

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

**REPLY BRIEF OF APPELLANT ANTHONY SIMON PUSUANT TO CERTIFIED
CONFLICT**

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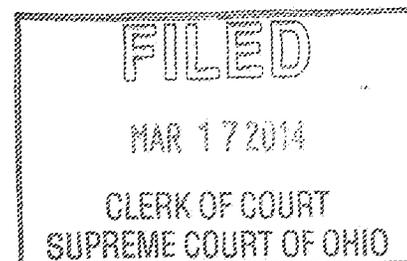
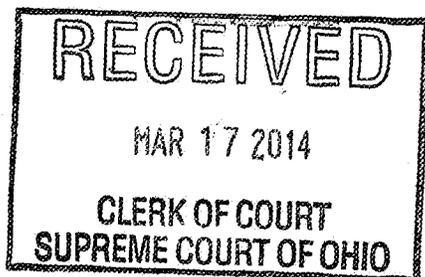


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STATEMENT OF FACTS

The Appellee attempts to persuade the court by showing how the facts support granting her a civil stalking protection order (CSPO). The Appellee sets forth facts that are not relevant to the issue before the court. The significant fact is that neither the Appellee nor her husband set forth any testimony to support the mental distress as defined in the R.C. 2903.211(D)(2). The issue before the Court is one of law not facts.

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.

The Appellee takes the position that a common sense reading of the statute supports that one must only believe that mental distress might be caused, and that the majority of districts adhere to this interpretation. In *Griga v. DiBenedetto*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6097, ¶ 12 the court voiced its view stating “The minority view requires actual harm to have occurred before a violation based on “mental distress” can be established. In light of the legislature's clear intent to stop harm before it occurs, combined with the somewhat high standard that must be met to show “mental distress,” we find that a “common sense” reading supports the majority view.” Thus reaching a conclusion that any other interpretation would undermine the legislative intent of the statute. While this is currently the majority view it is not conclusive that it is the proper view or interpretation of the statute.

Appellee argues the statute is ambiguous. Appellant does not agree and argues that the “common sense” reading of the statute set forth in *Griga* ignores the grammatical

construction of the statute. Surely the legislators are astute in the drafting of laws and they would have paid attention to the grammatical construction as a significant item in the drafting, and carefully crafted the language and punctuation. (See Appellant's Merit Brief, p. 3-4) R.C. 1.42 states in pertinent part "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." The majority view violates this premise.

The Appellee further argues that to interpret the statute any other way undermines the legislative intent, reasoning that such an interpretation mandates the situation to escalate to actual physical harm or mental distress before the court could intervene thus defeating the legislative intent of preempting an incident before it occurs. It is easy to buy into this view and believe that justice has been served, however the argument here is that the "standard" of *actual* mental distress is no different than what the statute requires to establish physical harm: that is some effect that supports mental distress as defined in R.C. 2903.211(D)(2). What is the purpose of R.C. 2903.211(D)(2) if not to provide direction and clarification to the court in the application of R.C. 2903.211(A)(1)? The statute must be read as a whole and construed as such. See *State of Ohio v. Moaning*, 76 Ohio St.3d 126 (1996) ¶ 4, 666 N.E.2d 1115, 1996 -Ohio- 413 (citation omitted). The majority view does not consider the statute as a whole in reaching its interpretation.

A "common sense" reading of the statute results in the conclusion that (D)(2) was written to define mental distress because it is required in (A)(1) that the petitioner experience mental distress. This argument refutes the contention that the statute is ambiguous; and therefore requires the court to determine legislative intent from the language of the statute: *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93 (1991) ¶

5, 573 N.E.2d 77 (citations omitted); and in determining intent, it is the duty of the court to give effect to the words used, not to delete words used or insert words not used; *Id.* (citations omitted). The majority view would require an inference or interpretation of R.C. 2903.211(A)(1) to establish “believe” as relating to the mental distress when it is not stated as such in the statute. And since the statute is not ambiguous (as argued above) they do not have the authority to do so.

The cases cited by Appellant (Appellate Brief, p. 11-15) show the effect of actual mental distress to be simple items that reflect a change in the petitioner’s normal activity; e.g. missing a day of work; changing the route one travels to work; not doing things one normally might do; among other changes in one’s routine. This list is not meant to be all inclusive as one well knows the circumstances for each case are different. These are items that would more than likely manifest if mental distress was “actually” caused. The proof of such items does not present a difficult burden but merely requires the testimony of the petitioner. And this added “burden” provides the court the basis to find “mental distress” was caused by the respondent. It is a measure that assures, to a reasonable degree, that the petitioner has actually suffered mental distress by the actions of the respondent. And it offers substantiation beyond ‘I believed it would cause me mental distress’ which is in reality no standard. As the *Caban* court voiced “simply being upset at someone does not qualify as mental distress”. See *Caban v. Ransome*, 7th Dist. No. 08 MA 36, 2009-Ohio-1034, ¶ 29. This substantiation of mental distress does not undermine the legislative intent but supports it.

