

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 2016AP9999

JANE DOE,

Petitioner-Respondent,

v.

JOHN SMITH,

Respondent-Appellant.

BRIEF OF RESPONDENT-APPELLANT JOHN SMITH

Appeal from an Order for Injunction Entered by the Circuit
Court for Milwaukee County, the Honorable William A.
Johnson Presiding, Case No. 2016CV1111

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ISSUE PRESENTED

1. Does minor physical contact resulting in no injury of any kind, in addition to two non-threatening telephone calls, amount to harassment warranting a restraining order?

Commissioner Answer: Yes.

Circuit Court Answer: Yes.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested. The briefs will fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant. Wis. Stat. (Rule) § 809.22(2)(b).

STATEMENT ON PUBLICATION

Similarly, publication is not warranted because the issues can be decided on the basis of controlling precedent, and it does not appear that this appeal will satisfy any of the criteria for publication set forth in Wis. Stat. (Rule) § 809.23(1)(a).

STATEMENT OF CASE AND FACTS

On April 30, 2015, the Petitioner-Respondent, Jane Doe, filed a request for an injunction against the Respondent-Appellant, John Smith. A hearing was held on May 13, 2015 before Court Commissioner David Jackson. Commissioner

Jackson ordered a four-year injunction against Mr. Smith. On July 10, 2015, Mr. Smith filed a request for a new hearing (also called a *de novo* hearing). On February 17th, 2016, a new hearing was conducted before the Honorable Judge William Johnson. Judge Johnson found that Mr. Smith's conduct was harassment of Ms. Doe and upheld the injunction. Mr. Smith timely filed this Notice of Appeal of Judge Johnson's decision on April 2, 2016.

The Petitioner-Respondent, Jane Doe, is the former wife of Respondent-Appellant John Smith. Ms. Doe alleged that on two occasions following their separation, Mr. Smith made minor physical contact with her. (R.22:7-8).¹ Ms. Doe also alleges that Mr. Smith attempted on two occasions to contact her via telephone.

A. Two Incidents of Alleged Physical Contact.

Ms. Doe complains of only two incidents in which she claims Mr. Smith had physical contact with her. (R.21:106). Neither of these incidents resulted in harm or injury of any kind.

The first incident allegedly occurred on March 20, 2015, when Ms. Doe and Mr. Smith saw each other at the grocery store. Ms. Doe testified that Mr. Smith was walking behind her in the parking lot of a Pick 'n Save and bumped her with his shoulder when he walked past her. She did not fall and was not injured in any way as a result of the alleged contact. (R.21:27). What's more, there were no witnesses to the incident. Mr. Smith testified that this incident did not

¹ Throughout this brief, references to the record will take the following form: (R.[item]:[page]), with [item] denoting the appellate record number for the referenced record item and [page] denoting the page number if applicable.

happen. He did not know that he was accused of this incident until he was served with the injunction paperwork. (R.22:21). And Ms. Doe testified that she “did not have any proof” that the incident occurred. (R.21:27).

The second incident allegedly occurred on April 10, 2015. Ms. Doe testified that on that date she was walking toward her attorney’s office as Mr. Smith was also approaching for an appointment. Mr. Smith was ahead of Ms. Doe, walking next to a woman. (R.21:75). Ms. Doe testified that she tried to go around Mr. Smith to get into the building and as she did so, Mr. Smith veered into her and “made physical contact.” (R.21:28). Ms. Doe testified that she avoided most of the contact and that she never lost her balance. (R.21:28). After this, Ms. Doe again tried to go around Mr. Smith, and when she did, Mr. Smith allegedly stuck his foot out. (R.21:28). Ms. Doe testified that she stumbled but did not fall. (R.21:28).

Again, Ms. Doe did not suffer any injury of any kind. (R.21:77). Ms. Doe herself testified that she swung an elbow at Mr. Smith, making contact with him. (R.21:76). Ms. Doe also called a witness, George Brown, who testified that he was approaching the law office at the time and observed Mr. Smith bump Ms. Doe “a little bit.” (R.21:102-103). Brown testified that Mr. Smith’s leg “seemed to get in front of” Ms. Doe’s, and she “tripped a little bit.” (R.21:103).

Mr. Smith testified that on April 10, 2015, he was approaching the law office with his girlfriend when Ms. Doe came up from behind and cut in front of him. It was Ms. Doe’s behavior that caused their legs to get tangled. (R.22:20). It was after that when Ms. Doe raised her elbow to him. (R.22:21). Mr. Smith testified that this was the only time he ever had physical contact with Ms. Doe after they

separated. (R.22:21). With the exception of the alleged grocery store incident, Ms. Doe did not dispute this point. (R21:118).

B. Two Incidents of Alleged Telephone Contact

Ms. Doe alleges two incidents where Mr. Doe called her on the telephone. The first incident allegedly took place on April 1, 2015. Ms. Doe testified that Mr. Smith called her but she did not answer her phone. (R.22:23). There was absolutely no communication or interaction whatsoever between the two on that date.

The final alleged incident occurred on April 22, 2015. Ms. Doe claimed that Mr. Smith called her and was angry, telling her that she “wasn’t getting anything in the divorce” and that he “never should have settled” for her. (R.22:24). No other evidence was offered about the circumstances of this call.

I. Standard of Review.

To grant an injunction under Wis. Stat. § 813.125, 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. *M.Q. v. Z.Q.*, 152 Wis. 2d 701, 708, 449 N.W.2d 75 (Ct.App.1989).

When presented with such a question, this Court will not set aside the circuit court’s *factual findings* unless they are clearly erroneous. Wis. Stat. § 805.17(2). However, this Court will independently review the circuit court’s *conclusion*, based on the established facts, whether reasonable grounds for an injunction exist. *M.Q.*, 152 Wis. 2d at 708. Whether Ms. Doe has met her burden of proof also is a

question of law. *Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct.App.1988).

Here, Mr. Smith challenges whether the facts alleged constitute harassment with intent to harass, so the Court's review is *de novo*, granting no deference to the trial court.²

II. The Circuit Court Erred in Holding that Mr. Smith's Conduct Constituted Harassment under Wis. Stat. § 813.125.

Ms. Doe failed to meet her burden of proof that the alleged incidents involving Mr. Smith rose to the level of harassment warranting an injunction under the law. The minor incidents alleged do not constitute harassment and certainly do not show intent to harass. Ms. Doe produced no evidence that Mr. Smith engaged in any conduct prohibited by § 813.125(1), and the circuit court erred in ruling otherwise.

A. Legal Definition of Harassment

The definition of harassment is found in Wis. Stat. § 813.125:

(1) In this section, 'harassment' means any of the following:

(a) Striking, shoving, kicking or otherwise subjecting another person to physical contact; engaging in [child

² Mr. Smith does not argue that the circuit court abused its discretion in entering the injunction, which is typically the last step of the Court's analysis if the evidence itself would justify an injunction. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 23, 312 Wis. 2d 435, 752 N.W.2d 359. Here, because Mr. Smith argues the facts did not warrant an injunction under the law, the Court need not reach the question of discretion.

abuse, sexual assault, or stalking]; 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.

Moreover, when seeking an injunction, it is not enough to show harassment; the 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(3)(a)2. (emphasis added). As described below, none of the incidents complained of by Ms. Doe pass this test.

B. The March 20, 2015 Grocery Store Incident.

One of the grounds the circuit court stated for its ruling was the alleged interaction between Mr. Smith and Ms. Doe on March 20, 2015, when the court found there was “almost a tripping” that occurred. (R.22:88). The record shows that this finding was in error. There was no testimony from *anyone*, not even Ms. Doe herself, that Mr. Smith “almost tripped” her. Rather, Ms. Doe testified that Mr. Smith bumped her with his shoulder, admitting that there was no significant contact between the two.

But even setting this aside, “*almost tripping*” someone implies that no *actual* tripping occurred, so the court’s own findings establish that there was *not* physical contact between Mr. Smith and Ms. Doe at the grocery store. Because Ms. Doe did not prove that Mr. Smith engaged in “[s]triking, shoving, kicking or otherwise subjecting [her] to physical contact,” no harassment occurred on this date.

C. The April 10, 2015 Law Firm Incident

The court also found that on April 10, 2015, Mr. Smith bumped Ms. Doe while walking towards a law office. The court noted there is “corroborating evidence for this.” (R.22:87). However, the evidence shows that even though physical contact between the two occurred, there was no intent to harass on Mr. Smith’s part. Ms. Doe’s own testimony and that of her witness George Brown established that it was Ms. Doe who was trying to get by Mr. Smith. (R.21:28). Mr. Brown characterized the contact as Mr. Smith “bumping” Ms. Doe a “little bit,” and as Ms. Doe tried to get in front of Mr. Smith, Mr. Smith’s leg “seemed to get in front” of Ms. Doe’s and she “tripped a little bit.” The court’s characterization of this incident as harassment of Ms. Doe with intent to harass is inconsistent with the evidence showing that Ms. Doe approached Mr. Smith from behind and he was more bumped than bumper. Because nothing in the record showed that Mr. Smith *intended* to make physical contact with Ms. Doe, the court erred in citing this incident as grounds for an injunction.

D. The Two Telephone Calls

The two alleged telephone calls from Mr. Smith to Ms. Doe do not support a harassment claim. The first call was never even completed. As to the second call, the evidence—which consisted solely of Ms. Doe’s uncorroborated testimony—merely showed that Mr. Smith became angry during the call.

By themselves, these phone calls are not physical contact, so cannot meet the definition of harassment in any physical sense. *See* Wis. Stat. § 813.125(1)(am)1. (listing several types of physical contact that constitute harassment). They also do not meet the second definition of harassment,

“engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.” Wis. Stat. § 813.125(1)(am)2. The two phone calls at issue, one of which was not even completed, is not a “course of conduct” or “repeatedly committing acts,” and the one phone call that was completed served the legitimate purpose of discussing the former couple’s divorce.

Finally, as with the other incidents, the mere allegation that Mr. Smith became angry during a single phone call does not suffice to show the “intent to harass” that the court must find before it can issue an injunction under Wis. Stat. § 813.125. The court’s contrary finding was error.

CONCLUSION

Mr. Smith respectfully requests that this Court vacate the order for the injunction entered on May 13, 2015 and dismiss the underlying petition.

Dated this 30th day of September, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,822 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 30th day of September, 2016.

Signed:

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