[Cite as *Ellet v. Falk*, 2010-Ohio-6219.]

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

Richard Ellet, Jr.	Court of Appeals No. L-09-1313
Appellee	Trial Court No. CI0200904749
v.	
Deborah Falk & Karl Falk	**DECISION AND JUDGMENT**
Appellants	Decided: December 17, 2010

* * * * *

Heather J. Fournier, for appellee.

Kelli S. Jelinger, for appellants.

* * * * *

COSME, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas granting a stalking civil protection order ("SCPO") to appellee, Richard Ellett, Jr., for the protection of his minor children from their aunt and uncle. Appellants, Deborah Falk and Karl Falk, challenge the issuance of the order as being contrary to the manifest

weight of the evidence and based on hearsay testimony. Because we conclude that the SCPO was supported by competent, credible evidence going to all the essential elements of menacing by stalking under R.C. 2903.211, we affirm the judgment of the trial court.

I. TESTIMONY PRESENTED AT FULL HEARING

{¶ 2} On June 8, 2009, appellee filed a petition for a SCPO pursuant to R.C. 2903.214 on behalf of his wife, Susan Ellett, and his twin daughters, both minors. The children are the nieces of appellants; Susan Ellett and Deborah Falk are sisters. An ex parte civil protection order was issued that day and the matter was scheduled for a full hearing on June 18, 2009. By consent of the parties, the hearing was continued to November 3, 2009, and the ex parte order remained in effect. The following testimony was presented at the hearing.

{¶ 3} By all accounts, Susan Ellett and Deborah Falk enjoyed a magnanimous sibling relationship until 2005, when their father was tragically killed in an explosion. Following their father's death, the sisters became embroiled in a protracted legal battle in regard to the administration of his estate. As a result, their relationship, and that of their respective families, significantly deteriorated to the point of estrangement.

{¶ 4} According to the Elletts, over the next two years Deborah left numerous aggressive or threatening messages on their answering machine demanding to see the twins and expressing anger when the Elletts did not respond, sometimes stating that the whole family was dead as far as she was concerned. On numerous intermittent occasions, Deborah sat in her car at the end of the street on which the Elletts reside and watched the children as

they played in their front yard. On one occasion, Karl and Debbie parked in front of the Ellett's house and asked the twins to approach their vehicle. The twins became increasingly anxious and frightened following contact with their aunt and uncle. One of them was hospitalized for a week due to stress-related abdominal pains. The Elletts asked Deborah to stay away from the children. They also attempted unsuccessfully to file a police report in regard to these incidents.

{¶ 5} In the summer of 2008, Susan and Deborah attempted to reconcile their relationship. During that time, the families met at a ball park, but one of the Ellett twins was "afraid of being around [the Falks] not sure what was going on." Later, the twins indicated that they did not want to participate in a visit between them and Deborah. Susan then told Deborah that the twins were not ready for such contact and that while "[h]er and I could do something [together], * * * I had to let my girls work their way into it." In December 2008, Deborah called Susan in order to arrange a time when she could deliver some Christmas presents for the twins. Susan did not return her call and Deborah left the presents on the Elletts' front porch.

{¶ 6} On April 22, 2009, Richard Ellett took one of his daughters to Ideal Hot Dogs, where they frequently ate. They had eaten breakfast there two weeks prior on April 9, 2009, and were attended by the same waitress on both occasions. According to Mr. Ellett, the waitress approached him and his daughter on the second occasion and told them that "Debbie had visited the restaurant approximately 10 to 15 minutes after [my daughter] and I did on the 9th inquiring why [my daughter] was out of school and if she

could attend—if she knew where the children attended school and if Debbie could attend the kids' functions at the kids' school * * *." Over appellants' objection, the trial court accepted this testimony "as an incident alleged," but not for the truth of the matter asserted.