Appellant and Appellee agree that the legislative intent is to avoid a situation from escalating to one of harm to either party. Requiring the petitioner to provide

evidence to support mental distress, as described above, is minimal and does not compel the court to wait until harm is caused before it can intervene. In assessing the physical harm aspect of the statute and the case law it (physical harm) is shown by some overt act or threat which is a precursor for the court to arrive at the conclusion that the petitioner really has a basis for the perceived harm. Why should the 'standard' be any different for the mental distress element? It should not. The simple items illustrated above serve as a precursor for mental distress and allow the court to achieve the legislative intent – preemption. As the Appellee states, the court must still rely on the evidence placed before it. This also works to prevent vexatious litigation.

A concern set forth by the Appellant is innocent respondents being ensnared in the legal system, which could be as long as five years, by vexatious petitioners. (See Appellant's Merit Brief, p. 5-6) The Appellee argues that the majority standard works to this prevent this type of litigation and perhaps it does, as I am sure the courts do not want to promote meritless cases. But by adopting the same 'precursor test' for the mental distress element as for the physical harm element it provides one more measure to insulate an innocent party from a vindictive petitioner. The test also promotes consistency in the interpretation and application of the statute. The Appellee further expresses concern that a pro se litigant could be deprived of the court's protection due to this "higher standard" of proving mental distress.

Here the Appellee argues that a pro se litigant would not be aware of this "higher standard" and therefore has a less likely chance of securing the court's protection, but such is not the case. How is this different from the "burden" for physical harm? It is not. The pro se litigant must make his case for each which should flow naturally if harm and

mental distress were present. The court has the prerogative to inquire of a witness and therefore has the ability to insure the pro se litigant has the opportunity to present evidence as a precursor of mental distress. But doesn't this create a burden for the court? No. Since the court can intercede should they choose to do so in the interest of protecting the pro se petitioner from any potential harm or mental distress. But the "higher standard" makes it more difficult for counsel to prove actual mental distress argues the Appellee.

If a petitioner suffers mental distress surely he/she should be able to give testimony as how that mental distress affected them. If a stalker is engaging in psychological warfare, which is probably atypical in cases such as this one, the petitioner would be able to provide reasons that support the claim of mental distress. Appellant cites example of this in his brief to the Sixth District Appellate Court. (Appellate Brief, p.11-15) The "higher standard" does not make it difficult for counsel to prove mental distress but only requires the petitioner give an effect for the mental distress, which is only rational when applying R.C. 2903.211(D)(2). Appellee suggests that adoption of the "minority standard" would allow this type of conduct to go unpunished and not allow protection by the court.

Both Appellant and Appellee agree that the protection of the endangered petitioner is the primary concern, not that a "stalker" be punished. The remedies to the court are meant to protect the petitioner even though they may be restrictive to the respondent they are not punitive in nature. However should a respondent violate the CSPO there are punitive measures the court could take. The court has the responsibility to protect not only the petitioner from the harmful acts of a stalker, but also to protect the respondent from retaliatory or vexatious allegations/lawsuits. The "minority view" - to

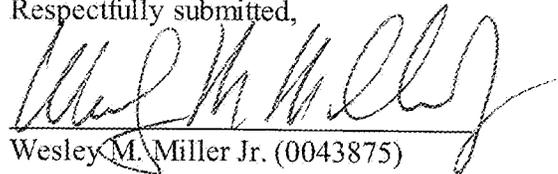
actually cause mental distress, not merely mental distress as an annoyance - as set forth in *Caban*, Supra ¶ 24, 29, accomplishes this.

CONCLUSION

The minority view correctly interprets and applies the statute. The minority view protects the petitioner and the respondent as intended by the legislature.

The judgment of the Sixth District appeal court must be reversed and the protection order vacated as a matter of law and justice.

Respectfully submitted,

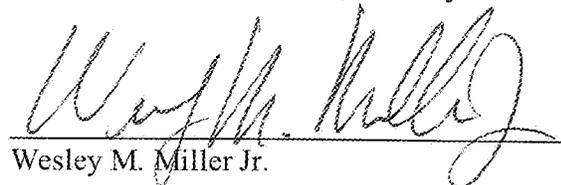


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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 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.



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