

**IN THE SUPREME COURT OF OHIO**

<b>DOROTHY FONDESSY</b>	*	<b>CASE NO. 2013-1574</b>
<b>Appellee</b>	*	
	•	<b>Appeal from the Ottawa County Court of Appeals, Sixth Appellate District</b>
<b>ANTHONY SIMON</b>	*	
<b>Appellant</b>	*	
	*	

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MERIT BRIEF OF APPELLEE DOROTHY FONDESSY

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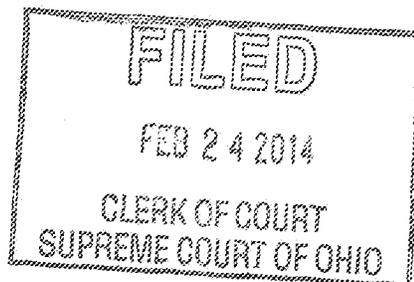


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## **STATEMENT OF THE FACTS**

The Appellee and her husband have lived next to the Appellant since the 1970's. There had been no incidents between the parties until 2005, when the Appellant's father, Charles Simon, died. After that time, there have been ongoing and constant disputes between the parties. Those disputes began with a property line dispute in 2005. The property line dispute was resolved by a survey, however, it began the larger dispute between the parties.

Serious confrontations began in 2006, when the Appellant, with the use of a chainsaw, cut down and severely trimmed the Appellee's lilac bushes over and across the property line. (Trial transcript page 8 (hereinafter T 8)). Contrary to the Appellant's statement of facts that there have been only six incidents between the parties, uncontroverted testimony in the Trial Court showed that the Appellant was constantly cutting the Appellee's trees and bushes from 2006 to the present. (T 16). A second source of irritation between the neighbors was the Appellant's constant discharge of grass, weeds, sticks and other debris into the yard and pond owned by the Appellee and her husband. In fact, a photograph was introduced at the trial showing the Appellant mowing his yard and intentionally discharging debris into the Appellee's pond. (T 11, 16, 37, 40 and 50).

Other evidence considered by the Trial Court showed that the Appellant had intentionally thrown debris into the Appellee's pond and had used a leaf blower to blow debris onto the Appellee's property. (T 11, 21, 42, 51 and 94).

A third and frequent source of dispute between the parties, was the Appellant's discharge of his sump pump onto the Appellee's property. This caused flooding and the movement of debris onto the Appellee's property. (T 16, 20 and 56).

All of the above actions taken by the Appellant led to numerous confrontations over the years. These confrontations often became heated, and included the use of vulgarities, hand gestures, and even led to the calling of the police on multiple occasions. (T 13, 43, 57, 59 and 65). It was clear to the Trial Court that these confrontations were extremely upsetting to all parties involved. (T 13, 38, 39, 54 and 57). The Appellee testified that she was afraid of the Appellant because of the gestures, language, accusations and the fits of rage that the Appellant would show during these confrontations. (T 22). Further, the Appellee was afraid for her husband's physical well-being based on his medical condition. (T 21 and 23). Mr Fondessy testified that he observed how upset the Appellee became during these confrontations. She would become so upset that she would shake and cry. (T 39).

Even the Appellant admitted that these confrontations were upsetting to both sides, and were in his words, "scary". They were so scary that he continually called the police regarding these confrontations. (T 57, 65 and 81). The confrontations escalated and ultimately resulted in the filing of the Civil Stalking Protection Order by the Appellee.

On November 2, 2011, the Trial Court granted a Civil Stalking Protection Order against the Appellant, Anthony G. Simon. Since that time, there have been no confrontations or disputes between the neighbors.

On August 9, 2013, the Court of Appeals upheld the Civil Stalking Protection Order by finding that the Trial Court's Order was supported by competent, credible evidence

demonstrating that the Appellant had engaged in a pattern of confrontational behavior over a four to five year period during which time the Appellant used racial epithets, vulgar terminology, blew debris and leaves in the Appellee's yard, bumped Appellee on her mower and expressed his wish that the Appellee's husband would have a heart attack and die. Fondessy v. Simon, 6<sup>th</sup> Dist. Ottawa No. OT-11-041 ¶ 19.

## ARGUMENT

### Proposition of Law

**In order for a Trial Court to issue a Civil Stalking Protection Order (CSPO), Ohio Revised Code Section 2903.211(A)(1) merely requires that the victim believes the stalker will cause mental distress or physical harm.**

In the present case, the statute in question is Ohio Revised Code Section 2903.211(A)(1), which has been interpreted differently by the Ohio Courts of Appeal.