{¶ 7} On May 31, 2009, the Elletts attended a Toledo Mud Hens game at Fifth Third Field. The girls were attending the game on behalf of their school baseball team. The Falks, whose son Andrew was working as a vendor at the stadium, were also in attendance at the game. At the beginning of the game, the twins were invited onto the field during the singing of the National Anthem. Deborah approached the twins as they were entering onto the field and Richard asked her to please stay away from the children and leave them alone. Deborah proceeded to take pictures of the twins throughout the game. Later in the evening, the children were permitted to run the bases. While the twins were on the field, their coach, who was aware of the situation between the families, informed the Ellets that Deborah and Karl were waiting at the exit to approach the children when they came off the field. Richard went down to redirect his children. At that point, Karl purportedly approached Richard in an aggressive manner and inquired as to his earlier conversation with Deborah. Richard responded, "I'll tell you the same thing I told her, it's about the children tonight, please leave us alone." A brief physical altercation then ensued between Richard and Karl.

{¶ 8} When Susan and Richard arrived home that night from the game, a message was left on their answering machine in which Deborah yelled at Susan about the incident,

demanded a return call, and proclaimed "you're all dead as far as I'm concerned." The children heard the message and became so afraid to leave their parents' sight that they missed their last week of school. The Elletts testified that they contacted the police and played the message for them, but the police declined to take any action because they interpreted the message as a threat of familial disassociation, rather than physical harm.

{¶ 9} In their testimony, the Falks essentially denied that they had ever harassed or threatened the Elletts or their children and either refuted or explained each incident alleged by the Elletts. They denied the bulk of the claimed incidents, except for having left the Christmas presents on the Elletts' front porch. They denied ever having been told by the Elletts to stay away from the twins until May 31, 2009, at the Mud Hens game. They denied the remainder of the Elletts' version of the events on that evening and testified that Richard was the aggressor in the altercation between him and Karl. Deborah admitted to leaving the message for Susan on her answering machine after the game, but vehemently denied that it was intended or spoken as any sort of physical threat.

{¶ 10} At the conclusion of the hearing, the trial court indicated that it would grant the petition and enter a SCPO against the Falks for the protection of the children. In so doing, the court stated that it did not believe "every element of the facts" as presented by the Elletts. Specifically, the court did not believe that Deborah had been "sitting in the neighborhood watching" the children or that she was stalking the children by "taking a picture of them from third base." On November 10, 2009, the trial court issued separate

orders of protection against Karl Falk and Deborah Falk for a term of one year, listing the twins as the protected persons.

{¶ 11} The Falks have appealed these orders, raising two assignments of error.

II. MANIFEST WEIGHT OF THE EVIDENCE

{¶ 12} In their first assignment of error, appellants assert:

{¶ 13} "The trial court erred based on the weight of the evidence in granting a Civil Stalking Protection Order because appellee did not prove by a preponderance of the evidence the appellant engaged in a pattern of conduct that knowingly caused the appellee to believe the appellant would cause physical harm or mental distress."

{¶ 14} Appellants argue that appellee failed to establish the elements of menacing by stalking. Specifically, appellants claim that no competent, credible evidence was presented by appellee to support a finding that they engaged in a "pattern of conduct," that they "knowingly" caused the children to suffer or believe they would suffer mental distress or physical harm, or that their actions were in fact the "cause" of any alleged "mental distress." According to appellants, all of the evidence presented by appellee with regard to the alleged incidents and elements of stalking "has either been deemed [by the trial court] not to be stalking, or has been deemed unbelievable by the court, or does not rise to the level of having been more then (sic) one incident in a short span of time." Thus, appellants contend that the trial court's judgment was against the manifest weight of the evidence.

{¶ 15} We disagree.

{¶ 16} R.C. 2903.214 provides for the issuance of a SCPO against a respondent who engaged in a violation of R.C. 2903.211, the menacing by stalking statute. Pursuant to R.C. 2903.214(C), "any parent or adult household member may seek relief under this section on behalf of any other family or household member." In order for a SCPO to issue, the petitioner must show by a preponderance of the evidence that the respondent violated R.C. 2903.211. *Szymanski* v. *Trendel*, 6th Dist. Nos. L-08-1110, L-08-1111, 2009-Ohio-992, ¶ 5; *Gruber v. Hart*, 6th Dist. No. OT-06-011, 2007-Ohio-873, ¶ 16; *Kramer v. Kramer*, 3d Dist. No. 13-02-03, 2002-Ohio-4383, ¶ 14.

{¶ 17} R.C. 2903.211(A)(1) provides:

{¶ 18} "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."

