COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP722 **Cir. Ct. No. 2009CV82**

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

JEROME J. FABISH,

PETITIONER-APPELLANT,

V.

KURT FOSTER,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Green County: WILLIAM D. JOHNSTON, Judge. *Affirmed*.

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Jerome J. Fabish appeals an order dismissing his petition for a harassment injunction against his neighbor, Kurt Foster. Fabish contends that: (1) the record does not support the circuit court's decision as a proper exercise of discretion; and (2) Fabish was denied his right to cross-examine

one of Foster's witnesses before the court issued its decision. We reject each of these contentions, and affirm.

Background

¶2 Fabish filed a petition for a temporary restraining order and harassment injunction against Foster. Fabish alleged that Foster had: (1) stormed onto Fabish's property and argued with him; (2) almost run over Fabish with a snow plow; (3) verbally abused him; and (4) made false complaints against him to the police department. Fabish sought an order preventing Foster from coming within ten feet of Fabish, having any verbal or physical contact with Fabish, or conducting any snow plowing or other maintenance of the driveway located on Fabish's property.[1]

¶3 After a hearing before a circuit court commissioner, Foster requested a de novo hearing in the circuit court. Fabish, Fabish's wife, Foster, and two New Glarus police officers testified at the de novo hearing. The circuit court found that Fabish had not met his burden of proof, and dismissed the petition. Fabish appeals.

Standard of Review

¶4 We review a circuit court's decision whether to grant a harassment injunction for an erroneous exercise of discretion. *See* ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. In reviewing the circuit court's exercise of discretion, we uphold the court's factual findings unless clearly

[1] Underlying the parties' conflict is a dispute over the right to use the driveway on Fabish's property. The merits of that dispute are not before us on this appeal.

erroneous, but independently review whether the facts of the case meet the criteria for an injunction and whether the petitioner has met the required burden of proof. ***Id.*** "We may not overturn a discretionary determination that is demonstrably made and based upon the facts of record and the appropriate and applicable law. Also, because the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary rulings." ***Id.***, ¶24 (citation omitted).

Discussion

¶5 Under WIS. STAT. § 813.125(4)(a)3. (2009-10),[2] "[a] judge … may grant an injunction ordering the respondent to cease or avoid the harassment of another person … if … [a]fter hearing, the judge … finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner." The definition of "harassment" under § 813.125(1)(b) includes "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." The supreme court has further defined "harass" under § 813.125 according to its common dictionary definition as "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) (citation omitted). It also applied the common dictionary definition of "intimidate" as "to make timid or fearful." ***Id.***

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶6 Fabish contends first that the circuit court's statements on the record establish that the circuit court erroneously exercised its discretion in dismissing his petition. He points out that the circuit court repeatedly stated that the parties were mutually harassing each other, and that the parties' conduct amounted to disorderly conduct, establishing that the circuit court determined that Foster was harassing Fabish.[3] He also points out that the circuit court stated that the parties were being *more* disorderly than harassing, establishing that the circuit court found that the parties were engaged in harassing behavior. We disagree.

¶7 While Fabish is correct that the circuit court found that both parties were mutually "engaging in a course of conduct or repeatedly committing acts which harass or intimidate and serve no legitimate purpose" as defined under WIS. STAT. § 813.125(1)(b), and that the parties were being more disorderly than harassing, that is not all the court said. The court also found that there was "conflict but not harassment," and that it did not "see a harassment either way." Thus, the court did not clearly state that it found both parties were engaged in harassing behavior; at most, the court made conflicting findings: that the parties were engaged in conduct that amounted to harassment, and that they were not. Thus, we do not agree that the circuit court's statements establish that the court improperly exercised its discretion in dismissing Fabish's petition. Because we search for reasons to affirm a circuit court's discretionary decision, we will rely on the statements the court made consistent with its determination. *See* ***Welytok***, 312

[3] Fabish cites ***Reardon v. Braeger***, No. 2005AP2189, unpublished slip op. (WI App June 14, 2006), for his contention that disorderly conduct supports a finding of harassment. First, unpublished opinions may not be cited for precedential value. *See* WIS. STAT. RULE 809.23(3). Additionally, while we do not dispute that actions that amount to disorderly conduct may also amount to harassment, we do not agree that this is always necessarily the case.

Wis. 2d 435, ¶24. Moreover, the court was entitled to conclude that Fabish's mutually antagonistic conduct in this case involved at least some degree of consensual or invited conduct, just as a *mutual* physical fight is generally not seen as a series of batteries. Additionally, we independently review whether the facts found by the circuit court meet the statutory criteria for harassment, and thus we are not bound by the court's conclusion.[4] *See* ***id.***, ¶23.

