APPENDICES

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March 17, 2020

To:

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

No. 2018AP1794 Pflieger v. Bush-Pensy L.C. #2018CV4

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of respondent-appellant-petitioner, Lara Bush-Pensy, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP1794 Cir. Ct. No. 2018CV4

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

TIMOTHY PFLIEGER,

PETITIONER-RESPONDENT,

V.

LARA BUSH-PENSY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Door County: KEITH A. MEHN, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Lara Bush-Pensy appeals from an order denying her motion for relief from a harassment injunction entered in favor of Timothy

Pflieger. Bush-Pensy contends: (1) evidence that Bush-Pensy had violated a stipulation upon which the injunction action had previously been dismissed was insufficient to support the issuance of the injunction because there was no showing the violation was intentional and the stipulation was itself illegal and against public policy; (2) the judge issuing the injunction failed to disclose contacts he had with Pflieger's family in violation of WIS. STAT. § 757.19(3) (2017-18);[1] and (3) the injunction is overbroad because it prohibits conduct broader than the claimed harassment. We affirm on the grounds that Bush-Pensy has failed to develop any argument showing the circuit court erroneously exercised its discretion when it refused to grant relief from the injunction.

BACKGROUND

¶2 On January 10, 2018, Pflieger filed a petition seeking a harassment injunction against Bush-Pensy. The petition alleged that after Pflieger and Bush-Pensy ended their relationship, Bush-Pensy sent Pflieger and one of Pflieger's employees a series of over eighty unwelcome text messages, as well as emails, Facebook messages, and phone calls with voicemails.

¶3 On February 1, 2018, the parties signed a stipulation to dismiss the case, agreeing that they would each avoid contact with one another, their immediate family, clients, associates, employees and co-workers. The stipulation further provided that the case could be reopened based upon future contact occurring after the dismissal. In that event, any future contact by Bush-Pensy

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

could be deemed harassment serving no legitimate purpose, and the circuit court could rely upon the stipulation to enter an injunction against Bush-Pensy.

¶4 On March 12, 2018, Pflieger moved to reopen the case. The motion was accompanied by an affidavit averring that Bush-Pensy had sent Pflieger three emails after the stipulation between the parties was filed and the case was dismissed, along with printouts of those emails. The first email stated "whoever you are, leave us all alone[,]" and it was sent in reply to a message sent to Bush-Pensy by an anonymous third party. Bush-Pensy copied Pflieger on her reply to the third party. The second and third emails were electronic notifications stating "Delete record" and "Delete record file, code 473_495-5272."

¶5 On March 14, 2018, Pflieger sent Bush-Pensy two emails with the subject line "Judgement Day" stating: "Judgement day is coming for you[.]" and "The final countdown and she won't be able to shit without my say-so." On March 16, 2018, Pflieger sent Bush-Pensy another email with the subject line "Judgement Day" stating: "You're going to be knocked off your pedestal. They won't think you're so great then. Who do you think you are with your newspaper articles. Enjoy your last days of freedom. Monday is judgement day for you."

¶6 On March 19, 2018, the circuit court held a hearing on the motion to reopen. Bush-Pensy's attorney made an offer of proof that: (1) Bush-Pensy had inadvertently hit "reply all" in response to the message from the anonymous party; and (2) Bush-Pensy had sent the second and third messages based on internet research she conducted about how to delete her phone number from the record of the person who had sent it, without realizing that those messages would go directly to Pflieger. The court accepted the offer of proof in lieu of testimony, but it concluded that Bush-Pensy's reasons for sending the emails were immaterial

because the stipulation was unequivocal that all contact was prohibited and would constitute further harassment. The court then entered a four-year harassment injunction.

¶7 On March 22, 2018, Pflieger sent Bush-Pensy an email stating: "I told you what would happen to you if you crossed me." On March 24, 2018, someone sent Bush-Pensy an email from Pflieger's work address with the subject line "Judgement Day" stating: "Having trouble sleeping?"

¶8 Bush-Pensy did not move the circuit court to reconsider the injunction nor did she appeal the injunction. Instead, on May 22, 2018, Bush-Pensy filed a motion for relief from judgment pursuant to WIS. STAT. § 806.07.[2] Bush-Pensy claimed she was entitled to have the injunction set aside either under subsection (1)(g) of the statute because it was no longer equitable to enforce it given Pflieger's continuing emails to her, or under subsection (1)(h) because extraordinary circumstances warranted abandoning the finality of the judgment in favor of an overall sense of justice, according to the five-factor test set forth in ***Miller v. Hanover Insurance Co.***, 2010 WI 75, ¶36, 326 Wis. 2d 640, 785 N.W.2d 493. In support of the latter claim, Bush-Pensy alleged that the merits of the injunction had never been fully presented because the stipulation was akin to a default judgment and because her counsel did not present Bush-Pensy's testimony at the hearing to reopen, and that Bush-Pensy had a meritorious defense.

¶9 The circuit court first observed that, while Pflieger's alleged emails from March 2018 were troubling, Bush-Pensy's remedy would be to obtain her

[2] Judge Mehn heard the motion after Judge D. Todd Ehlers recused himself.

own injunction against him, not to set aside the prior injunction against her. Regarding Bush-Pensy's second claim, the court rejected the assertions that the merits of the injunction had not been tried or that counsel had provided ineffective assistance by not having Bush-Pensy testify at the hearing to reopen because the court had accepted Bush-Pensy's offer of proof. The court further rejected Bush-Pensy's assertion that she had a meritorious defense because it concluded the three emails Bush-Pensy sent did violate the stipulation. The court found that Bush-Pensy had not met her burden under WIS. STAT. § 806.07 and denied her motion for relief from judgment. Bush-Pensy now appeals.

STANDARD OF REVIEW

¶10 As a threshold matter, we note that neither the circuit court's decision to reopen the case based upon the violation of the stipulation nor the validity of the injunction are properly before us on this appeal because Bush-Pensy did not appeal the injunction. Therefore, we will not address Bush-Pensy's arguments that there was insufficient evidence to support the injunction or that the terms of the injunction were overbroad.[3]

¶11 In sum, the scope of our review is limited to determining whether the circuit court properly denied Bush-Pensy's motion for relief from judgment under WIS. STAT. § 806.07. We review a circuit court's discretionary decision whether to grant relief from judgment with great deference, and we will uphold it as long

[3] In addition, we will not address Bush-Pensy's claim that Judge Ehlers should have recused himself from hearing her motion because she concedes in her reply brief that the alleged contacts between Judge Ehlers and Pflieger that underlie that claim have no evidentiary basis in the record.

as it was supported by a reasonable basis. ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶8, 282 Wis. 2d 46, 698 N.W.2d 610.

DISCUSSION

¶12 WISCONSIN STAT. § 806.07(1) allows a circuit court to reopen an order or judgment when: "(g) It is no longer equitable that the judgment should have prospective application; or (h) Any other reasons justify relief from the operation of the judgment." The catchall provision under sub. (h) should be employed only when extraordinary circumstances are present, taking into account: (1) whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; (2) whether the claimant received the effective assistance of counsel; (3) whether there had been any judicial consideration of the merits and the interest of deciding the case on the merits outweighs the interest in finality of judgments; (4) whether there was a meritorious defense to the claim; and (5) whether there are intervening circumstances making it inequitable to grant relief. ***Miller***, 326 Wis. 2d 640, ¶36.