{¶ 19} In considering the propriety of a SCPO, appellate courts have established a bifurcated standard of review depending on the nature of the challenge. If the terms or conditions of the order are challenged, the trial court's decision is reviewed under an abuse of discretion standard. Where the challenge is to the issuance of the order, that is, where the question concerns whether the elements of menacing by stalking were established by a preponderance of the evidence, the trial court's decision will be upheld unless it is contrary to the manifest weight of the evidence. *Gruber*, supra, 2007-Ohio-873, at ¶ 17; *Caban v. Ransome*, 7th Dist. No. 08 MA 36, 2009-Ohio-1034, ¶ 7.

{¶ 20} Civil judgments supported by some competent, credible evidence going to all the essential elements of a case cannot be reversed on appeal as being contrary to the manifest weight of the evidence. *Gruber* at ¶ 18. "Unlike criminal appeals, where we can reweigh the evidence, civil appeals require more deference to the trial court and require affirmance of those judgments supported by some competent and credible evidence." *Ransome* at ¶ 8.

{¶ 21} Appellants' arguments in this case are all directed at the granting or issuance of the SCPO, not its scope or restrictions. We must determine, therefore, whether there was some competent, credible evidence in the record on each element of menacing by stalking.

A. Pattern of Conduct

{¶ 22} R.C. 2903.211(D)(1) defines "pattern of conduct" as "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." The statute does not define "closely related in time." In failing to delimit the temporal period within which the two or more actions or incidents must occur, the statute leaves that matter to be determined by the trier of fact on a case-by-case basis. See *State v. Dario* (1995), 106 Ohio App.3d 232, 238. See, also, *Szymanski*, supra, 2009-Ohio-992, ¶ 6, quoting *Jenkins v. Jenkins*, 10th Dist. No. 06AP-652, 2007-Ohio-422, ¶ 18 (in order to constitute a pattern of conduct, "the incidents 'need not occur within any specific temporal period'").

{¶ 23} In *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, ¶ 10, the Twelfth Appellate District explained:

{¶ 24} "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 a 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."

{¶ 25} Depending upon the particular circumstances, therefore, a pattern of conduct can arise out of two or more events occurring on the same day, *Shockey v. Shockey*, 5th Dist. No. 08CAE070043, 2008-Ohio-6797, ¶ 19; *State v. Scruggs* (2000), 136 Ohio App.3d 631, 634, or it may consist of intermittent incidents occurring over a period of years, *Bloom v. Macbeth*, 5th Dist. No. 2007-COA-050, 2008-Ohio-4564; *Jones*, supra, at ¶ 11; *Berry v. Patrick*, 8th Dist. No. 85255, 2005-Ohio-3708, ¶ 14-15.

{¶ 26} In this case, the Elletts testified to a number of incidents spanning a four-year period, including two or more that occurred on May 31, 2009. Although the trial

court did not believe that Deborah had been sitting in the neighborhood watching the children during the two-year period from 2005 to 2007, or that she was stalking the children by taking pictures of them during the Mud Hens game on May 31, 2009, the record does not support appellants' assertion that the other alleged incidents were deemed unbelievable or otherwise discounted by the trial court. As the trier of fact, the trial court was "free to believe all, part, or none of the testimony of any witness who appears before it." *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005-Ohio-3498, ¶ 22. Moreover, while appellants "either refuted or explained each incident alleged by appellee, the trial court determines 'what weight and credibility to afford the appellant's version of the events and the appellee's version of the events.'" *Gruber*, supra, 2007-Ohio-873, ¶ 19, quoting *Wunsch* at ¶ 22.

{¶ 27} Aside from the discounted allegations, the Elletts testified that despite their rebuffs and admonishments to stay away from the children, Deborah and/or Karl had left numerous aggressive or threatening messages on their answering machine demanding access to the children between 2005 and 2007, stopped in front of the Elletts' house and attempted to contact the children, left presents for the children on the Elletts' front porch in December 2008, made inquiries of the waitress at Ideal Hot Dogs in regard to one daughter in April 2009, approached or attempted to approach the children twice at the Mud Hens game on May 31, 2009, precipitating a physical encounter between Richard and Karl, and then left an angry message on the Elletts' answering machine following the game in which they proclaimed that the family was dead to them. Considering this

testimony, we cannot say that the record lacks any competent, credible evidence that appellants engaged in a "pattern of conduct" for purposes of R.C. 2903.211.

