements, and the e-mail messages in responding to Buerger's arguments on appeal.

¶10 We turn now to Buerger's first assertion, that Frankiewicz did not present sufficient evidence that she felt personally harassed by Buerger. While it is true that Frankiewicz did not state at the hearing that she was harassed or intimidated by the e-mail messages, the record easily supports the court's implicit finding that she was. In the letter accompanying her petition, Frankiewicz asserted that she believed Buerger's behavior constituted harassment, that his e-mail

[2] We note that on appeal, Buerger does not plainly object to the court's consideration of the e-mail messages as evidence; rather, his efforts are expended on arguing that the content of the messages does not establish harassment.

messages contained threats, that he was causing her immense stress, and that she was afraid of him. Additionally, Frankiewicz indicated in an e-mail to Buerger that they could not be friends because she found his behavior erratic and scary.

¶11 Nor can we agree with Buerger that the e-mail messages themselves did not establish harassment. Copies of the e-mail messages indicate that in mid-November of 2000, Frankiewicz told Buerger that she needed space, that she never wanted their relationship to progress beyond friendship, and that she wanted to be left alone. Again in the beginning of December, Frankiewicz told Buerger that she did not like him e-mailing or calling her. Nevertheless, Buerger repeatedly e-mailed Frankiewicz over the course of the next two months. The tone of his e-mails ranged from apologetic to sarcastic to threatening.

¶12 Buerger repeatedly demanded that Frankiewicz converse with him. Buerger indicated at least five times that he would not rest until Frankiewicz communicated to him why she severed their friendship. Buerger told Frankiewicz that if she did not respond to his messages he would "keep after" her and become "more upset." He continually indicated to Frankiewicz that she was making things worse by not communicating with him and that her silence increased his anger. In one message, Buerger told Frankiewicz: "If you just want to make it easy on yourself, you'll be cooperative and try to sort this story out with me." In another attempt to force Frankiewicz to communicate with him, Buerger repeatedly refused to return a videotape she lent him unless she personally asked for it back.

¶13 On one occasion, Buerger told Frankiewicz that when he encountered her at work that evening, she was "going to have a surprise." On another, Buerger told Frankiewicz that if she did not respond to him, she was "in for a big surprise." Eventually, Frankiewicz complained to her employer that

Buerger was harassing her. Thereafter, Buerger's e-mail messages became more threatening. In one message, he wrote:

> Trying to get me fired is not the best way to get me to leave you alone. In fact it pisses me off 10X more than I already have been in the past with you. Now you force me to act in ways I never would have dreamed of being like.… I'm sure you feel that everything will be better now. Think again.… I guess I'm out of options, and I'll have to play like a baby too.

Two days later, Buerger wrote the following:

> [I]f you didn't like what was going on before october/november [sic] of last year between us, just wait and see how much you'll hate things that are coming in the next few months.… NOTHING IS BETTER, IT'S ONLY GETTING WORSE AS TIME GOES BY. BELIEVE ME, I'M NOT FEELING FRIENDLY LATELY, AND I DON'T THINK I WILL AGAIN UNTIL YOU GET OVER WHAT EVER IT IS YOU NEED TO GET OVER.… THINGS ARE JUST GOING TO GET WORSE UNTIL YOU LET GO OF YOUR PRIDE …."

¶14 After carefully reading all e-mail messages contained in the record, we conclude that the circuit court could reasonably find that the repeated e-mailing and the tone of the messages, as well as the threats contained within them, sufficiently established a course of conduct designed to harass and intimidate Frankiewicz.

¶15 We also conclude, based on the record, that the circuit court could reasonably find that Buerger intended to harass Frankiewicz. For purposes of WIS. STAT. § 947.013, "intent" means "that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result." WIS. STAT. § 939.23(4). Intent, however, is "rarely susceptible to proof by direct evidence," but may be established by circumstantial evidence and inferred from the acts and statements of the respondent, in light of

the circumstances. ***W.W.W. v. M.C.S.***, 185 Wis. 2d 468, 489, 518 N.W.2d 285 (Ct. App. 1994) (citations omitted). From an objective standpoint, Buerger's acts in repeatedly e-mailing Frankiewicz threatening and hostile messages indicate an intent to harass.

¶16 Finally, we note that Buerger never contested the imposition of the injunction in a non-work context. While Buerger indicated at one point at the hearing that he would "rather not have a restraining order," even that comment was made in the context of drawing the court's attention to the fact that the parties worked for the same company and Buerger wanted to maintain his current employment. Buerger indicated, when asked whether he opposed the issuance of the restraining order, that he did not care whether it was issued or not. His only concern was that he not be forced to find new employment.

*2. Overbreadth of the Injunction*

¶17 A harassment injunction "must be specific as to the acts and conduct which are enjoined," and should be based on the facts actually proven at trial or substantially similar conduct. ***Bachowski***, 139 Wis. 2d at 414. The language of an injunction order should be tailored to avoid proscribing constitutionally protected activity. *See* ***id.*** The scope of a harassment injunction lies within the sound discretion of the circuit court. ***W.W.W.***, 185 Wis. 2d at 495.

¶18 Buerger contends that the injunction must be vacated because it is overbroad under ***Bachowski***. Buerger seems to argue that the court only needed to enjoin personal e-mails and harassing personal contacts, but instead erroneously restricted Buerger from all non-work related contact with Frankiewicz and from being within 1000 feet of her outside work. We disagree.

¶19 The situation in ***Bachowski*** was different than that presented here. There, two neighboring families were engaged in mutual harassment and one family sought a restraining order against the other. ***Bachowski***, 139 Wis. 2d at 400-02. John Bachowski alleged that he, his wife, and his neighbors had been constantly harassed by Margaret Salamone. Testimony at the hearing revealed that the parties may have engaged in inappropriate conduct toward each other. ***Id.*** at 403. Nothing in the recitation of facts in the ***Bachowski*** opinion suggests that outwardly friendly or innocent contact needed to be enjoined.

¶20 Furthermore, we do not read ***Bachowski*** as holding that restraining orders may not limit constitutionally protected activities, such as distributing campaign literature, when such a limitation is necessary to end harassing behavior. For example, no significant limitation on constitutionally protected activity occurs when a physically and verbally abusive ex-boyfriend is restrained from approaching the woman he abused in order to promote a political candidate.

¶21 Here, the circuit court reasonably concluded that limiting all non-work related contact was necessary to stop the threatening and harassing behavior Buerger exhibited toward Frankiewicz. The parties initially had a friendly working relationship. However, the evidence supports a finding that when Frankiewicz rebuffed Buerger's attempts to take the relationship beyond friendship, Buerger became saddened, then frustrated, then angry. His contacts with Frankiewicz mirrored his evolving emotions to the point where all Buerger's non-work related contacts with Frankiewicz took on a harassing character, even those that were facially inoffensive. Despite Frankiewicz's repeated requests to Buerger to leave her alone, Buerger continuously e-mailed her with both innocuous and intimidating messages. He demanded Frankiewicz communicate with him and ultimately tried to frighten her into conversing with him via threats.

Considering the nature of Buerger's contacts with Frankiewicz, it was reasonable for the circuit court to conclude that any non-work related contact would be intimidating and harassing. Accordingly, we believe the injunction was properly tailored to prohibit further harassment and did not unduly impinge on Buerger's constitutionally protected activities. Therefore, we affirm the circuit court's issuance of the harassment injunction.

*By the Court.*—Order affirmed.

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