¶13 Although Bush-Pensy sought relief under both WIS. STAT. § 806.07(1)(g) and (h) in the circuit court, she has not developed any argument on appeal relating to either the equity of prospective application of the injunction or the ***Miller*** factors. This court need not address undeveloped arguments. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We therefore reject any claim by Bush-Pensy that the circuit court erroneously exercised its discretion in denying her motion for relief from judgment.

By the Court.—Order affirmed.

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

806.07 Relief from judgment or order.

(1) On motion and upon such terms as are just, the court, subject to subs. (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15 (3);

(c) Fraud, misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released or discharged;

(f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;

(g) It is no longer equitable that the judgment should have prospective application; or

(h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

(3) A motion under this section may not be made by an adoptive parent to relieve the adoptive parent from a judgment or order under s. 48.91 (3) granting adoption of a child. A petition for termination of parental rights under s. 48.42 and an appeal to the court of appeals shall be the exclusive remedies for an adoptive parent who wishes to end his or her parental relationship with his or her adoptive child.

History: Sup. Ct. Order, 67 Wis. 2d 585, 726 (1975); 1975 c. 218; 1997 a. 114.

813.125 Harassment restraining orders and injunctions.

(1) DEFINITIONS.

(am) In this section, "harassment" means any of the following:

1. Striking, shoving, kicking or otherwise subjecting another person to physical contact; engaging in an act that would constitute abuse under s. 48.02 (1), sexual assault under s. 940.225, or stalking under s. 940.32; or attempting or threatening to do the same.

2. Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.

(bm) In subs. (3) and (4), "household pet" means a domestic animal that is not a farm animal, as defined in s. 951.01 (3), that is kept, owned, or cared for by the petitioner or by a family member or a household member of the petitioner.

(2) COMMENCEMENT OF ACTION.

(a) An action under this section may be commenced by filing a petition described under sub. (5) (a). No action under this section may be commenced by service of summons. The action commences with service of the petition upon the respondent if a copy of the petition is filed before service or promptly after service. If the judge or a circuit court commissioner extends the time for a hearing under sub. (3) (c) and the petitioner files an affidavit with the court stating that personal service by the sheriff or a private server under s. 801.11 (1) (a) or (b) was unsuccessful because the respondent is avoiding service by concealment or otherwise, the judge or circuit court commissioner shall inform the petitioner that he or she may serve the respondent by publication of a summary of the petition as a class 1 notice, under ch. 985, and by mailing or sending a facsimile if the respondent's post-office address or facsimile number is known or can with due diligence be ascertained. The mailing or sending of a facsimile may be omitted if the post-office

address or facsimile number cannot be ascertained with due diligence. A summary of the petition published as a class 1 notice shall include the name of the respondent and of the petitioner, notice of the temporary restraining order, and notice of the date, time, and place of the hearing regarding the injunction. The court shall inform the petitioner in writing that, if the petitioner chooses to have the documents in the action served by the sheriff, the petitioner should contact the sheriff to verify the proof of service of the petition. Section 813.06 does not apply to an action under this section.

(b) Notwithstanding s. 803.01 (3) (a), a child, as defined in s. 813.122 (1) (b), or a parent, stepparent, or legal guardian of a child may be a petitioner under this section.

(2g) APPOINTMENT OF GUARDIAN AD LITEM. The court or circuit court commissioner, on its or his or her own motion, or on the motion of any party, may appoint a guardian ad litem for a child who is a party under this section when justice so requires.

(2m) TWO-PART PROCEDURE. If the fee under s. 814.61 (1) for filing a petition under this section is waived under s. 814.61 (1) (e), the procedure for an action under this section is in 2 parts. First, if the petitioner requests a temporary restraining order the court shall issue or refuse to issue that order. Second, the court shall hold a hearing under sub. (4) on whether to issue an injunction, which is the final relief. If the court issues a temporary restraining order, the order shall set forth the date for the hearing on an injunction. If the court does not issue a temporary restraining order, the date for the hearing shall be set upon motion by either party.

(3) TEMPORARY RESTRAINING ORDER.

(a) A judge or circuit court commissioner may issue a temporary restraining order ordering the respondent to avoid contacting or causing any person other than a party's attorney or a law enforcement officer to contact the petitioner without the petitioner's written consent; to cease or avoid the harassment of another person; to avoid the petitioner's residence, except as provided in par. (am), or any premises temporarily occupied by the petitioner or both; to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet; to allow the petitioner or a family member or household member of the petitioner acting on his or her behalf to retrieve a household pet; or any combination of these remedies requested in the petition, if all of the following occur:

1. The petitioner files a petition alleging the elements set forth under sub. (5) (a).

2. The judge or circuit court commissioner finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.

(am) If the petitioner and the respondent are not married, and the respondent owns the premises where the petitioner resides, and the petitioner has no legal interest in the premises, in lieu of ordering the respondent to avoid the petitioner's residence under par. (a) the judge or circuit court commissioner may order the respondent to avoid the premises for a reasonable time until the petitioner relocates and shall order the respondent to avoid the new residence for the duration of the order.

(b) Notice need not be given to the respondent before issuing a temporary restraining order under this subsection. A temporary restraining order may be entered only against the respondent named in the petition.

(c) The temporary restraining order is in effect until a hearing is held on issuance of an injunction under sub. (4), except that the court may extend the temporary restraining order under s. 813.1285. A judge or circuit court commissioner shall hold a hearing on issuance of an injunction within 14 days after the temporary restraining order is issued, unless the time is extended upon the written consent of the parties, extended under s. 801.58 (2m), or extended once for 14 days upon a finding that the respondent has not been served with a copy of the temporary restraining order although the petitioner has exercised due diligence. A judge or court commissioner may not extend the temporary restraining order in lieu of ruling on the issuance of an injunction.

(d) The judge or circuit court commissioner shall advise the petitioner of the right to serve the respondent the petition by published notice if with due diligence the respondent cannot be served as provided under

s. 801.11 (1) (a) or (b). The clerk of circuit court shall assist the petitioner with the preparation of the notice and filing of the affidavit of printing.

(e) The judge or circuit court commissioner may not dismiss or deny granting a temporary restraining order because of the existence of a pending action or of any other court order that bars contact between the parties, nor due to the necessity of verifying the terms of an existing court order.

(4) INJUNCTION.

(a) A judge or circuit court commissioner may grant an injunction ordering the respondent to avoid contacting or causing any person other than a party's attorney or a law enforcement officer to contact the petitioner without the petitioner's written consent; to cease or avoid the harassment of another person; to avoid the petitioner's residence, except as provided in par. (am), or any premises temporarily occupied by the petitioner or both; to refrain from removing, hiding, damaging, harming, or mistreating, or disposing of, a household pet; to allow the petitioner or a family member or household member of the petitioner acting on his or her behalf to retrieve a household pet; or any combination of these remedies requested in the petition, if all of the following occur:

1. The petitioner has filed a petition alleging the elements set forth under sub. (5) (a).

2. The petitioner serves upon the respondent a copy of a restraining order obtained under sub. (3) and notice of the time for the hearing on the issuance of the injunction under sub. (3) (c). The restraining order or notice of hearing served under this subdivision shall inform the respondent that, if the judge or circuit court commissioner issues an injunction, the judge or circuit court commissioner may also order the respondent not to possess a firearm while the injunction is in effect. The person who serves the respondent with the order or notice shall also provide the respondent with all of the following information:

a. Notice of the requirements and penalties under s. 941.29 and notice of any similar applicable federal laws and penalties.

b. An explanation of s. 813.1285, including the procedures for surrendering a firearm and the circumstances listed under s. 813.1285 under which a respondent must appear at a hearing to surrender firearms.

c. A firearm possession form developed under s. 813.1285 (5) (a), with instructions for completing and returning the form.