Said statute reads as follows:

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 recognized that the primary rule in Statutory Construction is to give effect to the legislature's intentions. Cline v. Ohio Bureau Of Motor Vehicles, 61OhioSt. 3d 93, 97 (Ohio 1991).

Because there are no legislative notes to indicate the exact intent of the legislature regarding Ohio Revised Code 2903.211(A)(1), Courts must first look to the plain meaning and common sense reading of said Code Section.

In at least one Court of Appeals decision, the Court found that a common sense reading of Ohio Revised Code Section 2903.211(A)(1) supports an interpretation that only a belief of possible mental distress is required. Griga v. DiBenedetto, 1<sup>st</sup> District Hamilton No. C-120300, 2012-Ohio-6097, ¶ 13. In fact, that Court found that an interpretation requiring actual mental distress would undermine the legislative intent of the statute. (Id at ¶ 12).

The majority of Ohio Courts of Appeals have found that the showing of actual mental distress is not required under Ohio's Menacing by Stalking statute, but rather, merely a showing that the victim believes the stalker will cause mental distress or physical harm. See Ensley v. Glover, 6<sup>th</sup> Dist. Lucas No. L-11-1026, 2012-Ohio-4487, ¶ 13; Griga v. DiBenedetto, 1<sup>st</sup> Dist. Hamilton No. C-120300, 2012-Ohio-6097, ¶ 13; Dayton V. Davis, 136 Ohio App. 3d 26, 32; 1999-Ohio-928, 735 N.E.2d 939 (2<sup>nd</sup> Dist. 1999); Holloway v. Parker, 3d Dist. Marion No. 9-12-50, 2013-Ohio-1940, ¶ 23; Bloom v. Macbeth, 5<sup>th</sup> Dist. Ashland No. 2007-COA-050, 2008-Ohio-4564, ¶ 11; Rufener v. Hutson, 8<sup>th</sup> Dist. Cuyahoga No. 97635, 2012-Ohio-5061, ¶ 13; Cooper v. Manta, 11<sup>th</sup> Dist. Lake No. 2011-L-035, 2012-Ohio-867, ¶ 33; and State v. Hart, 12<sup>th</sup> Dist. Warren No. CA2008-06-079, 2009-Ohio-997, ¶ 31.

In attempting to determine the legislative intent as to a statute, the Courts may consider the object to be attained and the consequences of a particular construction. (Ohio Revised Code Section 1.49(A)(E)) If this Court were to determine that victims must prove mental distress, it would be contrary to the legislative goal of preempting an incident before it has an opportunity to escalate. Griga, 2012-Ohio-6097, ¶ 12. Requiring a victim to show actual mental distress or physical harm would mandate that a situation escalate before a Court could intervene. If this Court were to require an actual showing of mental distress, the holding would be contrary to the legislative goal of preempting an incident before it occurs.

Petitioners in Civil Stalking Protection Order cases will still be required to show a reasonable belief that the Offender will cause mental distress or physical harm. The Trial Court must still rely on the evidence placed before it to determine whether the mental distress element has been established. Holloway, 2013-Ohio-1940 at ¶ 27.

By adopting the majority standard requiring the mere belief that the Offender will cause mental distress, this Court will prevent further escalation of ongoing conflicts before criminal or violent behavior occurs. The purpose of the Ohio Civil Stalking Protection Order statute should be interpreted as a preventative measure.

The Appellant argues that the lesser standard will contribute to innocent respondents being ensnared in the legal system by vexatious petitioners. (Merit Brief of Appellant at 5, Fondessy v. Simon, 2013-1574 (Ohio 2014)). The majority standard however, allows the Trial Court to adequately and efficiently address legitimate cases as well as dismiss cases having no merit.

The majority standard still provides the Courts with the means of dismissing petitions where the evidence does not warrant a Civil Stalking Protection Order. Rufener, 2012-Ohio-5061 ¶ 1. This Court should be mindful that many of the requests for Civil Stalking Protection Orders are litigated without the use of Counsel. In fact, many of the cases cited in this Brief have had at least one party that was not represented by Counsel at the Trial Court. (Ensley, Griga, Holloway, Bloom and Caban).