B. Knowingly

{¶ 28} Citing to alternate definitions of "knowing" in Black's Law Dictionary, appellants argue that appellee failed to present evidence that they "knowingly caused the children to believe that they would be physically harmed or mentally distressed." The term "knowingly," however, is defined in R.C. 2901.22(B):

{¶ 29} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 30} Thus, the petitioner seeking a SCPO under R.C. 2903.214 is not required to prove either purpose or intent to cause physical harm or mental distress. It is enough that the alleged offender acted knowingly, that is, with awareness that his or her conduct will probably cause such a result. *State v. Sanchez*, 9th Dist. No. 09CA009582, 2010-Ohio-4660, ¶ 17; *Szymanski*, supra, 2009-Ohio-992, ¶ 5; *Perry v. Joseph*, 10th Dist. Nos. 07AP-359, 07AP-360, 07AP-361, 2008-Ohio-1107, ¶ 7; *Jenkins*, supra, 2007-Ohio-422, ¶ 16-17. Moreover, as noted in the 1973 Legislative Service Commission Comments to R.C. 2901.22, "Something is 'probable' when there is more reason for expectation or belief than not * * *."

{¶ 31} In the present case, appellants admit in their brief that "they were aware the children were having a difficult time dealing with the tragic death of their grandfather * * *." It is also undisputed that the families became estranged and alienated from one another during the estate-related legal battle between Susan and Deborah. The Elletts testified that they told appellants the children were not ready to see them and asked appellants to stay away from the children. They also testified as to the anger and frustration expressed by Deborah in her numerous phone messages when her demands to see the children went unheeded. Nevertheless, appellants allegedly persisted in their efforts to access the children in spite of the Elletts' protective requests to leave their children alone. Based on the Elletts' testimony that appellants attempted to force their way into the lives of emotionally fragile children amid an atmosphere of hostility between the families, there were obvious reasons for appellants to expect that their actions would cause mental distress to the children.

{¶ 32} Considering the nature and circumstances of the alleged stalking incidents in this case, we find there is sufficient evidence to establish that appellants engaged in a pattern of conduct with knowledge that their actions and behavior would cause mental distress to the Ellett children.

C. Mental Distress

{¶ 33} In their argument with respect to the element of mental distress, appellants claim that there is no proof of any causal relationship between their actions and the children's alleged mental distress. Appellants acknowledge the Elletts' testimony that

"the children * * * had to [be] put on anti anxiety medication, that they have missed days of school several times throughout the years, and that they are scared." They maintain, however, that there is no evidence establishing "a correlation between the alleged mental distress or emotional trauma that these children may be suffering from and any thing (sic) the Falk's (sic) have done * * *." In addition, at various points throughout their brief, appellants portray the children's alleged mental condition in de minimis terms. This seems to suggest that appellants may also be arguing that the children's alleged symptomatology is insufficient to meet the statutory definition of mental distress. We will consider both of these issues together in order to determine whether the record contains some competent, credible evidence that appellants' actions have caused the children to experience mental distress as that term is statutorily defined.

{¶ 34} In addressing this issue, we note up front that there is a disagreement among the courts as to whether R.C. 2903.211(A)(1) requires proof that the victim actually experienced mental distress or merely that the victim believes mental distress will occur. As explained by the Seventh District, some courts "proceed as if the test is whether mental distress was in fact caused," while other 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." *Caban v. Ransome*, supra, 2009-Ohio-1034, ¶ 22, 23. The court in *Ransome* adopted the position that actual mental distress is required, while this court has held that the statute requires only a belief that the stalker will cause mental distress. *Szymanski*, supra, 2009-Ohio-992, ¶ 6. In reaching our conclusion in this case,

however, we do not rely upon the more lenient test. In this case, appellee has alleged that appellants' behavior in fact caused his children to suffer mental distress and we find in any event that the evidence is sufficient to satisfy both tests.

{¶ 35} R.C. 2903.211 (D)(2) defines "mental distress" as either of the following:

{¶ 36} "(a) Any mental illness or condition that involves some temporary substantial incapacity;

{¶ 37} "(b) Any 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."