¶8 Next, Fabish contends that the circuit court erroneously exercised its discretion because Fabish, rather than Foster, provided credible testimony as to the events underlying his petition. He argues that the circuit court made no explicit credibility determinations, and the record supports a finding that Fabish was more credible, because Foster's witnesses—two New Glarus police officers—largely supported Fabish's version of the events. Fabish points out that Foster repeatedly denied that he ever argued with or yelled at Fabish, while the officers testified that there was yelling and hostility by both parties. Fabish argues that Foster's testimony is incredible as a matter of law for this reason, and because: (1) Foster testified that he called police about Fabish only once, while Foster actually called police multiple times; (2) Foster testified that an event occurred on a particular date, in conflict with other purported facts; (3) Foster testified about an event that he has not alleged in other proceedings between the parties; and (4) Foster claimed not to remember details of an intense conflict between the parties that occurred more recently than other events that Foster claimed to remember. *See* ***Hallin v. Hallin***, 228 Wis. 2d 250, 258-59, 596 N.W.2d 818 (Ct. App. 1999) ("[W]e must accept the trial court's assessment of the credibility of a witness unless we can say

[4] Here, as we will explain, the facts found by the court do not meet the criteria for a harassment injunction.

that a witness was credible or incredible as a matter of law."). Fabish then asserts that his testimony should be deemed more credible because he admitted to his role in the conflict. Again, we disagree.

¶9 The circuit court explicitly found that neither party had provided a fully credible version of the events. After reviewing some of the conflicts between the two versions—such as Fabish contending Foster yelled and used profanities towards him, Foster asserting he never yelled or used profanities toward Fabish, Fabish asserting Foster bumped him with his truck, but Foster rebutting that assertion by saying Fabish had thrown a shovel at his truck—the court stated, "I suspect the truth is somewhere between the two versions." While Fabish has provided us with reasons that aspects of his testimony should have been deemed entirely credible and aspects of Foster's entirely incredible, he has not provided a basis for us to conclude that his testimony was credible, and Foster's incredible, as a matter of law. Thus, we have no basis to disturb the circuit court's credibility determinations.

¶10 Fabish then contends that the evidence at trial established that Foster had harassed him, because Foster came onto Fabish's property on June 2, 2007, December 2, 2007, and October 30, 2008, and also yelled at Fabish in early October 2008. Fabish argues that the circuit court erred in basing its decision to dismiss the petition on its finding that Fabish was not someone who could be intimidated, because WIS. STAT. § 813.125(1)(b) defines harassment as including acts that harass *or* intimidate. We are not persuaded.

¶11 First, as Fabish recognizes, the parties provided very different versions of the events underlying Fabish's petition. The court found that neither party had provided a fully accurate version of the events, but that the truth was

somewhere between the two versions. It also found that both parties had "taken … various shots at each other on various incidents," and were "apparently seeking these responses." The court's findings are supported by the alternative versions provided in the trial testimony, which the circuit court was entitled to believe or disbelieve based on its credibility determinations. Based on the court's findings that Fabish's testimony regarding the extent of Foster's negative conduct directed toward Fabish was not fully accurate, and that Fabish was seeking the response he obtained from Foster, we conclude that Fabish did not meet his burden to prove harassment. Fabish's assertion that Foster entered his property on three occasions and yelled at him on another occasion does not alter our analysis.

¶12 Additionally, we do not agree with Fabish's interpretation of the court's decision as relying on the fact that it found that Fabish was not someone who could be intimidated. The court also found that neither party had provided a completely accurate version of events, and that while the parties were engaged in a conflict, there was no harassment. As Fabish asserts, WIS. STAT. § 813.125(1)(b) defines harassment as including repeated acts which harass *or* intimidate; the court expressly found that Foster's acts did not harass or intimidate Fabish.

¶13 Lastly, Fabish contends that he was denied the right to cross-examine one of Foster's witnesses, police officer Steven Allbaugh. Fabish contends that he was denied his right to cross-examine Allbaugh under the Sixth Amendment to the United States Constitution. We disagree.

¶14 At the outset, we note that this case is civil in nature, and therefore there is no constitutional right to cross-examine witnesses. *See* ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 176, 384 N.W.2d 701 (1986). Rather, the right to cross-examine witnesses in civil actions arises from the common law. ***Id.*** at 177. It is

also codified in the Wisconsin statutes. *See* ***id.*** at 179; WIS. STAT. § 906.11(2) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination."). "[A]lthough the judge has a relatively broad discretion as to directing the mode of examining and cross-examining witnesses, the judge's absolute right to exclude cross-examining questions is sharply limited by the last sentence of [§ 906.11(2)]." ***Town of Geneva***, 129 Wis. 2d at 179. Thus, under the common law and Wisconsin statutes, while "[t]he judge … has wide discretionary control over the extent of cross-examination upon particular topics, … the denial of cross-examinations altogether, or its arbitrary curtailment, upon a proper subject of cross-examination will be ground for reversal if the ruling appears to have been substantially harmful." ***Id.*** at 180 (citation omitted).