Many of the litigants seeking a Civil Stalking Protection Order are pro-se because they are unable to afford legal Counsel. If this Court were to adopt the higher standard of proving

mental distress, many cases may be dismissed, not because they have no merit, but because of the litigants lack knowledge of the legal system.

It is often difficult even for Counsel to prove actual mental distress in stalking cases. At least one Court of Appeals noted that stalkers “engage in psychological warfare, which by it’s nature is devious, insidious and subtle.....”. Cooper, 2012-Ohio-867, quoting State v. Werfel, 22<sup>nd</sup> Dist. No.2006-L-163, 2007-Ohio-5198 ¶ 34, quoting Paulus v. Rucker, 11<sup>th</sup> Dist. No.2002-P-0080, 2003-Ohio-2816, ¶ 35 (Christley J., concurring). This subtle and psychological warfare is the exact harm the statute attempts to protect, yet is the hardest for a petitioner to prove. By adopting the minority standard, the Court would increase the chance that psychologically damaging conduct would not only go unpunished, but would not even give rise to protection by the Courts.

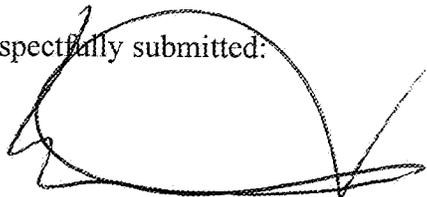
Even the Appellant, in his Brief, concedes that “the protection of the endangered persons is of the utmost concern and the primary reason for the stalking statute” (Merit Brief of Appellant at 5, Fondessy v. Simon, 2013-1574 (Ohio 2014)). It therefore would be counter-productive for this Court to interpret this statute in such a way as to severely limit the Ohio Trial Courts from issuing protective orders against stalkers.

## CONCLUSION

The majority of the Ohio Appellate Courts have correctly found that a petitioner seeking a Civil Stalking Protection Order need only prove that the victim believes the stalker will cause mental distress or physical harm. That standard has been correctly established by a majority of the Ohio Courts of Appeals. The implementation of that standard further provides the appropriate preemptive measures for a Court to issue an order and therefore prohibit the escalation of a civil dispute.

Wherefore, the Appellee requests that this Court affirm the Judgment of the Sixth District Court of Appeals, finding that substantial justice had been granted in the Judgment of the Ottawa County Court of Common Pleas.

Respectfully submitted:

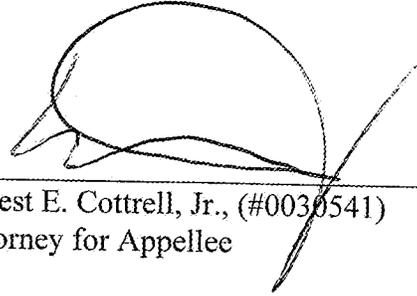


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Ernest E. Cottrell Jr., (#0030341)  
Attorney for Appellee, Dorothy Fondessy

**PROOF OF SERVICE**

The foregoing instrument was sent by ordinary U. S. Mail this 21 day of February, 2014, to Attorney Wesley M. Miller, Jr, P.O. Box 352530, Toledo, Ohio 43635.

A handwritten signature in black ink, appearing to read "Ernest E. Cottrell, Jr.", is written over a horizontal line. The signature is stylized and somewhat cursive.

Ernest E. Cottrell, Jr., (#0030541)  
Attorney for Appellee

§ 1.49. Determining legislative intent.

**Ohio Statutes**

**GENERAL PROVISIONS**

**Chapter 1. DEFINITIONS; RULES OF CONSTRUCTION**

*Current with Legislation effective as of 12/1/2013*

**§ 1.49. Determining legislative intent**

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

**Cite as R.C. § 1.49**

**History.** Effective Date: 01-03-1972

§ 2903.211. Menacing by stalking.

