

ORIGINAL

IN THE SUPREME COURT OF OHIO

Dorothy Fondessy

Appellee

Case No. 2013-1574

v.

Anthony Simon

Appellant

On Appeal from the Ottawa
County Court of Appeals
Sixth Appellate District

BRIEF OF APPELLANT ANTHONY SIMON PUSUANT TO CERTIFIED CONFLICT

Wesley M. Miller Jr. (0043875) (COUNSEL OF RECORD)
P.O. Box 352530
Toledo, OH 43635
Phone: 419-508-7892
Fax No: 567-225-3000
wes@wesleymillerlaw.com

COUNSEL FOR APPELLANT, ANTHONY SIMON

Ernest E. Cottrell, Jr. (0030541)
21980 W. State Route 51
Genoa, Ohio 43430
Phone: 419-855-9955
Fax No: 419-855-9933
ecottrell@amplex.net

COUNSEL FOR APPELLEE, DOROTHY FONDESSY

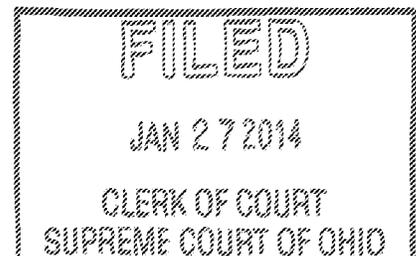
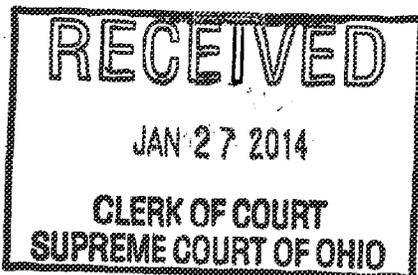


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	2
 <u>Proposition of Law</u>	
Whether R.C. 2903.211(A)(1) requires a victim to actually experience mental distress or only believe that the stalker will cause the victim physical harm or mental distress, for a court to issue a civil stalking protection order	2
CONCLUSION	6
PROOF OF SERVICE	7
APPENDIX	<u>Appx.</u>
Opinion of the Ottawa County Court of Appeals Certifying Conflict (Sep. 20, 2013)	A
Entry of Certified Conflict of the Supreme Court (Nov. 25, 2013)	B
Opinion of the Ottawa County Court of Appeals (Aug. 9, 2013)	C
Opinion of the Mahoning County Court of Appeals (Mar. 4, 2009)	D

TABLE OF AUTHORITIES

CASES

Page

Caban v. Ransome, 7th Dist. No. 08 MA 36, 2009-Ohio-1034 1, 4, 5

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

Page

R.C. 2903.211(A)(1)..... 2, 4, 5

R.C. 2903.211(D)(2)..... 4

STATEMENT OF FACTS

This case arises from the attempt of the appellant Anthony Simon (Simon) to appeal a civil stalking protection order (CSPO). The CSPO was granted on November 2, 2011 (App. Brf. Appx. - A.) to his life-long neighbor the appellee Dorothy Fondessy (Fondessy) and her husband Wayne (Wayne). His appeal was denied by the Sixth District Appellate Court however the court granted his motion to certify a conflict of law. (Appx. A.)

In 2006 after the death of Simon's father Charles -- who was Fondessy's uncle - a mistake in a survey of the estate property caused issues between Simon, Wayne, and Fondessy. (App. Brf. 2) In the succeeding years there were six incidents that formed the basis for Fondessy's application for a CSPO. (App. Brf. 3-6.) Prior to the CSPO being granted criminal charges were brought against Simon in June and September 2011 arising from the same incidents (App. Brf. Appx. B, C, D.) of which he was acquitted on April 20, 2012. (App. Brf. Appx. E, F, G.)

In his brief to the Sixth District Appellate Court Simon argued the evidence was not sufficient to warrant a CSPO as set forth in R.C. 2903.211 identifying only two incidents involving Wayne and five involving Fondessy. (App. Brf. 8-9.) Simon argued the statutory requirements, pattern of conduct, mental distress, (App. Brf. 11-15) and knowingly were not met. The appellate court disagreed on all points. (Appx. C 9-10.) Simon then filed a motion to certify a conflict of law which the court granted with respect to the mental distress requirement finding a conflict exists with a decision from the Seventh District Appellate Court in *Caban v. Ransome*, 7th Dist. No. 08 MA 36, 2009-Ohio-1034. (Appx. B.) on September 20, 2013.

Simon filed his notice to certify a conflict of law on October 4, 2013 which the Supreme Court granted on November 25, 2013. (Appx. B) Simon now timely files his brief on the conflict of law.

ARGUMENT

Proposition of Law

Whether R.C. 2903.211(A)(1) requires a victim to actually experience mental distress or only believe that the stalker will cause the victim physical harm or mental distress, for a court to issue a civil stalking protection order.

To be entitled to a CSPO, the petitioner must show by a preponderance of the evidence that the respondent engaged in a violation of R.C. 2903.211, Ohio's menacing by stalking statute, against him or her. The issue before this Court concerns the mental distress requirement as set forth in R.C. 2903.211(A)(1):