3. After hearing, the judge or circuit court commissioner finds reasonable grounds to believe that the respondent has engaged in harassment with intent to harass or intimidate the petitioner.

(aj) The judge or circuit court commissioner may not dismiss or deny granting an injunction because of the existence of a pending action or of any other court order that bars contact between the parties, nor due to the necessity of verifying the terms of an existing court order.

(am) If the petitioner and the respondent are not married, and the respondent owns the premises where the petitioner resides, and the petitioner has no legal interest in the premises, in lieu of ordering the respondent to avoid the petitioner's residence under par. (a) the judge or circuit court commissioner may order the respondent to avoid the premises for a reasonable time until the petitioner relocates and shall order the respondent to avoid the new residence for the duration of the order.

(b) The injunction may be entered only against the respondent named in the petition.

(c) An injunction under this subsection is effective according to its terms, but for not more than 4 years, except as provided in par. (d).

(d)

1. A judge or circuit court commissioner may, upon issuing an injunction or granting an extension of an injunction issued under this subsection, order that the injunction is in effect for not more than 10 years, if the court finds, by a preponderance of the evidence stated on the record, that any of the following is true:

a. There is a substantial risk that the respondent may commit first-degree intentional homicide under s. 940.01, or 2nd-degree intentional homicide under s. 940.05, against the petitioner.

b. There is a substantial risk that the respondent may commit sexual assault under s. 940.225 (1), (2), or (3), or under s. 948.02 (1) or (2), against the petitioner.

2. This paragraph does not prohibit a petitioner from requesting a new temporary restraining order under sub. (3) or injunction under this subsection before or at the expiration of a previously entered order or injunction.

(4g) ORDER; TELEPHONE SERVICES.

(a) Unless a condition described in par. (b) exists, a judge or circuit court commissioner who issues an injunction under sub. (4) may, upon request by the petitioner, order a wireless telephone service provider to transfer to the petitioner the right to continue to use a telephone number or numbers indicated by the petitioner and the financial responsibility associated with the number or numbers, as set forth in par. (c). The petitioner may request transfer of each telephone number he or she, or a minor child in his or her custody, uses. The order shall contain all of the following:

1. The name and billing telephone number of the account holder.

2. Each telephone number that will be transferred.

3. A statement that the provider transfers to the petitioner all financial responsibility for and right to the use of any telephone number transferred under this subsection. In this subdivision, "financial responsibility" includes monthly service costs and costs associated with any mobile device associated with the number.

(b) A wireless telephone service provider shall terminate the respondent's use of, and shall transfer to the petitioner use of, the telephone number or numbers indicated in par. (a) unless it notifies the petitioner, within 72 hours after it receives the order, that one of the following applies:

1. The account holder named in the order has terminated the account.

2. A difference in network technology would prevent or impair the functionality of a device on a network if the transfer occurs.

3. The transfer would cause a geographic or other limitation on network or service provision to the petitioner.

4. Another technological or operational issue would prevent or impair the use of the telephone number if the transfer occurs.

(c) The petitioner assumes all financial responsibility for and right to the use of any telephone number transferred under this subsection. In this paragraph, "financial responsibility" includes monthly service costs and costs associated with any mobile device associated with the number.

(d) A wireless telephone service provider may apply to the petitioner its routine and customary requirements for establishing an account or transferring a number, including requiring the petitioner to provide proof of identification, financial information, and customer preferences.

(e) A wireless telephone service provider is immune from civil liability for its actions taken in compliance with a court order issued under this subsection.

(4m) RESTRICTION ON FIREARM POSSESSION; SURRENDER OF FIREARMS.

(a) If a judge or circuit court commissioner issues an injunction under sub. (4) and the judge or circuit court commissioner determines, based on clear and convincing evidence presented at the hearing on the issuance of the injunction, that the respondent may use a firearm to cause physical harm to another or to endanger public safety, the judge or circuit court commissioner may prohibit the respondent from possessing a firearm.

(b) An order prohibiting a respondent from possessing a firearm issued under par. (a) remains in effect until the expiration of the injunction issued under sub. (4).

(c) An order issued under par. (a) that prohibits a respondent from possessing a firearm shall do all of the following:

1. Inform the respondent named in the petition of the requirements and penalties under s. 941.29 and any similar applicable federal laws and penalties.

2. Except as provided in par. (cg), require in writing the respondent to surrender any firearms that he or she owns or has in his or her possession to the sheriff of the county in which the action under this section was commenced, to the sheriff of the county in which the respondent resides or to another person designated

by the respondent and approved by the judge or circuit court commissioner, in accordance with s. 813.1285.

(cg) If the respondent is a peace officer, an order issued under par. (a) may not require the respondent to surrender a firearm that he or she is required, as a condition of employment, to possess whether or not he or she is on duty.

(5) PETITION.

(a) The petition shall allege facts sufficient to show the following:

1. The name of the person who is the alleged victim.

2. The name of the respondent.

3. That the respondent has engaged in harassment with intent to harass or intimidate the petitioner.

4. If the petitioner knows of any other court proceeding in which the petitioner is a person affected by a court order or judgment that includes provisions regarding contact with the respondent, any of the following that are known by the petitioner:

a. The name or type of the court proceeding.

b. The date of the court proceeding.

c. The type of provisions regarding contact between the petitioner and respondent.

(am) The petition shall inform the respondent that, if the judge or circuit court commissioner issues an injunction, the judge or circuit court commissioner may also order the respondent not to possess a firearm while the injunction is in effect.

(b) The clerk of circuit court shall provide simplified forms.

(5g) ENFORCEMENT ASSISTANCE.

(a) Within one business day after an order or injunction is issued, extended, modified or vacated under this section, the clerk of the circuit court shall send a copy of the order or injunction, or of the order extending, modifying or vacating an order or injunction, to the sheriff or to any local law enforcement agency which is the central repository for orders and injunctions and which has jurisdiction over the petitioner's premises.

(b) The sheriff or other appropriate local law enforcement agency under par. (a) shall enter the information received under par. (a) concerning an order or injunction issued, extended, modified or vacated under this section into the transaction information for management of enforcement system no later than 24 hours after receiving the information and shall make available to other law enforcement agencies, through a verification system, information on the existence and status of any order or injunction issued under this section. The information need not be maintained after the order or injunction is no longer in effect.

(c) If an order is issued under this section, upon request by the petitioner the court or circuit court commissioner shall order the sheriff to accompany the petitioner and assist in placing him or her in physical possession of his or her residence.

(cm)

1. The clerk of the circuit court shall forward to the sheriff any temporary restraining order, injunction, or other document or notice that must be served on the respondent under this section and the sheriff shall assist the petitioner in executing or serving the temporary restraining order, injunction, or other document or notice on the respondent. The petitioner may, at his or her expense, elect to use a private server to effect service.

2. If the petitioner elects service by the sheriff, the clerk of circuit court shall provide a form supplied by the sheriff to the petitioner that allows the petitioner to provide information about the respondent that may be useful to the sheriff in effecting service. The clerk shall forward the completed form to the sheriff. The clerk shall maintain the form provided under this subdivision in a confidential manner. If a service fee is required by the sheriff under s. 814.70 (1), the petitioner shall pay the fee directly to the sheriff.

(d) The issuance of an order or injunction under sub. (3) or (4) is enforceable despite the existence of any other criminal or civil order restricting or prohibiting contact.

(e) A law enforcement agency and a clerk of circuit court may use electronic transmission to facilitate the exchange of documents under this section. Any person who uses electronic transmission shall ensure that the electronic transmission does not allow unauthorized disclosure of the documents transmitted.

(5m) CONFIDENTIALITY OF VICTIM'S ADDRESS. The petition under sub. (5) and the court order under sub. (3), (4), or (4g) may not disclose the address of the alleged victim. The petitioner shall provide the clerk of circuit court with the petitioner's address when he or she files a petition under this section. The clerk shall maintain the petitioner's address in a confidential manner.

(5r) NOTICE TO DEPARTMENT OF JUSTICE.

(a) If an order prohibiting a respondent from possessing a firearm is issued under sub. (4m), the clerk of the circuit court shall notify the department of justice of the existence of the order prohibiting a respondent from possessing a firearm and shall provide the department of justice with information concerning the period during which the order is in effect and information necessary to identify the respondent for purposes of responding to a request under s. 165.63 or for purposes of a firearms restrictions record search under s. 175.35 (2g) (c) or a background check under s. 175.60 (9g) (a).

(b) Except as provided in par. (c), the department of justice may disclose information that it receives under par. (a) only to respond to a request under s. 165.63 or as part of a firearms restrictions record search under s. 175.35 (2g) (c) or a background check under s. 175.60 (9g) (a).

(c) The department of justice shall disclose any information that it receives under par. (a) to a law enforcement agency when the information is needed for law enforcement purposes.

(6) ARREST.

(am) A law enforcement officer shall arrest and take a person into custody if all of the following occur:

1. A person named in a petition under sub. (5) presents the law enforcement officer with a copy of a court order issued under sub. (3) or (4), or the law enforcement officer determines that such an order exists through communication with appropriate authorities.

2. The law enforcement officer has probable cause to believe that the person has violated the court order issued under sub. (3) or (4).

(c) A respondent who does not appear at a hearing at which the court orders an injunction under sub. (4) but who has been served with a copy of the petition and notice of the time for hearing under sub. (4) (a) 2. that includes the information required under sub. (4) (a) 2. a., b., and c. has constructive knowledge of the existence of the injunction and shall be arrested for violation of the injunction regardless of whether he or she has been served with a copy of the injunction.

(7) PENALTY. Whoever violates a temporary restraining order or injunction issued under this section shall be fined not more than $10,000 or imprisoned not more than 9 months or both.

(8) NOTICE OF FULL FAITH AND CREDIT. An order or injunction issued under sub. (3) or (4) shall include a statement that the order or injunction may be accorded full faith and credit in every civil or criminal court of the United States, civil or criminal courts of any other state and Indian tribal courts to the extent that such courts may have personal jurisdiction over nontribal members.

History: 1983 a. 336; 1991 a. 39, 194; 1995 a. 71, 306; 2001 a. 16, 61, 105; 2003 a. 321; 2005 a. 272; 2007 a. 124; 2009 a. 262; 2011 a. 35, 266; 2013 a. 20, 223, 311, 321, 322; 2015 a. 109; 2015 a. 195, 253, 349, 353.

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John J. BACHOWSKI, Petitioner-Respondent,
v.
Margaret SALAMONE, Appellant-Petitioner.
No. 86-0281.
Supreme Court of Wisconsin.
Submitted on Briefs Feb. 10, 1987.
Opinion Filed June 19, 1987.

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[139 Wis.2d 399] Michael B. Rick, Eugene E. Detert and Godsell, Weber, Bruch & Rick, S.C., Hales Corners, for appellant-petitioner.

Milton R. Bordow, Milwaukee, for petitioner-respondent.

[139 Wis.2d 400] BABLITCH, Justice.

Margaret Salamone (Salamone) appeals challenging the constitutionality of sec. 813.125, Stats.1985, the "harassment injunction" statute. That statute sets forth the procedures for obtaining civil injunctive relief against a person who has allegedly violated the harassment statute, sec. 947.013(1). [1] Salamone argues the "harassment injunction" statute 1) fails to provide sufficient notice to prepare for the final hearing on the injunction, thereby violating her rights to due process, and 2) is unconstitutionally vague and overbroad. We find the statute does provide sufficient notice, and is neither vague nor overbroad. However, because the proof offered at the hearing did not conform to the conduct alleged in the petition and because the specific injunction issued in this case was overbroad, we conclude the statute was improperly applied. Accordingly, we reverse.

Salamone and Bachowski are neighbors. Approximately two years preceding Bachowski's petition for an injunction against Salamone, the two began feuding. The feud escalated in the summer and fall of 1985 and a number of their neighbors joined the fray. On December 5, 1985, Bachowski petitioned for a sec. 813.125, Stats., injunction ("harassment injunction") [139 Wis.2d 401] against Salamone. The statute is cited in full below. [2] The petition stated:

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[139 Wis.2d 402] "My wife and I and neighbors who will be present at the hearing have been constantly harrassed (sic) by virtue of both the actions and conduct of the respondent, including many false charges made to the Police Department of Hales Corners, Wisconsin. In addition, physical damage to property has been caused by the conduct of the respondent."

On the day this petition was filed, the circuit court granted a temporary restraining order (TRO) ex parte based on the petition, pursuant to sec. 813.125(3), Stats. The TRO restrained and enjoined [139 Wis.2d 403] Salamone "from harassing John J. Bachowski in any manner" until the injunction hearing which was scheduled for December 12, 1985 at 10:30 a.m. On December 9, 1985, at 9:00 p.m., Salamone received notice of this hearing and a copy of the petition filed by Bachowski.

At the injunction hearing on December 12, Mrs. Bachowski and five neighbors testified concerning the incidents which precipitated the harassment petition. Mr. Bachowski did not testify. Review of the hearing testimony reveals that both Bachowski and Salamone may have engaged in inappropriate conduct toward each other. The neighbors and Mrs. Bachowski testified that Salamone repeatedly yelled at Bachowski, and stared at him and his family. Salamone asserted that the yelling was in response to obscene gestures and comments Bachowski made to her in the presence of her young children. It was also revealed at the

hearing that charges against Bachowski for improper use of the telephone, stemming from obscene phone calls allegedly made to Salamone, were pending. The trial court acknowledged

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that Salamone might have a reciprocal claim for harassment and may also be entitled to an injunction under sec. 813.125, Stats. However, the trial court noted that without having filed a petition for such relief Salamone's testimony concerning the actions of Bachowski which "harassed" her was simply not relevant to disposition of Bachowski's injunction request.

The judge granted Bachowski's injunction concluding that Salamone "has no right to stand out on her driveway and yell at another neighbor no matter what the relationship between those parties is." The injunction enjoined Salamone for a period of two years from "harassing petitioner, having any contact with [139 Wis.2d 404] petitioner or coming upon petitioner's premises." This appeal followed.

Salamone argues that the statute is unconstitutional and, alternatively, that it was improperly applied. We note that neither the trial court nor court of appeals have ruled on the constitutional issues presented in this case. Nevertheless, the constitutionality of a statute is a question of law which we review de novo without deference to the lower courts' decisions. See State v. Ludwig, 124 Wis.2d 600, 607, 369 N.W.2d 722 (1985).

In reviewing the constitutionality of sec. 813.125, Stats., we recognize that there is a strong presumption that a legislative enactment is constitutional. State v. Cissell, 127 Wis.2d 205, 214, 378 N.W.2d 691 (1985). The party challenging the constitutionality of a statute assumes a heavy burden of persuasion. This court has repeatedly stated that it is not enough that the challenger of a law

"... establish doubt as to the act's constitutionality nor is it sufficient that respondent establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis.2d 32, 46, 205 N.W.2d 784 (1973).

With these principles in mind, we turn to the constitutional challenges to sec. 813.125 raised in this appeal. We begin with the question of whether certain procedures set forth in sec. 813.125 violate the notice [139 Wis.2d 405] requirements of the due process clause of the fourteenth amendment of the United States Constitution.

Salamone asserts that the summary procedures set forth in sec. 813.125, Stats., fail to allow sufficient time to prepare for the final hearing on the injunction, thereby denying her due process.

Under the statute a court may, upon the filing of a petition by a victim, issue an ex parte TRO ordering the respondent to "cease or avoid the harassment" of the victim. Section 813.125(3)(a), Stats. The judge must hold a hearing on the issuance of the requested injunction within seven days of the issuance of the TRO. Section 813.125(3)(b). One of the prerequisites to granting the injunction is that the court find that the petitioner has served upon the respondent a copy of the TRO and notice of the time for the hearing on the issuance of the injunction. Section 813.125(4)(a)3.

We acknowledge that no minimum notice period is specified in the statute but we must interpret the statute to avoid constitutional

invalidity. See State ex rel. Lynch v. Conta, 71 Wis.2d 662, 689, 239 N.W.2d 313 (1976) ("[g]iven a choice of possible interpretations, this court must select the construction that results in constitutionality rather than invalidity....") Because an alternative construction would render the statute unconstitutional, we construe notice to mean "reasonable notice," which is all that is required by due process. E.g., Jones v. Jones, 54 Wis.2d 41, 45, 194 N.W.2d 627 (1972). The notice must be "reasonably calculated to inform the person of the pending proceeding and to afford him or her an opportunity to object and defend his or her rights." In Matter of Estate of Fessler, 100 Wis.2d 437, 447, 302 N.W.2d 414 (1981). There is nothing in the statute [139 Wis.2d 406] which precludes the trial court from recessing the hearing until a later

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date if reasonable notice has not been provided to the respondent. In fact the statute precludes a judge from granting an injunction unless "notice," which we construe as meaning "reasonable" notice, has been given to the respondent. If a judge fails to delay the hearing to afford the respondent adequate time to prepare or grants the injunction when reasonable notice has not been given to the respondent, the judge's action may upon review be deemed an abuse of discretion. We conclude that the procedures set forth in the statute are sufficient to provide the type of notice due process requires.

We now turn to Salamone's vagueness challenge. A statute is "unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic arrests and convictions." Milwaukee v. Wilson, 96 Wis.2d 11, 16, 291 N.W.2d 452 (1980). In State v. Popanz, 112 Wis.2d 166, 332 N.W.2d 750 (1983) this court explained that "[t]he principles underlying the void for vagueness doctrine ... stem from concepts of procedural due process." Id. at 172, 332 N.W.2d 750.

To survive a vagueness challenge a statute must be sufficiently definite to give persons of ordinary intelligence who wish to abide by the law sufficient notice of the proscribed conduct. Id. at 173, 332 N.W.2d 750; Wilson, 96 Wis.2d at 16, 291 N.W.2d 452. A vague law " 'may trap the innocent by not providing fair warning.' " Popanz, 112 Wis.2d at 173, 332 N.W.2d 750 quoting, Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972). It must also permit law enforcement officers, judges and juries to enforce and apply the law without forcing them to create their own standards. Id. "The danger posed by a vague law is that officials [139 Wis.2d 407] charged with enforcing the law may apply it arbitrarily or the law may be so unclear that a trial court cannot properly instruct the jury as to the applicable law." Id. at 173, 332 N.W.2d 750. However, it is not necessary in order to withstand a vagueness challenge, "for a law to attain the precision of mathematics or science...." Wilson, 96 Wis.2d at 16, 291 N.W.2d 452.

Salamone contends that the statutory definition of harassment set forth in sec. 813.125(1)(b), Stats., fails to state with sufficient definiteness or certainty the specific conduct which is proscribed by the law. That section defines harassment as "[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose." Section 813.125(1)(b). We reject Salamone's contention that this definition fails the vagueness test set forth above. Though the key words in this definition, "harass" or "intimidate" are not expressly defined in the statute, to "a person of ordinary intelligence" these words clearly connote more than mere bothersome or annoying behavior. See, e.g., People v. Malausky, 127 Misc.2d 84, 485 N.Y.S.2d 925, 928 (N.Y.Crim.Ct.1985) ("immature,

immoderate, rude or patronizing manner which annoys another is not enough ..." to establish a violation of criminal harassment statute).

Their meaning can be readily ascertained by consulting a recognized dictionary. E.g., State v. Wickstrom, 118 Wis.2d 339, 352, 348 N.W.2d 183 (Ct.App.1984). "Harass" means to worry and impede by repeated attacks, to vex, trouble or annoy continually or chronically, to plague, bedevil or badger. Webster's Third New International Dictionary 1031 (1961). "Intimidate" means "to make timid or fearful." Id. at 1184. Moreover, their meaning is narrowed by the statute's [139 Wis.2d 408] requirement that the acts which harass or intimidate must be accomplished by repeated acts or a course of conduct. Section 813.125(1)(b), Stats. Thus, it is clear that single isolated acts do not constitute "harassment" under the statute. E.g., People v. Hotchkiss, 59 Misc.2d 823, 300 N.Y.S.2d 405, 407 (N.Y.Civ.Ct.1969). The definition of harassment further requires that the harassing and intimidating acts "serve no legitimate purpose." This is a recognition by the legislature that conduct or repetitive acts that are intended to harass or intimidate do not serve a legitimate purpose. Whether acts

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or conduct are done for the purpose of harassing or intimidating, rather than for a purpose that is protected or permitted by law, is a determination that must of necessity be left to the fact finder, taking into account all the facts and circumstances. See Model Penal Code sec. 250.4 comment 5, 368 (1980).

Yet another aspect of the statute narrows the meaning of "harassment." A TRO or injunction can only be obtained if the conduct was intended to harass. Section 813.125(3) and (4), Stats., requires that a judge find reasonable grounds to believe that the respondent violated sec, 947.013, the criminal harassment statute. That section explicitly requires "intent to harass or intimidate another person...." Section 947.013(1). (Emphasis added.)

The legislative history of secs. 813.125 and 947.013, Stats., sheds some light on the purpose and meaning of these statutes. According to the analysis of the legislation by the Legislative Reference Bureau, Wisconsin's harassment statute was based substantially on a New York statute. See Drafting File for 1983 Wis. Act 336, see also N.Y. Penal Law sec. 240.25 (McKinney 1987). That statute in turn was based on sec. 250.4 of the American Law Institute's Model [139 Wis.2d 409] Penal Code. A review of the commentary accompanying New York's statute and the model code indicates that the purpose of the legislation was to extend to the individual the protections long afforded to the general public under disorderly conduct or breach of peace statutes. See Model Penal Code sec. 250.4 comment 1, at 360; N.Y. Penal Law sec. 240.25 Practice Commentary, 300 (McKinney 1987). In reviewing the statute and its history it is clear the legislature has sought to prevent repeated assaults on the privacy interests of individuals without unnecessarily infringing on their freedom to express themselves through speech and conduct.

The statute's history reveals that the legislature was attempting to define harassment with as much precision as the English language permits. The drafting file includes early drafts of the statute, modeled after the New York harassment statute, which contain much broader definitions of "harassment." See Drafting File for 1983 Wis. Act 336. The initial Assembly version of the bill defined "harassment" as,

"1. Insulting, taunting or challenging another person in a manner likely to provoke a violent or disorderly response.

"2. Striking, shoving, kicking or otherwise subjecting the other person to

physical contact or attempting or threatening to do the same.

"3. Following the other person in or about a public place.

"4. Engaging in a course of conduct or repeatedly committing acts which harass, annoy, frighten or intimidate the other person and which serve no legitimate purpose." 1983 Assembly Bill 353.

[139 Wis.2d 410] Over the course of Assembly and Senate deliberations definitions (1) and (3) were dropped entirely and (4) was substantially narrowed. The legislature may have been aware that the term "annoy" had been held unconstitutionally vague by other jurisdictions, e.g., Bolles v. People, 189 Colo. 394, 541 P.2d 80, 82-83 (1975), and in contrast, statutes using the term "harass" had been ruled sufficiently specific to survive constitutional challenges on vagueness grounds. E.g., State v. Hagen, 27 Ariz.App. 722, 558 P.2d 750, 752 (1976); Commonwealth v. Duncan, 239 Pa.Super. 539, 363 A.2d 803, 806-07 (1976).

We again emphasize that scientific precision in drafting is not always possible nor is it necessary for a statute to withstand a vagueness challenge. As the United States Supreme Court explained in the context of a vagueness challenge to an obscenity statute, "lack of precision is not itself offensive to the requirement of due process. '... [T]he Constitution does not require impossible standards;' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices....' " Roth v. United States, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498 (1957) (Citation omitted.)

We also agree with the authors of the Model Penal Code that the requirements of an intent to harass and the absence of any

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legitimate purpose for the acts, render the harassment provisions of sec. 813.125, Stats., sufficiently precise to carry fair warning to the citizenry. As the Model Penal Code authors state:

"Taken together, these elements of the offense should sufficiently flesh out its meaning to survive vagueness review. This conclusion is supported by [139 Wis.2d 411] the fact that it is probably impossible to do any better. There is no realistic prospect of anticipating in a series of more specific provisions all the ways that persons may devise to harass others, and without a residual offense of this sort, many illegitimate and plainly reprehensible forms of harassment would not be covered." Model Penal Code sec. 250.4 comment 6 at 371. (Footnote omitted.)

It is clear from sec. 813.125, Stats., 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 sec. 813.125 with sufficient specificity to meet constitutional requirements with respect to vagueness.

We now turn to Salamone's overbreadth challenge. A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate. Wilson, 96 Wis.2d at 19, 291 N.W.2d 452. The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms, the so-called "chilling effect." We reject Salamone's argument that sec. 813.125, Stats., 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. It is not directed at the exposition of ideas but at oppressing repetitive behavior which invades another's privacy interests in an intolerable manner. [139 Wis.2d 412] We conclude that the zone of conduct regulated by this statute is clear. It does not, by its terms, sweep within its ambit actions which are constitutionally protected so as to render it unconstitutionally overbroad.

We now address the question of whether the statute has been properly applied. We note that a constitutional statute may be improperly applied. Cf. Wilson, 96 Wis.2d at 21, 291 N.W.2d 452 ("the fact that a law may be improperly applied or even abused does not render it constitutionally invalid.")

Salamone argues that the statute has been improperly applied in several respects: 1) the content of the notice was insufficient; 2) the proof at the hearing was insufficient; and 3) the injunction was overbroad. We will address each of these in turn.

1) THE CONTENTS OF THE NOTICE

Salamone claims that the notice was insufficient to apprise her of the nature of the claims and the evidence to be produced at the hearing, thereby leaving her to speculate about the charges she might have to defend against. We disagree.

As previously stated, due process requires that the notice provided reasonably convey the information required for parties to prepare their defense and make their objections. Estate of Fessler, 100 Wis.2d at 446-47, 302 N.W.2d 414. We conclude that compliance with the requirements of sec. 813.125(5)(a), Stats., would provide adequate notice in this regard. That section states: "(5) Petition. (a) The petition shall allege facts sufficient to show the following: 1. The name of the person who is the alleged victim. 2. The name of the respondent. 3. That the respondent has violated s. 947.013." This section requires a petitioner to state facts and circumstances which describe and support the specific acts or [139 Wis.2d 413] conduct which allegedly constitute the harassing behavior as defined by secs. 813.125(1)(a) and (1)(b) and 947.013(1)(a) and (1)(b). Significantly, the circuit court form which a petitioner must file to obtain a harassment TRO and injunction, requires the petitioner to specify "what happened when, where, who did what to whom." Thus, it would be insufficient, for example,

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pursuant to sec. 813.125(5)(a) for a petitioner to simply allege that he or she has been "harassed or intimidated" by the respondent.

In this case Bachowski alleged in his petition that he had been constantly harassed by the actions and conduct of Salamone. The alleged harassing acts specifically identified in the petition were that Salamone made false charges against him to the local police department and physically damaged his property. These specifically identified acts constitute the type of "facts" which must be alleged under sec. 813.125(5)(a), Stats. Accordingly, the notice provided was sufficient.

2) THE PROOF AT THE HEARING

At the hearing on the injunction, no evidence concerning property damage or false charges was offered. The testimony of Mrs. Bachowski and neighbors largely concerned Salamone's yelling at the Bachowskis. The judge stated at the hearing that Salamone's yelling across the street constituted harassment. There was no proof and there were no findings concerning the acts and conduct specified in Bachowski's petition--false charges and property damage. Given the disparity between what was alleged in the petition and what was offered and proven [139 Wis.2d 414] at trial, we conclude that the

proof in this case was insufficient as a matter of law.

3) THE INJUNCTION

The violation of an injunction issued under sec. 813.125, Stats., is a criminal offense. Substantial fines and imprisonment could result. Section 813.125(7). Accordingly, injunctions issued under this section must be specific as to the acts and conduct which are enjoined.

We conclude that the injunction issued in this case does not meet these standards. The judge restrained Salamone from "harassing petitioner, having any contact with petitioner or coming upon petitioner's premises." The enjoined conduct is described too broadly. The statute contemplates that the court will ultimately determine whether acts which allegedly harass a person do in fact constitute harassment under the statute. See sec. 813.124(4)(a)3, Stats. Only the acts or conduct which are proven at trial and form the basis of the judge's finding of harassment or substantially similar conduct should be enjoined.

In this case the judge concluded that Salamone's repeated yelling at Bachowski constituted harassment. The judge's order enjoins Salamone from "harassing" Bachowski or having "any contact" with him. This language, unfortunately, could proscribe conduct which is constitutionally protected, e.g., distributing campaign literature, or which simply would not constitute harassment under the statute, e.g., saying good morning to Mr. Bachowski or his family. Thus, we conclude the injunction is drafted too broadly and is therefore invalid.

In summary, we conclude that the statute is constitutional with respect to the notice required by [139 Wis.2d 415] due process. The statute is neither vague nor overbroad. However, because the statute was improperly applied, we reverse the decision of the court of appeals.

The decision of the court of appeals is reversed.

SHIRLEY S. ABRAHAMSON, Justice (concurring).

