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**DISTRICT IV**

May 12, 2015

To:

Hon. Ellen K. Berz  
Circuit Court Judge  
215 South Hamilton, Br.11, Rm. 5103  
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Mary Eloise Snyder

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

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2014AP1391

Mary Eloise Snyder v. Larry E. Gates (L.C. # 2014CV739)

Before Higginbotham, Sherman and Kloppenburg, JJ.

Larry Gates appeals an order granting a four-year harassment injunction against him, on behalf of his sister-in-law, Mary Eloise Snyder. Gates argues on appeal that the circuit court erroneously relied on hearsay in granting the injunction. Based upon our review of the briefing and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We summarily reverse.

Gates is married to Snyder's sister, Lois. Lois has dementia and, at the time of the injunction hearing, there was a guardianship action pending regarding Lois's care. Snyder filed a petition for an injunction, alleging that Gates came over to her house on January 16, 2014, while

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Lois was there and pushed open the door while Snyder was holding it open. The petition also alleged that Gates had threatened to push Snyder in the past.

The circuit court held a hearing at which it heard testimony from Gates and Snyder. Snyder's son-in-law also testified at the hearing, but he admitted that he did not have personal knowledge about Gates's acts toward Snyder.

Snyder testified that Gates pushed open the door of her home on January 16, 2014, and that she felt afraid of him. She also testified about an incident on February 28, 2014, in which Gates allegedly got into an argument with other family members and keyed his daughter's car. Snyder was not present when Gates allegedly keyed the car. Gates's counsel interrupted during Snyder's testimony and pointed out that the testimony contained inadmissible hearsay. The court stated, "I know. But I can distinguish between it, so we're okay."

Snyder went on to testify that the police had investigated the car-keying incident, and she offered to produce a police report of the incident. Snyder testified that, while she was on vacation, Gates allegedly had a conversation with his daughter in which he made threats against certain family members. Gates's counsel objected on hearsay grounds, to which the court replied, "I know. I know." Snyder then produced the police report, to which Gates's counsel objected on hearsay and authentication grounds. The court overruled the objection and allowed the police report to come into evidence. When asked by the court if there was anything else Gates had done directly to Snyder, she replied, "Just pushed the door open and, you know, I said leave and he didn't[.]"

Gates testified that he went to Snyder's house on January 16, 2014, because his wife called him to come get her. Lois told Gates that she was being held prisoner by Snyder.

According to Gates, he knocked on the door but Snyder had it blocked. Lois came outside with her coat on and her purse. Gates testified that he never set foot inside Snyder's house that night and that he did not have any other contact with Snyder during that incident. Regarding the alleged threats against family members, Gates denied having made any such threats.

The court questioned Gates's counsel about a prior emergency mental commitment involving Gates. The court used the file from the mental commitment proceedings, over the objection of Gates's counsel on hearsay grounds, to assess Gates's credibility.

In closing argument, Gates's counsel argued that Snyder was using the injunction proceedings as a "proxy" for a larger legal battle involving Lois. The court responded, "I understand the point ... and were it just the pushing in the door, I would be persuaded." The court then went on to conclude that a harassment injunction was proper, given the alleged threats Gates had made against members of his family. The court relied on the statements of law enforcement contained in the police report in finding that Gates had made those threats. This appeal follows.

To grant a harassment injunction after a hearing, the circuit court must find "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. This presents a mixed question of fact and law. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶23, 312 Wis. 2d 435, 752 N.W.2d 359. We will not set aside the circuit court's factual findings unless they are clearly erroneous, but we independently review the circuit court's conclusion, based on the established facts, as to whether reasonable grounds exist for the injunction. *Id.*

We cannot conclude, in this case, that the circuit court's decision was based on admissible established facts that were not clearly erroneous. The court issued the injunction based on its finding that Gates threatened to kill certain family members, including Snyder. However, the only record evidence to support this finding is inadmissible hearsay. Snyder stated that "Gates called his daughter Leslie in Janesville and said he was gonna kill the five of us." When Gates's counsel objected on hearsay grounds, Snyder then stated that she "got the police reports," inferring that the basis of her knowledge of Gates's statement was something she read in a police report. Thus, her testimony about Gates's statement to his daughter involved multiple levels of hearsay—Snyder was reporting something that (1) Gates allegedly told his daughter who (2) told a police officer who (3) wrote the information in a report that Snyder then read. Gates's alleged threats were statements "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" and, thus, were hearsay. WIS. STAT. § 908.01(3). Neither Snyder nor the court provided any reason why the evidence should be admitted over the objection of Gates's counsel, and we are not aware of any such reason. Thus, the circuit court erroneously exercised its discretion in allowing Snyder to testify about the threats allegedly made by Gates.

When Snyder later proffered a copy of a police report to support her claim that Gates had made the threats, Gates's counsel again objected on hearsay grounds. The court overruled the objection, reasoning that the report fell within the "catchall exception to hearsay of other indicia of reliability as it is a business record" kept in the police department's normal course of business. This ruling appears to reference two separate hearsay exceptions. One is the so-called "residual" exception, WIS. STAT. § 908.03(24), which "applies to statements determined to have guarantees of trustworthiness comparable to the enumerated hearsay exceptions." *Mitchell v. State*, 84

Wis. 2d 325, 333, 267 N.W.2d 349 (1978). The other exception referenced by the court was the exception for business records under WIS. STAT. § 908.03(6). However, under the business records exception, the report in question must be made by “a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification[.]” WIS. STAT. § 908.03(6). In this case, the police report does not carry any certification, nor was any testimony given by a custodian or qualified witness regarding the report. The police report therefore fails to qualify as a business record under § 908.03(6). In addition, nothing in the record supports a conclusion that the report carries a guarantee of trustworthiness comparable to the enumerated hearsay exceptions. *See* WIS. STAT. § 908.03(24). No foundation for the report was laid, and no one from the police department was called as a witness. In light of all of the foregoing, the circuit court erred in admitting the police report into evidence.

The only interaction between Snyder and Gates for which there was admissible evidence was the January 2014 incident in which Gates allegedly pushed open the door to Snyder’s home. The parties gave conflicting testimony about this incident. Even if the parties’ versions of the incident had not conflicted with each other, the circuit court acknowledged that the alleged door-pushing incident was not, in and of itself, enough to warrant a harassment injunction. We agree, and conclude that the scant amount of admissible evidence in the record was insufficient to support the issuance of an injunction under WIS. STAT. § 813.125.<sup>2</sup>

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<sup>2</sup> We note that Snyder never filed a respondent’s brief in this matter as required by WIS. STAT. RULE 809.19(3)(a) and the delinquency order issued by this court. Therefore, the case was decided based solely on the appellant’s brief and the record.

IT IS ORDERED that the order is summarily reversed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*