(A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

The court of appeals ruled that a person need only believe that another's actions might cause mental distress stating "...a rational trier of fact could conclude that because appellant knew that the Fondessys were aging and that Wayne was in poor health, that his actions and behavior would cause the Fondessys mental distress." (Appx. C 10.) In doing this the court has interpreted the law incorrectly and made the issue of mental distress a burden that Simon must bear not the injured party. The court makes Simon accountable because of the age and health of the other party; effectively making mental distress a subjective matter that a person -- here Simon -- *must* be concerned about and evaluate before he takes an action or speaks a word. Unfortunately that has a very broad

application in our society. And in this case also runs to Fondessy and Wayne. The appellate court imputes to Simon that he must surely *know* that his actions/words would bring mental distress -- in this case "fear" of what Simon *might* do -- to the Fondessys. This view would be reasonable if there was evidence that Simon had previously threatened, or physically harmed them, or if he made some overt threat of attack or harm such as shaking his fist at them. But the court had no such evidence,(CPO Tr. 22)only that Fondessy was upset by Simon's actions of blowing leaves (CPO Tr. 21) and grass clippings, (CPO Tr. 11)trimming bushes on the property line, (CPO Tr. 8) throwing "garbage" into her pond, (CPO Tr. 13-14) and running water in the direction of her property,(CPO Tr. 16, 26) and use of obscenities (CPO Tr. 13)and that Fondessy considers Simon's "verbiage" a threat. (CPO Tr. 21-22)These actions, even if true as the court believed, do not rise to the requirement of the statute. And needless to say, some of these 'atrocities' occur routinely between neighbors throughout the land, which is not meant to trivialize the actions but only to point out that people do or say things that upset their neighbors at some time. Even Simon testified that on occasion he was upset by the actions/words of the Fondessys. (CPO Tr. 57, 58)A strict interpretation of the statute leads to an objective applicationof the facts to effectuate justice.

The construction of the statute by the legislature clearly requires only a *belief*that the offender might cause physical harm, but *must actually* cause mental distress. Had the legislature intended only a belief of causing mental distress they would have constructed the statute to read; 'No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm or mental distress to the other person.' This construction clearly delineates that only a belief that the offender

will cause physical harm or mental distress is the requirement. Or alternatively they could have used punctuation to convey that singular requirement - 'No person by engaging in a pattern of conduct shall knowingly cause another person to believe that: the offender will cause physical harm to the other person; or cause mental distress to the other person.' The placement of the colon after that and a semi-colon after person achieves the connection of the two actions to the verb believe and therefore *mandates* the interpretation that only a belief of physical harm or belief of mental distress is necessary. The legislature did not do either which is conclusive that it *did* intend that mental distress actually be caused. Any contrary interpretation, as that reached by the appellate court, violates a basic principle of statutory construction. *Caban v. Ransom*, Supra. at ¶ 24, explains it thusly "... note by repeating "to the other person" after physical harm and mental distress, rather than merely placing it at the end of the sentence, the legislature expressed that "to believe" does not modify "mental distress". As such, any mental distress must have actually been caused." Not only does the Seventh Appellate District apply the statute as constructed, moreover other appellate districts comprehend the correct meaning of the statute: Second, Fourth, Ninth, and Twelfth. Simon provides a complete analysis of the application of "mental distress" in his appellate brief (App. Brf. 11-15)

Not only was the appeals court remiss in its interpretation of R.C. 2903.211(A)(1) but it also neglected to follow section (D)(2) of statute which defines mental distress:

(D)(2) "Mental Distress" means any of the following: (a) Any mental illness or condition that involves some temporary substantial incapacity; (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment or other mental health services.

The evidence shows that Fondessy and Wayne were "upset" by the actions/words of Simon but does not demonstrate mental distress as defined by the statute. As argued above many things may cause one to be upset but there must be some outward manifestation of mental distress that comports with the statute. The *Caban* court properly considered this issue at ¶ 28-29. The Seventh Appellate District Court demonstrates a proper application of the stalking statute that is in the best interest of the public and promotes safety and confidence in the judicial system

The protection of endangered persons is of the utmost concern and the primary reason for the stalking statute. It may seem that the favored interpretation to adopt regarding R.C. 2903.211(A)(1) is the liberal one as employed by the Sixth District Appeals Court as it more readily provides relief for endangered persons. But it also allows for vexatious petitioners to ensnare people in the legal system for purposes other than safety. Far more CSPOs are granted than denied and a percentage of them are vexatious in nature and are used to harass, restrict, and punish others. This is evident in the underlying case. Neighbors who lived next to each other for 30 plus years without incident, but after the death of Simon's father issues arose -- 6 over a 5 year period -- some involving harsh words but *none* presenting any threat or harm to anyone. (CPO Tr. 22) Complaints from Fondessy and Wayne were over petty issues such as discharging grass, blowing leaves, and discharging water across the property line although harsh words may have been exchanged between the parties. The authorities were aware of and continually informed of any issue by the Fondessys. Simon also contacted the authorities to insure that what he was doing was not illegal. (CPO Tr. 59-60) And he consulted an attorney to advise him on what he could legally do on his property. (CPO Tr. 48, 52, 68,

70) Simon did not breach any law civil or criminal yet he is hauled into court because all of a sudden the neighbors are in fear of him. Nothing had changed in terms of the parties interactions and the Fondessys were not satisfied. Simon also sought advice from others in local government regarding zoning and other restrictions to insure he was not violating any ordinances or regulations. (CPO Tr. 78) It appears the Fondessys used the stalking statute to address purely property issues which could have been remedied through the civil system. Simon, having been victimized by the criminal charges and the civil protection order, must, for the next 5 years, live under the threat of being hauled into court, and perhaps jail, due to being accused of violating the protection order. The liberal application encourages the use of a CSPO in lieu of the civil process, which is more likely to resolve disputes that stem from property issues, rather than holding them in abeyance for a period of time under threat of a criminal sanction under the CSPO.

However injustices such as this can be avoided using the stricter interpretation of the statute as applied by the Seventh Appellate District Court. It still provides necessary protection for endangered persons who believe they would suffer physical harm or if they demonstrated they actually suffered mental distress. And it also protects those who may be innocent respondents in a stalking civil protection order case.

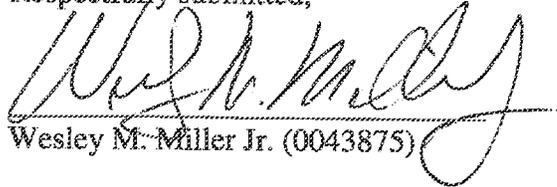
CONCLUSION

The decision below interpreting the statute in a liberal construction is flawed as it serves to encourage the use of the statute to address issues fundamentally civil in nature and promotes vexatious use of the protection order. The strict view, the correct interpretation, will protect endangered persons and better protect innocent respondents from injustice, and instill confidence in the judicial system. The conflict in the

interpretation of this statute must be given the strict view, which is unmistakably the view intended by the legislature.

The appeal court must be reversed and the matter remanded to the trial court for new proceedings.

Respectfully submitted,

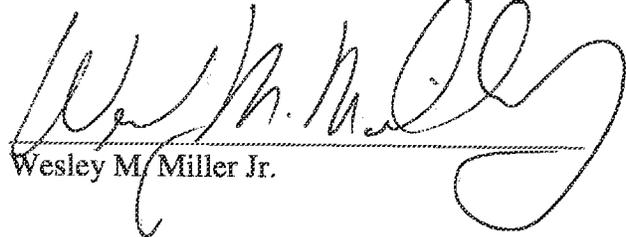


Wesley M. Miller Jr. (0043875)

COUNSEL FOR APPELLANT,
ANTHONY SIMON

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014 the foregoing was sent via U.S. mail to Ernest E. Cottrell Jr. at 21980 State Rte. 51 W. Genoa, OH 43430-1252, Attorney for Appellee.



Wesley M. Miller Jr.

APPENDIX

Opinion of the Ottawa County Court of Appeals Certifying Conflict (Sep. 20, 2013)	A
Entry of Certified Conflict of the Supreme Court (Nov. 20, 2013)	B
Opinion of the Ottawa County Court of Appeals (Aug. 9, 2013)	C
Opinion of the Mahoning County Court of Appeals (Mar. 4, 2009)	D

FILED
COURT OF APPEALS
 SEP 20 2013
GARY A. KOHLI CLERK
OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
 SIXTH APPELLATE DISTRICT
 OTTAWA COUNTY

Dorothy Fondessy

Court of Appeals No. OT-11-041

Appellee

Trial Court No. 11-CV-515H

v.

Anthony Simon

DECISION AND JUDGMENT

Appellant

Decided: **SEP 20 2013**

This matter is before the court on the motion of defendant-appellant, Anthony Simon, to certify this case to the Supreme Court of Ohio on the ground that the judgment rendered by this court on August 9, 2013, is in conflict with decisions of several other Ohio District Courts of Appeals. Appellee, Dorothy Fondessy, has filed a contra memorandum.

In our decision of August 9, 2013, we affirmed the judgment of the trial court which entered a civil stalking protection order ("CSPO") against appellant for the protection of appellee Dorothy Fondessy and her husband Wayne Fondessy. In

FAXED

1.

VOL 035 PG 30

JOURNALIZED

A

particular, we concluded that there was competent, credible evidence to support the trial court's judgment.

Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, "[w]henver the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The Ohio Supreme Court has set forth three requirements that must be met in order for a case to be certified:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Appellant asserts that our decision in this case is in conflict with the decisions of several other appellate districts on the issue of our interpretation of the "mental distress" a petitioner must prove for a court to grant a petition for a CSPO.

As we discussed in our decision of August 9, 2013, for a trial court to grant a CSPO, the petitioner must show by a preponderance of the evidence, that the complained

of conduct violates the menacing by stalking statute. R.C. 2903.211(A)(1) proscribes menacing by stalking and reads: "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." This court has consistently held that the statute "does not require that the victim actually experience mental distress, but only that the victim believes the stalker would cause mental distress or physical harm." *Ensley v Glover*, 6th Dist. Lucas No. L-11-1026, 2012-Ohio-4487, ¶ 13. In the present case, we relied on this interpretation in concluding that appellee had established the elements for the court to order a CSPO. It is this interpretation with which appellant contends there is a conflict among the Ohio District Courts of Appeals.

This court follows the interpretation of a majority of the Ohio District Courts of Appeals. See *Griga v. DiBenedetto*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6097, ¶ 13; *Dayton v. Davis*, 136 Ohio App.3d 26, 32, 735 N.E.2d 939 (2d Dist.1999); *Holloway v. Parker*, 3d Dist. Marion No. 9-12-50, 2013-Ohio-1940, ¶ 23; *Bloom v. Macbeth*, 5th Dist. Ashland No. 2007-COA-050, 2008-Ohio-4564, ¶ 11; *Rufener v. Hutson*, 8th Dist. Cuyahoga No. 97635, 2012-Ohio-5061, ¶ 13; *Cooper v. Manta*, 11th Dist. Lake No. 2011-L-035, 2012-Ohio-867, ¶ 33; and *State v. Hart*, 12th Dist. Warren No. CA2008-06-079, 2009-Ohio-997, ¶ 31.

Several other Ohio District Courts of Appeals, however, "proceed as if the test is whether mental distress was in fact caused." *Caban v. Ransome*, 7th Dist. Mahoning No. 08 MA 36, 2009-Ohio-1034, ¶ 23. See also *Smith v. Wunsch*, 162 Ohio App.3d 21,

2005-Ohio-3498, 832 N.E.2d 757, ¶ 21 (4th Dist.); *State v. Payne*, 178 Ohio App.3d 617, 2008-Ohio-5447, 899 N.E.2d 1011, ¶ 10 (9th Dist.).

Accordingly, we find that there is a conflict with our decision of August 9, 2013, and the decisions of the Seventh, Fourth and Ninth District Courts of Appeals in *Caban*, *Smith*, and *Payne* on the issue of whether R.C. 2903.211(A)(1) requires a victim to actually experience mental distress or only believe that the stalker will cause the victim physical harm or mental distress, for a court to issue a CSPO.

Appellant further appears to argue that our decision is in conflict with decisions of the Seventh and Tenth District Courts of Appeals on the issue of the “knowingly” element that must be proven for the issuance of a CSPO. Appellant cites to *Darling v. Darling*, 7th Dist. Jefferson Nos. 06 JE 6, 06 JE 7, 2007-Ohio-3151, and *Jenkins v. Jenkins*, 10th Dist. Franklin No. 06AP-652, 2007-Ohio-422, in support. Neither of these cases conflict with our decision on the issue of knowingly. While *Darling* does conflict with our decision on the issue of mental distress, that case is from the Seventh District Court of Appeals, the same court with which we have already identified a conflict as stated above. Moreover, *Jenkins* follows the same interpretation of R.C. 2903.211(A)(1) that this court follows. See *Jenkins*, *supra*, at ¶ 15.

Finding a conflict in our ruling and those of the Fourth, Seventh and Ninth District Courts of Appeals, we hereby grant appellant’s motion and certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue: Whether R.C. 2903.211(A)(1) requires a victim to actually experience mental distress or

only believe that the stalker will cause the victim physical harm or mental distress, for a court to issue a civil stalking protection order.

It is so ordered.

Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

The Supreme Court of Ohio

FILED

NOV 20 2013

CLERK OF COURT
SUPREME COURT OF OHIO

Dorothy Fondessy

Case No. 2013-1574

v.

ENTRY

Anthony Simon

This cause is pending before the court on the certification of a conflict by the Court of Appeals for Ottawa County. On review of the order certifying a conflict, it is determined that a conflict exists with respect to *Caban v. Ransome*, 7th Dist. Mahoning No 08 MA 36, 2009-Ohio-1034. The parties are to brief the issue stated at page 4 of the court of appeals' Judgment Entry filed September 20, 2013, as follows:

"Whether R.C. 2903.211(A)(1) requires a victim to actually experience mental distress or only believe that the stalker will cause the victim physical harm or mental distress, for a court to issue a civil stalking protection order."

It is ordered by the court that the clerk shall issue an order for the transmittal of the record from the Court of Appeals for Ottawa County.

(Ottawa County Court of Appeals; No. OT-11-041)



Maureen O'Connor
Chief Justice

B

FILED
COURT OF APPEALS
AUG 09 2013
GARY A. KOHLI CLERK
OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Dorothy Fondessy

Court of Appeals No. OT-11-041

Appellee

Trial Court No. 11-CV-515H

v.

Anthony Simon

DECISION AND JUDGMENT

Appellant

Decided:

AUG 09 2013

* * * * *

Ernest E. Cottrell, Jr., for appellee.

STATE OF OHIO, OTTAWA COUNTY.

I hereby certify this to be a true copy of original on file.

Wesley M. Miller, Jr., for appellant.

Subscribed to me this 9th day of

August 2013
Gary A. Kohli, Clerk of Courts

* * * * *

By: [Signature], deputy

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a civil stalking protection order ("CSPO") issued by the Ottawa County Court of Common Pleas against defendant-appellant, Anthony Simon, for the protection of plaintiff-appellee, Dorothy Fondessy, and her husband Wayne Fondessy. Simon now challenges that order through the following assignments of error:

1.

VOL 035 PG 547
JOURNALIZED
COURT OF APPEALS

C

Assignment of Error I.

The trial court erred as a matter of law when it granted the stalking civil protection order against the appellant.

Assignment of Error II.

The trial court erred, based on the weight of the evidence, when it granted a stalking civil protection order against the appellant.

{¶ 2} On September 27, 2011, Dorothy filed a petition seeking a CSPO against appellant for the protection of herself and her husband Wayne. In describing the nature and extent of the pattern of conduct that caused Dorothy to believe that appellant would cause her and Wayne physical harm or causes or has caused them mental distress, Dorothy attached to the petition written narratives from herself and Wayne regarding the history of appellant's harassing behavior toward them that they asserted caused them mental anguish. They asserted that over the past four years, appellant had engaged in harassing behavior toward them including trespassing, verbal abuse, inappropriate gestures, a death wish and obscenities. Dorothy stated that appellant had deliberately blocked her from mowing her lawn so that he could yell vulgarities at her and constantly yells obscenities and gives obscene gestures toward her and Wayne while they are gardening. The narratives also asserted that Wayne had open heart surgery in 2005, that appellant's behavior was affecting his health, and that the Fondessys were in fear of their lives and well-being. The lower court issued an ex parte civil protection order and

scheduled the matter for a full hearing. That hearing proceeded on October 18, 2011, at which the following evidence was presented.

{¶ 3} Dorothy testified that she and Wayne have lived at their home on North Genoa-Clay Center Road in Ottawa County since 1974. When they first built their home, Dorothy's uncle, Charles Simon, was their neighbor to the north. Appellant is Charles Simon's son. When Charles Simon died in 2005, appellant inherited his property and the disputes between the parties began. Initially, there was a property line dispute that was resolved with a survey. Dorothy then described a number of confrontations between the parties over the years.

{¶ 4} In 2006, appellant was upset that the Fondessys' lilac bushes were hanging over a fence that marked the property line. The Fondessys then gave appellant permission to trim the bushes but he used a chain saw to severely cut them, including the parts of the bushes that were on the Fondessys' property.

{¶ 5} The Fondessys' property contains a pond that abuts the parties' property line. Appellant regularly discharged lawn clippings into the pond when mowing his lawn. In late April 2006, Dorothy noticed appellant throwing sticks and debris into the pond. She approached appellant and asked him why he was throwing garbage into the pond. Appellant denied doing so and used vulgarities. Wayne then approached Dorothy and appellant, and appellant said to Wayne "I hope you have another heart attack and die."

{¶ 6} During another encounter, Dorothy testified that she was mowing her lawn at a time when appellant was also mowing his lawn. Appellant approached Dorothy and ran his mower into her mower at the property line. He then asked if she had sold any farmland recently. When Dorothy did not respond appellant called her a "f ***ing c**t."

{¶ 7} Dorothy also testified that over the years appellant has continually used his leaf blower to blow leaves and debris onto the Fondessys' property and has used a pipe to discharge sump pump water from his property onto the Fondessys' property.

{¶ 8} Dorothy stated that although appellant has never directly threatened her, throughout all of these exchanges, his verbiage and rage have caused her to fear him and have caused her mental distress. She further testified that she fears for her husband's health because he has high blood pressure and the confrontations upset him.

{¶ 9} Wayne Fondessy also testified regarding the numerous confrontations over the years. Wayne stated that during the parties' initial property line dispute, appellant threatened to take away an easement which lead to the Fondessys' farmland. Without the easement, the farmland would be worthless. Wayne stated that although he tried to not talk to appellant, he did witness many confrontations between Dorothy and appellant. He testified that during the incident when appellant was discharging his mower into the Fondessys' pond, Dorothy was highly upset, and was crying and shaking. Wayne further witnessed the incident when appellant ran his mower into Dorothy's. Wayne testified that when Dorothy was mowing the lawn, he saw appellant exit his garage with his mower, head straight for Dorothy and bump into her at the property line. Wayne also

testified as to a recent incident (within two months of the date of the hearing below) in which appellant was blowing leaves onto the Fondessys' property. Wayne stated that when appellant was blowing leaves and approaching the Fondessys' property, Wayne looked at appellant but did not say anything. Appellant then called Wayne "a black mother f***ing n***er" and gave him the finger. Wayne testified that he was very upset by the incident and that all of the incidents are upsetting. He further stated that he is concerned for his health because of the stress that all of the confrontations have caused him, that both he and Dorothy have been distressed by the confrontations, and that his doctor told him that the stress is bad for his blood pressure.

{¶ 10} Appellant also testified at the hearing below. Appellant admitted that he had discharged grass clippings, sticks and debris into the Fondessys' pond and he had used his leaf blower to blow leaves onto the Fondessys' property. He also agreed that it was reasonable that his actions would upset the Fondessys. He further admitted using profanities and vulgarities in his confrontations with the Fondessys, admitted to "flipping them off," and admitted that the confrontations were "heated" and upsetting to all three of them. He denied, however, the name calling to which the Fondessys testified and denied saying he wished Wayne would have another heart attack and die.

{¶ 11} On November 2, 2011, the lower court issued the CSPO that is before us on appeal. The court entered the order for the protection of both Dorothy and Wayne for a period of five years, ordered appellant to stay away from the Fondessys and not be present within 25 feet of them, ordered appellant to not initiate or have any contact with

the Fondessys, and ordered appellant to not enter or cause any item or thing to enter the Fondessys' property. It is from that judgment that appellant appeals.

{¶ 12} Appellant's assignments of error are related and will be discussed together. Appellant asserts that the CSPO entered by the lower court was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶ 13} Appellee filed her petition for a CSPO pursuant to R.C. 2903.214. That statute reads in relevant part:

(C) A person may seek relief under this section for the person, or any parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court. The petition shall contain or state all of the following:

(1) An allegation that respondent is eighteen years of age or older and engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order * * *, including a description of the nature and extent of the violation[.]

{¶ 14} For a trial court to grant a CSPO, the petitioner must show, by a preponderance of the evidence, that the complained of conduct violates the menacing by stalking statute. *Striff v. Striff*, 6th Dist. Wood No. WD-02-031, 2003-Ohio-794, ¶ 10. "Similarly, where the petitioner seeks protection of a 'family or household member' under a CSPO, the petitioner must show by a preponderance of the evidence that the respondent engaged in a violation of R.C. 2903.211 against the 'family or household

member' to be protected." *Retterer v. Little*, 3d Dist. Marion No. 9-11-23, 2012-Ohio-131, ¶ 25. When reviewing the issuance of a CSPO on appeal, we apply the civil manifest weight of the evidence standard. *Gruber v. Hart*, 6th Dist. Ottawa No. OT-06-011, 2007-Ohio-873, ¶ 17. Accordingly, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 15} R.C. 2903.211(A)(1) proscribes menacing by stalking and reads: "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." As used in R.C. 2903.211, "'pattern of conduct' means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents." R.C. 2903.211(D)(1). The statute, however, does not define "closely related in time." Accordingly, "the temporal period within which the two or more actions or incidents must occur * * * [is a] matter to be determined by the trier of fact on a case-by-case basis." *Ellet v. Falk*, 6th Dist. Lucas No. L-09-1313, 2010-Ohio-6219, ¶ 22. As the court in *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 10 (12th Dist.) explained,

Because the statute does not specifically state what constitutes incidents "closely related in time," whether the incidents in question were "closely related in time" should be resolved by the trier of fact "considering

the evidence in the context of all the circumstances of the case.” *State v. Honeycutt*, Montgomery App. No. 19004, 2002-Ohio-3490, 2002 WL 1438648, ¶ 26, citing *State v. Dario* (1995), 106 Ohio App.3d 232, 238, 665 N.E.2d 759. In determining what constitutes pattern of conduct for purposes of R.C. 2903.211(D)(1), courts must take every action into consideration even if, as appellant argues, “some of the person’s actions may not, in isolation, seem particularly threatening.” *Guthrie v. Long*, Franklin App. No. 04AP-913, 2005-Ohio-1541, 2005 WL 737402, ¶ 12; *Miller v. Francisco*, Lake App. No. 2002-L-097, 2003-Ohio-1978, 2003 WL 1904066, ¶ 11.

{¶ 16} The culpable mental state for the issuance of a CSPO is “knowing.” A person acts knowingly when, regardless of his purpose, “he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.” R.C. 2901.22(B). “A person has knowledge of circumstances when he is aware that such circumstances probably exist.” *Id.*

{¶ 17} Finally, “mental distress” is defined under R.C. 2903.211(D)(2) as either of the following:

- (a) Any mental illness or condition that involves some temporary substantial incapacity;
- (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health

services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

{¶ 18} The statute, however, “does not require that the victim actually experience mental distress, but only that the victim believes the stalker would cause mental distress or physical harm.” *Bloom v. Macbeth*, 5th Dist. Ashland No. 2007-COA-050, 2008-Ohio-4564, ¶ 11, citing *State v. Horsley*, 10th Dist. Franklin No. 05AP-350, 2006-Ohio-1208. Moreover, the testimony of the victim herself as to her fear is sufficient to establish mental distress. *Horsley* at ¶ 48.

{¶ 19} Upon a review of the record, we find that trial court’s order granting the CSPO was supported by competent, credible evidence. The record demonstrates that appellant engaged in a pattern of confrontational behavior over a four to five year period during which he used racial epithets and vulgar terminology toward the Fondessys. Appellant knew that the Fondessys were both in their seventies, and that Wayne had a history of heart trouble. Nevertheless, he blew debris and leaves onto their property knowing that it would upset them, yelled profanities at them knowing it would upset them, directed his lawn mower toward Dorothy, bumping into her for no apparent reason other than to call her a vulgar name, and expressed to the Fondessys his wish that Wayne would have another heart attack and die. What possible reason could he have had to make that statement other than to cause the Fondessys mental distress? While we recognize that “mental distress for purposes of the menacing by stalking statute is not mere mental stress or annoyance,” *Caban v. Ransome*, 7th Dist. Mahoning No.

08 MA 36, 2009-Ohio-1034, ¶ 29, the Fondessys both testified that because of appellant's behavior toward them and fits of rage, they were afraid of him and were afraid of how his actions were affecting Wayne's health. Indeed, a rational trier of fact could conclude that because appellant knew that the Fondessys were aging and that Wayne was in poor health, he knew that his actions and behavior would cause the Fondessys mental distress.

{¶ 20} We therefore conclude that the trial court did not err in granting the petition for a CSPO and the two assignments of error are not well-taken.

{¶ 21} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.



1 of 1 DOCUMENT

**NORMA CABAN, PLAINTIFF-APPELLEE, VS. ALONZO RANSOME,
DEFENDANT-APPELLANT.**

CASE NO. 08 MA 36

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,
MAHONING COUNTY**

2009-Ohio-1034; 2009 Ohio App. LEXIS 909

March 4, 2009, Decided

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 07CV3889.

DISPOSITION: Reversed and Vacated.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant ex-boyfriend sought review of the judgment of the Mahoning County Common Pleas Court (Ohio), which granted a civil stalking protection order (CSPO) against him in favor of appellee ex-girlfriend.

OVERVIEW: After dating for fourteen years, the parties terminated their relationship. About five months later, the girlfriend filed a petition for a CSPO. The court held that the trial court improperly granted the CSPO as the elements of menacing by stalking had not been demonstrated by some competent, credible evidence. The evidence did establish a pattern of conduct under *R.C. 2903.211(D)(1)*. However, the evidence did not show that the boyfriend caused the girlfriend to believe that he would cause her physical harm. In her testimony, the girlfriend did not state that she feared for her safety but instead testified that she feared that the boyfriend would confront her and ask her again why she broke up with him. Threatening to approach a person for conversation

was not a threat of physical harm. The alternative element of mental distress was not satisfied. The girlfriend did not testify that the boyfriend's call to her, stating that, when he found her, "all bets are off," caused her to develop a mental condition that involved some temporary substantial incapacity, as required by *§ 2903.211(D)(2)*, or that would normally require mental health services.

OUTCOME: The court reversed the judgment of the trial court, vacated the CSPO, and entered judgment for the ex-boyfriend.

COUNSEL: Norma Caban, Plaintiff-Appellee, Pro se, Youngstown, Ohio.

For Defendant-Appellant: Attorney James Gentile, Youngstown, Ohio.

JUDGES: Hon. Joseph J. Vukovich, Hon. Cheryl L. Waite, Hon. Mary DeGenaro. Waite, J., concurs. DeGenaro, J., concurs.

OPINION BY: Joseph J. Vukovich

OPINION

VUKOVICH, P.J.

[*P1] Defendant-appellant Alonzo Ransome appeals the decision of the Mahoning County Common Pleas Court granting a civil stalking protection order against him in favor of plaintiff-appellee Norma Caban. The issue is whether there was some competent, credible evidence on the elements of menacing by stalking, which is a prerequisite for granting a civil stalking protection order. For the following reasons, there was not some competent, credible evidence upon which the fact-finder could determine that appellant knowingly caused appellee to believe that he would cause her physical harm or alternatively that he knowingly caused appellee mental distress, *as statutorily defined*. For the following reasons, the judgment of the trial court is reversed on grounds of manifest weight of the evidence and the civil stalking protection order [**2] is vacated.

STATEMENT OF THE CASE

[*P2] Appellee dated appellant for fourteen years, and terminated the relationship at the end of May in 2007. After receiving multiple telephone messages from appellant over the summer, appellee filed a petition for a civil stalking protection order against him on October 17, 2007. An *ex parte* order was issued, and then the full hearing was held before a magistrate on November 5, 2007, where appellant and appellee both testified. At that time, the magistrate granted the petition for a protection order with an expiration date of November 5, 2009.

[*P3] The magistrate found that appellant repeatedly called and left messages at appellee's home and on her cellular telephone, he came to her place of employment and he left a threatening message stating that when he found her, "all bets are off." The magistrate concluded that the preponderance of the evidence established that appellant knowingly engaged in a pattern of conduct that "caused [appellee] to believe that [he] will cause physical harm or cause or has caused mental distress." The magistrate then prohibited appellant from contacting and coming within fifty yards of appellee or entering appellee's property and [**3] place of employment.

[*P4] Appellant filed timely objections to the magistrate's decision. On January 7, 2008, the trial court overruled the objections, adopted the magistrate's decision and granted appellee's petition for a civil stalking protection order. Because the clerk did not serve the parties with the entry until February 5, 2008, appellant's March 4, 2008 notice of appeal was timely

filed.