I agree with the majority that the injunction issued in this case should be vacated, but I do not agree that the court needs to reach the constitutional question. The court has said that it will not generally decide constitutional questions if the case can be resolved on other grounds. Labor and Farm Party v. Election Board, 117 Wis.2d 351, 354, 344 N.W.2d 177 (1984). I conclude that secs. 813.125(1)(b) and 947.013(1)(b), Stats. 1985-86, define harassment to encompass conduct and acts only, not verbal communication. Because this case involves only speech, the case does not fall within the statutes as I believe the statutes should be interpreted. If the statutes are interpreted to include speech, they are, in my opinion, unconstitutional.

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I.

Both sec. 813.125(1) and sec. 947.013(1) define harassment as follows:

"(a) Striking, shoving, kicking or otherwise subjecting another person to physical contact or attempting or threatening to do the same;" or

"(b) Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose."

[139 Wis.2d 416] I conclude that the words "course of conduct" and "repeatedly committing acts" in secs. 813.125(1)(b) and 947.013(1)(b) encompass only conduct, not

speech. I rest this conclusion on the text and the legislative history of the statutes.

Looking first to the text of the statutes. I note that the dictionary defines the words "conduct" and "acts" as actions, performances and deeds, not as speech.

Looking next to the legislative history of the statutes, I conclude that the great weight of the evidence indicates that the legislature intended the words "course of conduct" and "repeatedly committing acts" to regulate conduct and not speech.

The first piece of evidence in the legislative history demonstrating that the Wisconsin legislature did not intend to include speech in the harassment statutes is that the Wisconsin legislature deliberately omitted from its definition of harassment both the New York's and the Model Penal Code's provisions defining harassment to include certain kinds of speech. As the majority correctly explains, secs. 813.125(1)(a), (b) and 947.013(1)(a), (b) are based substantially on a New York statute [1] which was in turn [139 Wis.2d 417] based on sec. 250.4 of the American Law Institute's Model Penal Code. [2] See pp. 538-539. The Wisconsin legislature adopted only two provisions defining harassment, and both provisions--offensive touching and a course of conduct or repeated acts--do not on their face relate to verbal communications.

A second piece of evidence in the legislative history demonstrating that the Wisconsin legislature did not intend to include speech within the harassment statute is that sec. 250.4(5) of the Model Penal Code (set forth in note 2), upon which sec. 813.125(1)(b) and 947.013(1)(b) are based, does not regulate speech. The Commentary to the Model Penal Code explains that the phrase "course of alarming conduct" in sec. 250.4(5) of the Code encompasses only acts; the "core of the prohibition" in sec. 250.4(5) is "harassment by action rather than by communication." See American Law Institute, Model Penal Code, sec. 250.4, Comment 6, p. 371 (1980). All the examples the Commentary [139 Wis.2d 418] gives to illustrate a course of alarming conduct are acts, not verbal communication. Id. [3]

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Confirming this reading of the statute, the Colorado Supreme Court interpreted its statute which has language substantially similar to that in sec. 813.125(1)(b) and 947.013(1)(b), Stats. 1985-86, and sec. 250.4(5) of the Model Penal Code as prohibiting "conduct rather than communication." People v. Norman, 703 P.2d 1261, 1267 (Colo.1985).

On the basis of the text and legislative history of the Wisconsin statutes, I conclude that the legislature did not intend to include verbal communications within the words "course of conduct" and "repeatedly committing acts" in secs. 813.125(1)(b) and 947.013(1)(b). Because this case involves verbal communication, it does not fall within the statutes. Accordingly I concur that the injunction should be vacated.

II.

The majority needlessly reads a constitutional defect into the statutes by construing the statutes to cover verbal communications. As interpreted by the majority opinion sec. 813.125(1)(b) and sec. 947.013(1)(b) are, in my opinion, unconstitutionally vague and overbroad. Amends. I, XIV, U.S. Const.

When the legislature seeks to regulate conduct through resort to the criminal law, it must identify [139 Wis.2d 419] the proscribed conduct definitely enough "to provide standards for those who enforce the laws and those who adjudicate guilt." State v. Popanz, 112 Wis.2d 166, 173, 332 N.W.2d 750 (1983). These "standards cannot lie only in the minds

of persons whose duty it is to enforce the laws," id. at 176, 332 N.W.2d 750, for "[d]efining the contours of laws subjecting a violator to a criminal penalty is a legislative, not a judicial, function." Id. at 177, 332 N.W.2d 750.

Where the legislature's regulation includes expression, "the standards of permissible statutory vagueness are strict." N.A.A.C.P. v. Button, 371 U.S. 415, 432, 83 S.Ct. 328, 337, 9 L.Ed.2d 405 (1963).

The statutory provisions at issue in this case are "catchalls" designed to prohibit forms of harassment without specifically describing them. The drafters of the Model Penal Code emphasized that what made sec. 250.4(5) (upon which the Wisconsin provisions are based) constitutionally palatable was the fact that it proscribed action rather than communication and did not "sweep within its ban any significant area of protected speech." Model Penal Code, Commentary 6, p. 371-72. As interpreted by the majority, however, the Wisconsin statutes lack this essential limitation. The drafters of the Model Penal Code recognized that if these catch-all provisions were to include speech, they must sketch more than the general outlines of the prohibited speech in order to survive a vagueness challenge.

The majority fails in its attempt to make the word harass definite by using the dictionary. Although this court traditionally employs the dictionary in construing statutes, the fact that a dictionary defines a term does not in itself make the term definite. The dictionary definition quoted by the majority, for instance, [139 Wis.2d 420] equates "harass" with terms of equal breadth, such as "annoy" (which the majority itself recognizes, p. 538, has been found unconstitutionally vague by several courts).

Equally unsuccessful is the majority's reliance on other components of the statutory definition to reveal the hidden contours of the term harass. Two of the aspects of the statute on which the majority relies to "narrow" the meaning of the statute, multiplicity of harassing acts and intent to harass, can hardly clarify the meaning of the term "harass" since their meaning depends on the meaning of harass.

The majority appears to conclude that the third aspect of the statute, that harassing acts "serve no legitimate purpose," does not narrow the meaning of the statute. [4]

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[139 Wis.2d 421] On the issue of overbreadth, I conclude that the majority opinion has created "a 'danger zone' within which protected expression may be inhibited." Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S.Ct. 1116, 1125, 14 L.Ed.2d 22 (1965). "Because first amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Button, 371 U.S. at 433, 83 S.Ct. at 338. Vague statutes that regulate speech, simply by virtue of the fact that the true extent of their restriction of speech is unknown, create a threat of prosecution of protected speech that unacceptably chills the exercise of free speech rights. Cf. Houston v. Hill, --- U.S. ----, 107 S.Ct. ----, 95 L.Ed.2d ---- No. 86-243, (June 15, 1987) (the United States Supreme [139 Wis.2d 422] Court held that a city ordinance making it unlawful for any person to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty" was substantially overbroad because it broadly criminalized speech which interrupts a police officer without regard to whether the speech was protected).

In the end, the majority's conclusion that the statute is constitutional rests on the idea that clarity and specificity in the injunctions fashioned by judges to enforce the statute can somehow cure the constitutional difficulties inherent in the statute. Clarity in the

injunctions, however, cannot cure the vagueness of the statute. Before a judge may issue an injunction the judge must find reasonable grounds to believe that the defendant has engaged in the conduct proscribed by sec. 947.013(1)(b). See sec. 813.125(4)(a)3. The judge's authority to enjoin any specific act therefore derives from the language of the statute and depends on the statute being explicit enough to tell the judge what conduct is proscribed. As the United States Supreme Court has said, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

In addition, the specificity of injunctions will not reduce the overbreadth problem,

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because the broad language of the statute will still chill the exercise of free speech rights. The permissibility of speech in an individual case under the statute will hang on a [139 Wis.2d 423] possibly extended battle in the courts at both the trial and the appellate level. As the United States Supreme Court has said, the overbreadth doctrine is designed to avoid "making vindication of freedom of expression await the outcome of protracted litigation." Dombrowski, 380 U.S. at 487, 85 S.Ct. at 1121.

In an increasingly crowded and interdependent world, this statute invites the judiciary to intervene routinely to an unprecedented extent in people's everyday speech in ordinary contexts--from the back yard to the school yard. It puts the judiciary in the business of sifting harassing from non-harassing speech and legitimate from illegitimate purposes. The judiciary must then translate that difficult sifting process into detailed rules of permissible speech, which are then incorporated into an injunction enforced by a criminal sanction.

This statute represents a good faith attempt by the legislature to grapple with a serious and difficult problem in our complex society. Nevertheless, if the legislature intends, as the majority holds, to use the criminal law to vindicate privacy interests against speech, the legislature must clearly identify the prohibited speech.

For the reasons set forth, I concur in the mandate but I do not join the opinion.

I am authorized to state that Chief Justice NATHAN S. HEFFERNAN joins this concurrence.

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1 "947.013 Harassment. (1) Whoever, with intent to harass or intimidate another person, does any of the following is subject to a Class B forfeiture:

"(a) Strikes, shoves, kicks or otherwise subjects the person to physical contact or attempts or threatens to do the same.

"(b) Engages in a course of conduct or repeatedly commits acts which harass or intimidate the person and which serve no legitimate purpose."

2 "813.125 Harassment restraining orders and injunctions. (1) DEFINITION. In this section, 'harassment' means any of the following:

"(a) Striking, shoving, kicking or otherwise subjecting another person to physical contact or attempting or threatening to do the same.

"(b) Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.

"(2) COMMENCEMENT OF ACTION. An action under this section may be commenced by filing a petition described under sub. (5)(a). No action under this section may be commenced by service of summons. Section 813.06 does not apply to an action under this section.

"(3) TEMPORARY RESTRAINING ORDER. (a) A judge may issue a temporary restraining order ordering the respondent to cease or avoid the harassment of another person, if all of the following occur:

"1. The petitioner files a petition alleging the elements set forth under sub. (5)(a).

"2. The judge finds reasonable grounds to believe that the respondent has violated section 947.013.

"(b) Notice need not be given to the respondent before issuing a temporary restraining order under this subsection. A temporary restraining order may be entered only against the respondent named in the petition.

"(c) The temporary restraining order is in effect until a hearing is held on issuance of an injunction under sub. (4). A judge shall hold a hearing on issuance of an injunction within 7 days after the temporary restraining order is issued, unless the time is extended upon the written consent of the parties or extended once for 7 days upon a finding that the respondent has not been served with a copy of the temporary restraining order although the petitioner has exercised due diligence.

"(4) INJUNCTION. (a) A judge may grant an injunction ordering the respondent to cease or avoid the harassment of another person, if all of the following occur:

"1. The petitioner has filed a petition alleging the elements set forth under sub. (5)(a).

"2. The petitioner serves upon the respondent a copy of a restraining order obtained under sub. (3) and notice of the time for the hearing on the issuance of the injunction under sub. (3)(c).

"3. After hearing, the judge finds reasonable grounds to believe that the respondent has violated section 947.013.

"(b) The injunction may be entered only against the respondent named in the petition.

"(c) An injunction under this subsection is effective according to its terms, but for not more than 2 years.

"(5) PETITION. (a) The petition shall allege facts sufficient to show the following:

"1. The name of the person who is the alleged victim.

"2. The name of the respondent.

"3. That the respondent has violated section 947.013.

"(b) The clerk of circuit court shall provide simplified forms.

"(6) ARREST. A law enforcement officer shall arrest and take a person into custody if all of the following occur:

"(a) A person named in a petition under sub. (5) presents the law enforcement officer with a copy of a court order issued under sub. (3) or (4), or the law enforcement officer determines that such an order exists through communication with appropriate authorities.

"(b) The law enforcement officer has probable cause to believe that the person has violated the court order issued under sub. (3) or (4).

"(7) PENALTY. 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."

1 The New York statute provides:

"Section 240.25 Harassment

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or

2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

3. He follows a person in or about a public place or places; or

4. As a student in school, college or other institution of learning, he engages in conduct commonly called hazing; or

5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Harassment is a violation."

New York Penal Code, sec. 240.25.

2 The Model Penal Code, sec. 250.4, provides:

"Section 250.4 Harassment

A person commits a petty misdemeanor if, with purpose to harass another, he:

(1) makes a telephone call without purpose of legitimate communication; or

(2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or

(3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or

(4) subjects another to an offensive touching; or

(5) engages in any other course of alarming conduct serving no legitimate purpose of the actor."

3 The Model Penal Code recognizes that "it may be possible that some instance of harassing conduct is so imbued with expressive content as to implicate first-amendment concerns, but such a case would probably be excluded by the statutory requirements that the action serve no legitimate purpose of the actor and that there be a purpose to harass." Model Penal Code, sec. 250.4, Comments, p. 371-372.

4 The question arises whether the Wisconsin statute prohibits conduct, for example, of a debt collector whose purpose is to get paid (a legitimate purpose) or of an individual whose purpose is to gain the affection of another, even if a court may view the conduct as having the purpose to harass or intimidate. See State v. Sarlund, 139 Wis.2d 386, 407 N.W.2d 544 (of even date).

The majority construes the "no legitimate purpose" requirement as a legislative recognition "that conduct or repetitive acts that are intended to harass or intimidate do not serve a legitimate purpose." At 538. Under the majority's interpretation, it appears that perhaps one cannot have two purposes: to harass and to achieve a lawful goal. The majority might be read as collapsing the two statutory elements, "intent to harass" and "no legitimate purpose," into one. The Model Penal Code makes clear that the two are separate elements of the offense of harassment.

Insight into how the "no legitimate purpose" requirement was designed to function is gained by examining the several subsections of sec. 250.4 of the Model Penal Code quoted at note 2. Only subsections (1) and (5) of sec. 250.4 include "no legitimate purpose" language; subsections (2), (3), and (4) do not include the "no legitimate purpose" language. See text of Code, note 2 supra.

The Commentary to the Model Penal Code explains that a person making "a single call for the purpose of legitimate communication cannot be punished under Subsection (1), even if it is made with the intent to harass. Although the phrase 'legitimate communication' invites judicial development, it plainly excludes many calls that are intended to annoy the recipient and that have precisely that effect.... A single call made to harass another into paying a debt could not be punished under Subsection (1) ... Subsection (3) addresses the more complex situation of calls made with the intent to harass but also with the purpose of legitimate communication." Model Penal Code, sec. 250.4, Comment 2, p. 362.

The Commentary to the Model Penal Code further explains that the framers of subsection (5), the catch-all provision upon which the Wisconsin statute is based, included only conduct that has "no legitimate purpose", in an attempt to limit the broad reach of the subsection. "The import of the phrase [no legitimate purpose] ... is broadly to exclude from this subsection any conduct that directly furthers some legitimate desire or objective of the actor. This element of the residual offense should limit its application to unarguably reprehensible instances of intentional imposition on another." Model Penal Code, sec. 250.4, Comment 5, p. 368.

For further discussion of the concept of legitimate purpose, see 1961 ALI Proceedings, pp. 225-226.