¶15 We turn, then, to the facts of this case to determine whether the circuit court impermissibly limited cross-examination under WIS. STAT. § 906.11(2). The trial transcript reveals the following. During Foster's direct examination of Allbaugh, the circuit court stepped in and conducted its own questioning of Allbaugh. The court then stated: "Okay. You know, counsel, I don't know how much more testimony you wanted to take. If you want another date to continue this, we can." Foster's counsel stated that he would not call his other witnesses, so that the case could be finished that day. The court stated: "Well … quite frankly, I don't see that the petitioner has carried his burden here," and stated Allbaugh was excused from the stand. Before Allbaugh left the stand, Fabish's attorney objected, stating: "Judge, you have excused the witness and I haven't had an opportunity to cross-examine." The following exchange between the court and counsel then took place:

THE COURT: Well, all right. If you want, I will recess this until this afternoon and we'll come back…. You folks had an hour. Now you are way past that. I've got a bunch of people waiting here for an 11:30. If you want your time, I can either give you another date to continue this or I can set it off to this afternoon and we'll take these other matters so that we can get them in and out of here timely.

That is—you know, setting these things is always a question, but you don't—when you have got a pile of people then calendared in behind you and you told the clerk you needed an hour and we're at an hour and-a-half and if you have got—if you want to bring three or four more witnesses in on this, that's fine, but we're going to have to reschedule this.

[Fabish's counsel]: I cannot do this this afternoon, Judge. I'm scheduled in Dane County on several matters this afternoon. I don't know what [Foster's counsel's] calendar looks like.

[Foster's counsel]: Well, I can be available whenever the court is. I guess I'd ask if counsel needs more than five minutes on cross and rebuttal.

[Fabish's counsel]: I'm not going to hold back. I mean the problem that I have is that you [the court] have indicated from the bench moments ago that you believe the petitioner has not carried his burden….

THE COURT: Right, and you are right that you may have a thousand people in rebuttal. I'm a little bit concerned that you haven't been open with the court as to the amount of time so that we can get you in here. You can't schedule these things and then tell the clerk you need an hour and then the clerk fills in the other time and then expect to come and run for days.

….

We either recess this and let these folks get in and get their matter done and we'll recess for the noon and then come back this afternoon and you will continue with your hearing and you will have to call your other appointments and tell them, Sorry, my hearing is running longer than I thought….

[Fabish's counsel]: In my defense, I had no input as to the length of time that this was to be placed on the

> calendar and I had no input as to how many witnesses [Foster's counsel] was going to call. Why don't we just finish right now. Thanks.
>
> THE COURT: All right. What do you want?
>
> [Fabish's counsel]: No questions on cross.
>
> THE COURT: Then you may step down….

Thus, contrary to Fabish's assertion, the court did not deny him the right to cross-examine Allbaugh; rather, Fabish's counsel declined to cross-examine Allbaugh. Accordingly, Fabish's argument fails on the threshold issue of whether the circuit court in fact limited his cross-examination of Allbaugh.[5]

¶16 We recognize that the reason Fabish's counsel did not cross-examine Allbaugh was that the time for the hearing had run and counsel had other professional obligations that afternoon. We also recognize Fabish's assertion on appeal that the circuit court wrongly held his attorney accountable for the fact that the hearing was scheduled for only one hour. However, the record is clear that the circuit court offered Fabish's counsel the opportunity to reconvene in the afternoon and Fabish's counsel declined.[6] It is also not apparent to us, based on

[5] We also note that Fabish's underlying argument as to Allbaugh's testimony is that Allbaugh provided information on a related civil suit between the parties, which the circuit court had previously deemed inadmissible during Fabish's testimony, and that the court relied on that information in making its determination. However, our review of the record reveals that the court consistently held that testimony as to the civil suit was not relevant to this case, during both Fabish and Allbaugh's testimony, and there is no indication the court relied on any information regarding the civil case in making its decision.

[6] In his reply brief, Fabish contends that his counsel declined to cross-examine Allbaugh only after the circuit court ruled that the petition would be denied, and also complains that his counsel did not consult with him on the decision of declining cross-examination. First, while the court indicated it did not think that Fabish had carried his burden, it did not state that it had already made its decision, as further evidenced by the court's willingness to hear more testimony. Additionally, Fabish appeared by counsel in the circuit court, and thus is bound by the decisions made by counsel on his behalf for purposes of this appeal; Fabish's complaints as to his counsel's representation are outside the scope of this appeal.

the record before us, why Fabish's counsel did not continue to pursue his earlier request to continue the hearing to another day, given his other professional obligations scheduled for that afternoon. We discern no error on this record. Accordingly, we affirm.

By the Court.—Order affirmed.

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