GENERAL LAW

[*P5] In order to grant a petition for a civil stalking protection order, the trial court must hold a full hearing and proceed as in a normal civil action. *R.C. 2903.214(D)(3)*. Notably, the petition is not evidence to be considered at that full hearing. *Felton v. Felton (1997), 79 Ohio St.3d 34, 42-43, 1997 Ohio 302, 679 N.E.2d 672*. The trier of fact must determine whether the preponderance of the evidence presented at the hearing establishes that the defendant engaged in a violation of *R.C. 2903.211*, which is the menacing by stalking statute. See *R.C. 2903.214(C)(1)*. See, also, *Felton, 79 Ohio St.3d at 42* (holding that since court considering a protection order is to proceed as in a normal civil action and since statute is silent on standard of proof, preponderance of evidence is the proper standard). The menacing by [**4] stalking statute provides:

[*P6] "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." *R.C. 2903.211(A)(1)*.

[*P7] Our standard of review for whether the protection order should have been granted and thus whether the elements of menacing by stalking were established by the preponderance of the evidence entails a manifest weight of the evidence review. *Abuhamda-Sliman v. Sliman 161 Ohio App.3d 541, 2005 Ohio 2836, P9-10, 831 N.E.2d 453*. See, also, *Felton, 79 Ohio St.3d at 42-43* (where Court evaluated whether there was sufficient credible evidence to support the decision that elements of protection order were satisfied). If there is a question as to the restrictions imposed by the court, however, we review the court's decision for an abuse of discretion. See *R.C. 2903.214(E)* (allowing court to design order to ensure safety and protection). See, also, *Abuhamda-Sliman, 161 Ohio App.3d 541 at P9, 2005 Ohio 2836, 831 N.E.2d 453*. Here, appellant's arguments are all concerned with the granting of the petition, not its contents or restrictions.

[*P8] Unlike criminal appeals, where we can reweigh the evidence, [**5] civil appeals require more deference to the trial court and require affirmance of those judgments supported by some competent and credible evidence. *State v. Wilson, 113 Ohio St.3d 382,*

2007 Ohio 2202, P26, 865 N.E.2d 1264. Thus, civil judgments supported by some competent and credible evidence cannot be reversed on appeal as being contrary to the manifest weight of the evidence. *Id.* at P24, citing *C.E. Morris Co. v. Foley Constr. Co. (1978)*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578. Thus, we must evaluate whether there was some competent, credible evidence on each element of menacing by stalking.

[*P9] In reviewing a trial court's weighing of competing evidence and credibility determinations, we are guided by a presumption that the trial court's factual findings are correct. *Id.* This is due in part to the fact that the trial court occupies the best position from which to view the witnesses and observe their demeanor, voice inflection, gestures, eye movements, etc. *Id.* We cannot reverse a civil judgment merely because we hold a different opinion on the weight of the evidence presented to the trial court and the credibility of the witnesses. *Id.*

ASSIGNMENT OF ERROR

[*P10] Appellant's sole assignment of error provides:

[*P11] "THE COURT ERRED [**6] IN ADOPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE."

[*P12] Appellant claims that after "a couple" efforts to contact appellee were rebuffed, he stopped attempting to communicate with her. He urges that this was a typical example of a long-term relationship ending. He alleges that there was no evidence to support the elements of menacing by stalking. More specifically, he contends there was no pattern of activity, he did not knowingly cause appellee to believe that he would cause physical harm, and there was no mental distress.

[*P13] Appellant's first argument concerns pattern of conduct, which is defined merely as two or more actions or incidents closely related in time. *R.C. 2903.211(D)(1)*. The pattern can include messages or information sent via computer or telephone. *R.C. 2903.211(D)(1),(6); 2913.01(V)*.

[*P14] At the November 2007 hearing, appellee complained that appellant had been calling her since June 2007, even though she told him in May that she did not want to speak to him again. (Tr. 4-5). She said that she spent all summer deleting his messages on her work and

home phones because he leaves more than the ten messages that the voice mail system will hold. (Tr. 5). She explained that [**7] on September 9, 2007, appellant came to an open house she was holding as a realtor, and appellant acknowledged that he went to this open house to talk. (Tr. 14).

[*P15] Appellee testified that appellant's October messages became threatening. She testified that one message stated that if he did not hear from her by midnight, then he would come looking for her at work or at a meeting or at an open house and that she would have to talk to him. (Tr. 7). Appellee played the latest October message for the court. (Tr. 8). The court could rationally believe this testimony on the amount of calls.

[*P16] Furthermore, appellant admitted that he called appellee repeatedly in July 2007 and conceded that he also emailed her. (Tr. 11-12). Appellant also disclosed that he called appellee's sister in Florida when she went on vacation. (Tr. 13). Consequently, there is some competent, credible evidence regarding a pattern of activity. Thus, the court's decision on this element is valid.

[*P17] Next, appellant contends that there was no evidence that he caused appellee to believe that he will cause her physical harm. This element was apparently found to exist because of appellant's persistence over the summer in combination [**8] with his final call, which appellee characterized as threatening and which the court also described as threatening because it relayed that "he would find her + 'all bets are off'." (Tr. 7-8). In that call, appellant gave appellee a deadline to contact him, advised that he would come looking for her at work, and expressed confidence that she would talk to him this time. (Tr. 7). Besides this call, appellee had also explained that appellant came to an open house she was working and that she sat in her car to avoid talking to him. (Tr. 6). She testified merely that she told him "no more talking" and that he left without responding. (Tr. 9-10).

[*P18] In a mere six pages of testimony given by appellee, she did not state that she feared for her safety. Instead, it seems as if what she feared was that appellant would confront her again and ask her again why she broke up with him after a fourteen-year relationship. The element of causing her to believe has subjective requirements. Labeling a call as threatening does not express a belief that the caller would cause physical harm. That is, threatening to approach a person for

conversation is not a threat of physical harm. As such, we cannot find [**9] some competent, credible evidence to support a finding that appellant knowingly caused appellee to believe that he would cause her physical harm.

[*P19] We turn to the question of whether the alternative element of mental distress was satisfied. To review, the menacing by stalking statute states:

[*P20] "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." *R.C. 2903.211(A)(1)*.

[*P21] Before proceeding to address what mental distress means, we must answer a statutory interpretation problem. Appellant's brief fluctuates between whether the defendant must have actually caused the victim to suffer mental distress or whether he need have only caused her to believe he would cause her mental distress. See *Apt. Br. at 7* versus *8*. The checked portion of the trial court's form entry proceeds as if the mental distress alternative is established by either causing mental distress or by causing the petitioner to believe that he will cause mental distress. See Order of Protection, page 2, first checked box ("caused [appellee] to believe that [he] will cause physical harm [**10] or cause or has caused mental distress") (emphasis added).

[*P22] Some courts have held that menacing by stalking can be found even if the defendant only caused the victim to believe that mental distress would be caused. See, e.g., *Irwin v. Murray*, 6th Dist. No. L-05-1113, 2006 Ohio 1633, P18; *Dayton v. Davis* (1999), 136 Ohio App.3d 26, 32, 735 N.E.2d 939 (2d Dist.).

[*P23] However, this district and various other districts proceed as if the test is whether mental distress was in fact caused. See *Darling v. Darling*, 7th Dist. Nos. 06JE6, 06JE7, 2007 Ohio 3151, P20 ("menacing by stalking involves either behavior that causes the victim to believe that he or she will be physically harmed, or behavior that causes mental distress to the victim"; *State v. Werfel*, 11th Dist. No. 2006-L-163, 2007 Ohio 5198, P26-27 (the test is whether defendant "knowingly acted in such a way that would cause a reasonable person to feel threatened of physical harm and/or suffer mental distress"); *Middletown v. Jones*, 167 Ohio App.3d 679,

2006 Ohio 3465, P7, 856 N.E.2d 1003 (12th Dist.); *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005 Ohio 3498, P18-19, 832 N.E.2d 757 (4th Dist); *State v. Tichon* (1995), 102 Ohio App. 3d 758, 763, 658 N.E.2d 16 (9th Dist).

[*P24] We maintain this position and further [**11] note that by repeating "to the other person" after both physical harm and mental distress, rather than merely placing it at the end of the sentence, the legislature expressed that "to believe" does not modify "mental distress". As such, any mental distress must have actually been caused.

[*P25] We can now address whether there was some competent, credible evidence to show that appellant knowingly and actually caused any mental distress here. The menacing by stalking statute specifically defines mental distress as follows:

[*P26] "(a) Any mental illness or condition that involves some temporary substantial incapacity; [or]

[*P27] (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services." *R.C. 2903.211(D)(2)*.

[*P28] Analyzing the available facts under the proper law, we conclude that there was not some competent, credible evidence showing that the defendant actually and knowingly caused mental distress. There is absolutely no indication that appellee developed a mental illness under *R.C. 2903.211(D)(2)(a)*. [**12] Thus, we are left with the question of whether there was some competent, credible evidence that she developed a mental condition that involved some temporary substantial incapacity or that would normally require mental health services. See *R.C. 2903.211(D)(2)(a)-(b)*.

[*P29] We acknowledge that the fact-finder can rely on its own experience and knowledge to determine if mental distress was caused. *Smith*, 162 Ohio App.3d 21, 2005 Ohio 3498 at P18, 832 N.E.2d 757. However, mental distress for purposes of menacing by stalking is not mere mental stress or annoyance.

[*P30] The magistrate heard evidence that appellant, who was appellee's boyfriend of fourteen

years, kept leaving appellant messages asking to talk about why their long-term relationship suddenly ended. Appellant's final message seemed to be the final straw which caused appellee to report appellant. The trial court failed to preserve this call for our review but did outline its contents. As set forth above, the call gave appellee a deadline to contact him, opined that he would find her wherever she is, warned that "all bets are off" and seemed confident that she would talk to him this time. The question is whether that call (combined with the prior behavior) actually caused [**13] appellee the kind of mental distress that is required by the definition portion of the statute.

[*P31] Appellee did not testify that it did cause her such distress. Nor did she mention any stress reactions that could qualify as temporary substantial incapacity or that would lead one to seek mental health services. Rather, the testimony showed that appellee is sick of appellant and that he is annoyingly obsessed with why she left him after all their years together and why she refuses to speak to him. The calls may constitute telephone harassment but do not by themselves establish mental distress was actually suffered.

[*P32] Nor did the open house encounter establish mental distress under the facts herein. Appellant did show up at her open house to which she responded by sitting in her car. See *id.* at P20 (evidence of changed routine can corroborate a finding of mental distress). However, he left after she told him that she would not speak to him. Even if this is enough to show mental stress, it is not enough to show mental distress as statutorily defined.

[*P33] We also point out that the magistrate read the petition into the record. (Tr. 4). Yet, as aforementioned in our general recital of the relevant [**14] law, the petition is not evidence and its contents cannot be considered by the court in granting a petition. See *Felton, 79 Ohio St.3d at 42-42* (holding that pleading is not evidence so answer to petition for protection order cannot be used by court).

[*P34] In conclusion, without any mention of or allusion to her mental state in the evidence presented to the court, the fairly stringent test of mental distress has not been met under the particular facts and circumstances of this case. Considering the totality of these facts and circumstances, the elements of menacing by stalking have not been demonstrated by some competent, credible evidence.

[*P35] For all of the foregoing reasons, we hereby reverse the granting of the civil stalking protection order on manifest weight of the evidence grounds. In the appeal of a civil non-jury trial, two appellate judges can reverse and remand one time on weight of the evidence grounds or the appellate court can enter the judgment that the trial court should have entered on that evidence. *App.R. 12(C)*. We choose to vacate the civil stalking protection order and enter judgment for appellant.

Waite, J., concurs.

DeGenaro, J., concurs.