**Ohio Statutes**

**Title 29. CRIMES - PROCEDURE**

**Chapter 2903. HOMICIDE AND ASSAULT**

*Current with Legislation effective as of 12/1/2013*

**§ 2903.211. Menacing by stalking**

- (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.
  - (2) No person, through the use of any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, or computer system, shall post a message with purpose to urge or incite another to commit a violation of division (A)(1) of this section.
  - (3) No person, with a sexual motivation, shall violate division (A)(1) or (2) of this section.
- (B) Whoever violates this section is guilty of menacing by stalking.
- (1) Except as otherwise provided in divisions (B)(2) and (3) of this section, menacing by stalking is a misdemeanor of the first degree.
  - (2) Menacing by stalking is a felony of the fourth degree if any of the following applies:
    - (a) The offender previously has been convicted of or pleaded guilty to a violation of this section or a violation of section 2911.211 of the Revised Code.
    - (b) In committing the offense under division (A)(1), (2), or (3) of this section, the offender made a threat of physical harm to or against the victim, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message made a threat of physical harm to or against the victim.
    - (c) In committing the offense under division (A)(1), (2), or (3) of this section, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives,

is employed, or attends school.

- (d) The victim of the offense is a minor.
  - (e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person.
  - (f) While committing the offense under division (A)(1) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(1) of this section, the offender had a deadly weapon on or about the offender's person or under the offender's control. Division (B)(2)(f) of this section does not apply in determining the penalty for a violation of division (A)(2) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(2) of this section.
  - (g) At the time of the commission of the offense, the offender was the subject of a protection order issued under section 2903.213 or 2903.214 of the Revised Code, regardless of whether the person to be protected under the order is the victim of the offense or another person.
  - (h) In committing the offense under division (A)(1), (2), or (3) of this section, the offender caused serious physical harm to the premises at which the victim resides, to the real property on which that premises is located, or to any personal property located on that premises, or, as a result of an offense committed under division (A)(2) of this section or an offense committed under division (A)(3) of this section based on a violation of division (A)(2) of this section, a third person induced by the offender's posted message caused serious physical harm to that premises, that real property, or any personal property on that premises.
  - (i) Prior to committing the offense, the offender had been determined to represent a substantial risk of physical harm to others as manifested by evidence of then-recent homicidal or other violent behavior, evidence of then-recent threats that placed another in reasonable fear of violent behavior and serious physical harm, or other evidence of then-present dangerousness.
- (3) If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, menacing by stalking is either a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's

or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

- (C) Section 2919.271 of the Revised Code applies in relation to a defendant charged with a violation of this section.
- (D) As used in this section:
  - (1) "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. Actions or incidents that prevent, obstruct, or delay the performance by a public official, firefighter, rescuer, emergency medical services person, or emergency facility person of any authorized act within the public official's, firefighter's, rescuer's, emergency medical services person's, or emergency facility person's official capacity, or the posting of messages or receipt of information or data through the use of an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."
  - (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.
  - (3) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in section 2133.21 of the Revised Code.
  - (4) "Emergency facility person" is the singular of "emergency facility personnel" as defined in section 2909.04 of the Revised Code.
  - (5) "Public official" has the same meaning as in section 2921.01 of the Revised Code.
  - (6) "Computer," "computer network," "computer program," "computer system," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.
  - (7) "Post a message" means transferring, sending, posting, publishing, disseminating, or otherwise communicating, or attempting to transfer, send, post, publish, disseminate, or otherwise communicate, any message or information, whether truthful or untruthful, about an individual, and whether done under one's own name,

under the name of another, or while impersonating another.

- (8) "Third person" means, in relation to conduct as described in division (A)(2) of this section, an individual who is neither the offender nor the victim of the conduct.
  - (9) "Sexual motivation" has the same meaning as in section 2971.01 of the Revised Code.
- (E) The state does not need to prove in a prosecution under this section that a person requested or received psychiatric treatment, psychological treatment, or other mental health services in order to show that the person was caused mental distress as described in division (D)(2)(b) of this section.
- (F)
- (1) This section does not apply to a person solely because the person provided access or connection to or from an electronic method of remotely transferring information not under that person's control, including having provided capabilities that are incidental to providing access or connection to or from the electronic method of remotely transferring the information, and that do not include the creation of the content of the material that is the subject of the access or connection. In addition, any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control shall not be liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section.
  - (2) Division (F)(1) of this section does not create an affirmative duty for any person providing access or connection to or from an electronic method of remotely transferring information not under that person's control to block the receipt or transmission through its service of any information that it believes is, or will be sent, in violation of this section except as otherwise provided by law.
  - (3) Division (F)(1) of this section does not apply to a person who conspires with a person actively involved in the creation or knowing distribution of material in violation of this section or who knowingly advertises the availability of material of that nature.

**Cite as R.C. § 2903.211**

**History.** Effective Date: 08-29-2003; 2007 SB10 01-01-2008