{¶ 38} It is clear that "mental distress for purposes of menacing by stalking is not mere mental stress or annoyance." *Ransome*, 2009-Ohio-1034, ¶ 29. The statute requires evidence that the victim "developed a mental condition that involved some temporary substantial incapacity or that would normally require mental health services." Id. at ¶ 28. The statute does not, however, require proof that the victim sought or received treatment for mental distress. *State v. Szloh*, 2d Dist. No. 2009-CA-56, 2010-Ohio-3777, ¶ 27; *Middletown v. Jones*, supra, 2006-Ohio-3465, ¶ 7. Nor does the statute require that the mental distress be totally or permanently incapacitating or debilitating. *Lias v. Beekman*, 12th Dist. No. 06AP-1134, 2007-Ohio-5737, ¶ 16. "Incapacity is substantial if it has a significant impact upon the victim's daily life." *State v. Horsley*, 10th Dist. No. 05AP-350, 2006-Ohio-1208, ¶ 48. See, also, *Ransome* at ¶ 32 (recognizing that "evidence of

changed routine can corroborate a finding of mental distress"). Thus, testimony that the offender's conduct or actions caused the victim considerable fear and anxiety can support a finding of mental distress under R.C. 2903.211. *Horsley* at ¶ 48; *Jones* at ¶ 8.

{¶ 39} In the proceedings below, the Elletts specifically and repeatedly testified that their children experienced overt signs of incapacitating mental distress following the various alleged incidents with the Falks. They testified that after seeing or hearing the Falks on particular occasions, the children became very frightened and anxious, cried, vomited, refused to attend and actually missed a week of school, and remained fearfully close at their side. Indeed, Susan related that although she did not perceive the message left by Deborah following the Mud Hens game as a physical threat, her daughter was still convinced that her aunt wanted her dead. This testimony is more than sufficient to establish that the children suffered actual mental distress as defined by the statute and that such distress was in fact caused by appellants' conduct.

{¶ 40} Based on the foregoing, we find that the trial court's decision to issue a SCPO in this case was not against the manifest weight of the evidence, as the record contains some competent, credible evidence to support all the essential elements of menacing by stalking under R.C. 2903.211. Accordingly, appellants' first assignment of error is not well-taken.

III. PARENT'S TESTIMONY AS TO CHILD'S MENTAL DISTRESS

{¶ 41} In their second assignment of error, appellants assert:

{¶ 42} "The trial court erred as a matter of law when granting the Civil Stalking Protection Order against the appellants."

{¶ 43} Here, appellants argue that the SCPO should be removed because the required element of mental distress was established solely through hearsay testimony. Specifically, appellants complain that the "only evidence that the minor children had mental distress or a fear that they would suffer mental distress was hearsay testimony when the parents said that the children said they were afraid." According to appellants, the children's mental condition cannot be appropriately established without medical records, expert testimony, or testimony from the children themselves.

{¶ 44} It is well-established that expert testimony is not required to prove the mental distress element of R.C. 2903.211. *Perry v. Joseph*, supra, 2008-Ohio-1107, ¶ 8; *Jenkins*, supra, 2007-Ohio-422, ¶ 19. This court has likewise held that expert testimony is not required to establish the existence of mental distress for purposes of menacing by stalking. *Toledo v. Emery* (June 30, 2000), 6th Dist. No. L-99-1067.

{¶ 45} It is also clear that a child's mental distress can be established through the testimony of the child's parent. In *Emery*, this court rejected the argument that a parent's testimony in regard to her children's mental distress was without personal knowledge or based on hearsay. In *State v. Tichon* (1995), 102 Ohio App.3d 758, the Ninth Appellate District explained in this regard that "'lay witnesses who were acquainted with the plaintiff, may testify as to any marked changes in the emotional or habitual makeup that they discern in the plaintiff after the [incident] has occurred * * *.'" Id. at 763, quoting

State v. Bilder (1994), 99 Ohio App.3d 653, 665. Similarly, in *State v. McCoy*, 9th Dist. No. 06CA008908, 2006-Ohio-6333, ¶ 17, the court explained, "Lay testimony as to one's mental condition—including testimony from the individual who is purportedly suffering from mental distress—can be sufficient to show the element of mental distress under R.C. 2903.211(A)."

{¶ 46} Accordingly, appellants' second assignment of error is not well-taken.

IV. CONCLUSION

{¶ 47} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE