[Cite as *Burnett v. Burnett,* 2012-Ohio-2673.]

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

Caren C. Burnett	Court of Appeals No. S-10-050
Appellee	Trial Court No. 10 DR 628
v.	
Alan L. Burnett, II	**DECISION AND JUDGMENT**
Appellant	Decided: June 15, 2012

* * * * *

Reese M. Wineman, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, that initially involved two underlying cases. In Sandusky County Common Pleas case No. 10 DR 628, appellee Caren Burnett, filed a petition for a domestic violence civil protection order ("CPO") against her husband, appellant Alan Burnett. In Sandusky County Common Pleas case No. 10 DR

853, appellee filed a complaint for legal separation with a motion for temporary custody. The judgment from which appellant filed his notice of appeal addressed both cases and, in his appellate brief filed in this action, appellant challenged the trial court's ruling in both cases. In our decision and judgment of February 3, 2011, however, we dismissed the appeal in case No. 10 DR 853, finding that the trial court's judgment in that case was not a final appealable order. Subsequently, in a decision and judgment of June 15, 2011, we granted appellee's motion to strike appellant's second assignment of error from his brief because it challenged the trial court's judgment in case No. 10 DR 853. Accordingly, in the appeal now before us, we will only address appellant's first assignment of error, which challenges the trial court's granting of the CPO and reads:

> The trial court below abused its discretion in granting the petitioner/appellee custody of the parties' minor children, consolidating the CPO action in case No. 10 DR 628 and separation action in 10 DR 853, in its failure to require a transcript of the proceedings before the magistrate held on June 28, 2010, in ignoring the magistrate's decision based upon the further hearing held on July 2nd, 2010, and its failure to dismiss the civil protection order and continuing that order for the period of one (1) year, denying the defendant/respondent, in case No. 10 DR 628, his basic due process rights as a citizen of Florida.

{¶ 2} The facts of this case are as follows. On June 3, 2010, appellee filed a petition for a domestic violence CPO in the court below, pursuant to R.C. 3113.31. At

that time, appellee had just moved to Bellevue, Ohio with the parties' three minor children and appellant was living in Zephyr Hills, Florida. Through the petition, appellee sought protection for herself and the three children. She alleged that over the course of seven years, appellant had threatened her with death by means of a handgun or wood chipper if she ever left him. She further alleged that appellant had ready access to firearms and knew all of the places she would go to keep herself and the children safe. Following an ex parte hearing on the same day, the lower court issued an ex parte domestic violence CPO, naming appellee and the parties' three minor children as protected persons. The court further ordered that the case proceed to a full hearing before the lower court magistrate.

{¶ 3} The full hearing proceeded before the lower court magistrate on June 28 and July 2, 2010. During that hearing, appellee testified that while the parties were still in Florida, around May 20, appellant began to show excessive interest in her handgun. His interest alarmed her to the point at which she locked the slide on the gun and then locked away the key. Appellee further testified as to comments appellant had made both recently and during the course of their marriage. Recently, while the parties were in Florida, they had been discussing a colleague of appellant's whose wife had cheated on him and then moved back in with the colleague. Appellee testified that appellant said "Well, we wouldn't have that problem because I'd just kill you." She further testified that dozens of times during their marriage, appellant had threatened her that if she ever left him he would just kill her. She stated that he had a "wood-chipper" plan at one point,

indicating that he could shoot a wood-chipper's contents into a lake and then dump bleach into it to get rid of the evidence. Generally, however, appellee testified that appellant's plans were not specific but that he would say: "If you leave me, I'll kill you and then I'll go to jail and the kids will have to stay with my parents." She stated that the last time appellant threatened to kill her was between May 3 and May 19, and that she left Florida for Ohio within a week after that threat was made.

{¶ 4} Appellee testified that she takes appellant's threats very seriously, and that while she doesn't believe appellant owns a gun, she knows that his parents both have handguns. Based on appellant's history and the threats he had made, appellee testified that she was very fearful of him. In addition to appellee, appellee's grandmother, Carol Calkins, testified that she witnessed appellant threatening appellee when they lived in Michigan. Calkins recalled an occasion approximately two years ago when she was visiting the parties and they were taking a walk. Calkins testified that appellant said if appellee ever left him there would be two dead people. When Calkins said "Oh, Al," appellant responded, "No, I'm serious. I'm dead serious." Calkins did not believe appellant was joking. Following appellee's presentation of her case, appellant moved to dismiss the petition on the ground that the court did not have personal jurisdiction over him.

{¶ 5} On August 24, 2010, the magistrate filed his decision in the court below and recommended that the petition for a CPO be dismissed. The magistrate determined that appellee had failed to prove by a preponderance of the evidence that any acts of alleged

domestic violence occurred in Ohio which would give the court long-arm jurisdiction over appellant pursuant to R.C. 2307.382(A). Thereafter, appellee filed objections to the magistrate's decision, and argued that in reaching his recommendation, the magistrate failed to consider R.C. 2307.382(A)(2), (3), (4), (6) and (7), R.C. 3113.31(B), and Civ.R. 3(B)(10). Appellee also filed a memorandum opposing the motion to dismiss.

{¶ 6} Concurrently with the CPO proceedings, appellee filed in the court below the complaint for legal separation, referenced above. On August 24, 2010, the same day that the magistrate filed his decision, the lower court held a hearing on the motion for temporary orders in the legal separation case. During that hearing, appellee, appellant, appellee's grandmother, Carol Calkins, appellant's parents, Barbara and Alan Burnett, and Leslie Wolcott, appellant's uncle, testified. One of the matters upon which the witnesses testified was an incident that had occurred on August 20, 2010. Previously, appellant's mother, Barbara, had spoken to appellee and expressed her desire to see her grandchildren. Appellee agreed, and the two planned for Barbara to fly to Detroit Metro airport, where appellee and the children would pick her up. When Barbara arrived, appellee picked her up at the curb. Barbara then asked appellee to help her with her bag which, she said, she had left just inside the door. When appellee went to retrieve the nonexistent bag, appellant, who was waiting nearby, jumped into the van that held his mother and the three children, and drove off. Several hours later, appellant, his parents and the children were found nearby at the home of his uncle, Leslie Wolcott in Flat Rock, Michigan. Appellant was preparing to leave and take the children to Florida when the

police arrived. He was arrested and charged with parental kidnapping, but the charges were subsequently dropped.

{¶ 7} During the hearing below, appellant, his parents and uncle all admitted to their roles in the kidnapping plot. Appellant's mother testified that she did not regret her actions, helped plan it and would do it again "in a heartbeat."

{¶ 8} In addition to evidence regarding the kidnapping, appellee testified that she feared for her safety because appellant had a history of threatening to kill her if she ever left him. Appellee did testify to an incident that occurred in Sandusky County when her family was gathered for Christmas, although she did not state the year this occurred. Appellee testified that her family was discussing divorce and appellant said that they (he and appellee) would never have to worry about divorce because if appellee ever left him he would kill her. When appellee's cousins laughed, appellant stated "No, we won't have that problem."

{¶ 9} Subsequently, the parties filed briefs in support of and opposing appellee's objections to the magistrate's decision, and appellee filed a motion for stipulation of facts. The first stipulation reads: "The Parties stipulate to the telephone records and other electronic correspondence submitted by the Plaintiff indicating telephone calls from the Defendant to the Plaintiff in the State of Ohio." That stipulation, filed in the record before us, was not signed by appellant's counsel. Appellant's counsel, however, did not contest the stipulation or oppose it in any manner. Moreover, the trial court signed a judgment entry that reads: "For good cause shown, it is hereby Ordered that the

'Stipulation of Facts' entered into by the parties shall be relevant to both cases, 10 DR 853 and 10 DR 628." We will therefore accept as fact that the parties stipulated that appellant, while in Florida, made telephone calls and text messages to appellee, who was in Ohio. The record, however, contains no evidence of the contents of those telephone records and text messages.

{¶ 10} On September 28, 2010, the lower court issued a decision and judgment entry which ruled on both the objections to the magistrate's decision and the complaint for legal separation. As to the CPO, the trial court rejected the magistrate's decision and issued a full civil protection order, concluding that given the death threats that appellant had expressed in the event that appellee ever left him, the court retained personal jurisdiction over appellant. Specifically, the court found appellant sent text message threats to appellee while she resided in Ohio, which supported the fears expressed by appellee at the ex parte hearing. In reaching this conclusion, the court also considered evidence taken at the August 24, 2010 hearing regarding the incident at Detroit Metro airport, as supportive evidence for the issuance of a full civil protection order. Accordingly, the court issued a full civil protection order against appellant for a period of one year. In that order, the court named appellee and the parties' three children as protected persons. In reaching its determination, the court expressly found that appellant had threatened appellee with physical harm. Appellant now challenges that judgment on appeal.

{¶ 11} In his assignment of error, appellant asserts that the lower court erred in rejecting the magistrate's decision and entering the full civil protection order where the record of the proceedings below fails to establish that appellant had the minimum contacts necessary for the court to exercise personal jurisdiction over him. Accordingly, appellant contends, the court's order violated his rights to due process.

{¶ 12} The decision to grant a civil protection order lies within the sound discretion of the trial court and should not be reversed absent an abuse of that discretion. *Deacon v. Landers*, 68 Ohio App.3d 26, 587 N.E.2d 395 (4th Dist.1990). A determination of whether a court has personal jurisdiction over a party, however, is a question of law which we review de novo. *Wiltberger v. Davis*, 110 Ohio App.3d 46, 673 N.E.2d 628 (10th Dist.1996). In *Keller v. Keller*, 6th Dist. No. E-05-006, 2005-Ohio-5258, ¶ 5, we explained:

> The power of a state court to exert personal jurisdiction over a nonresident defendant is limited by the Due Process Clause of the Fourteenth Amendment. *Asahi Metal Industry Co. v. Superior Court* (1987), 480 U.S. 102 108-09, 107 S.Ct. 1026, 94 L.Ed.2d 92. Due process requires that in order to subject a nonresident defendant to a judgment in personam, the nonresident must have certain minimum contacts with the forum, such that notions of fair play and substantial justice are not offended by requiring him to defend in that forum. *Internatl. Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95. The test

for minimum contacts may not be applied mechanically; rather, the facts of each case must be weighed to determine whether sufficient affiliating circumstances are present. *Kulko v. Superior Court of California* (1978), 436 U.S. 84, 92, 98 S.Ct. 1690, 56 L.Ed.2d 132, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 246, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

{¶ 13} Ohio's long-arm statute, R.C. 2307.382, authorizes the exercise of personal jurisdiction over nonresident defendants. Civ.R. 4.3 provides for service and determines the "minimum contacts" necessary to effectuate that jurisdiction. *Keller*, supra at ¶ 6. R.C. 2307.382 provides in relevant part:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
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> * * *
>
> (3) Causing tortious injury by an act or omission in this state;
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> * * *
>
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state[.]

Similarly, Civ.R. 4.3(A) reads:

> Service of process may be made outside of this state * * * in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes an individual, * * * who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:
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> * * *
>
> (9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably have expected that some person would be injured by the act in this state[.]

The long-arm provisions of both Civ.R. 4.3 and R.C. 2307.382 "are consistent [with] and in fact complement each other." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73, 75, 559 N.E.2d 477 (1990). To the extent that the civil rule and the statute conflict, the civil rule controls. *Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.*, 76 Ohio St.3d 374, 376-377, 667 N.E.2d 1189 (1996). Before a court may exercise jurisdiction over the person of an out-of-state defendant, it must find (1) that a provision of Civ.R. 4.3 extends to the defendant, and (2) that application of the rule would not offend the notions of "fair play and substantial justice" contained in the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Internatl. Shoe*, supra at 316.

{¶ 14} An action for a domestic violence CPO, which is the action that initiated the proceedings below, is brought pursuant to R.C. 3113.31 and is civil in nature. "When granting an order, the trial court must find that petitioner has shown by a preponderance of the evidence that petitioner or petitioner's family or household members are in danger of domestic violence." *Felton v. Felton*, 79 Ohio St.3d 34, 679 N.E.2d 672 (1997), paragraph two of the syllabus. R.C. 3113.31(A)(1) defines "domestic violence" as the occurrence of one or more of the following acts against a family or household member:

(a) Attempting to cause or recklessly causing bodily injury;

(b) Placing another person by the threat of force in fear of imminent serious physical harm * * *[.]

{¶ 15} It is well-established that threats of violence constitute domestic violence for purposes of R.C. 3113.31(A)(1)(b) if the fear resulting from the threat is reasonable. *Eichenberger v. Eichenberger*, 82 Ohio App.3d 809, 815, 613 N.E.2d 678 (10th Dist.1992). A court may determine the reasonableness of the petitioner's fear by reference to the parties' history and past acts of domestic violence. *Kiedrowicz v. Kiedrowicz*, 6th Dist. No. H-98-049, 1999 WL 197793 (Apr. 9, 1999); *Conkle v. Wolfe*, 131 Ohio App.3d 375, 383, 722 N.E.2d 586 (4th Dist.1998).

{¶ 16} The lower court rejected the magistrate's recommendation to dismiss the case for lack of personal jurisdiction. In finding that the court did have personal jurisdiction over appellant to consider appellee's petition for a domestic violence CPO, the court reviewed appellee's factual allegations made at the ex parte hearing "regarding

death threats and the use of a wood chipper in the event the petitioner ever left the respondent." The court also considered the evidence taken at the hearing of August 24, 2010, which the court was authorized to do pursuant to Civ.R. 53(D)(4)(b), and text messages that appellant had sent to appellee while appellant was in Florida and appellee was in Ohio. Based on this evidence, the court concluded that the text messages were tortious in nature and that the court, therefore, had personal jurisdiction over appellant to issue the domestic violence CPO.

{¶ 17} In the case of *Haas v. Semrad*, 6th Dist. No. L-06-1294, 2007-Ohio-2828, we were presented with a similar fact pattern and issue. In that case, the parties, a husband and wife, were married in Florida, after which the wife continued to live in Maumee, Ohio. The husband, however, would visit the wife regularly in Ohio. Subsequently, the husband committed various acts of domestic violence during his visits to Ohio. Thereafter, in a phone call from the husband, who was in Florida, to the wife, who was in Ohio, the husband made threatening comments toward the wife and her daughter. Upon consideration of the wife's request for a domestic violence CPO, the trial court magistrate determined that the husband's threats of violence, combined with his past acts of domestic violence, created competent, credible evidence that the phone call placed the wife "in fear of imminent serious physical harm for herself and her daughter." The husband filed a motion to dismiss and objections to the magistrate's decision, arguing that the court lacked personal jurisdiction over him. In overruling the objections, the trial court held that the husband's repeated visits to the wife in Ohio were sufficient to

establish jurisdiction over the husband. Upon review, we concluded that while the phone call and visits to Ohio, would separately be insufficient to establish minimum contacts, together they were sufficient to confer personal jurisdiction over the husband. In particular, we recognized that "[a] defendant's physical presence in the forum state is unnecessary when, in modern life, a substantial amount of interactions occur via telephone and electronic communications." *Id*. at ¶ 18. While we recognized in *Haas* that some states have exercised personal jurisdiction in civil protection matters when the out-of-state defendant's only contact with the forum state was through threatening phone calls or letters, we based our determination of minimum contacts on the coexisting facts that the defendant purposefully directed his communications into Ohio through a threatening phone call and the allegations that he had committed prior acts of domestic violence toward the wife while in Ohio. *See also Dobos v. Dobos*, 179 Ohio App.3d 173, 2008-Ohio-5665, 901 N.E.2d 248 (12th Dist.).

{¶ 18} In the present case, the lower court found that text messages and phone calls that appellant had made to appellee were tortious in nature and, therefore, found that appellant had the minimum contacts with Ohio necessary for the court to exercise personal jurisdiction over appellant. The record, however, contains no evidence as to the content of those text messages and phone calls. As we noted above, we review determinations of jurisdiction and minimum contacts de novo. Where a plaintiff has been granted a domestic violence CPO against a defendant, and the only basis for the defendant's connection to the state is through phone calls and electronic communication,

some evidence as to the content of those communications is essential to our affirmance of the trial court's order.

{¶ 19} It appears that the only evidence as to the content of these communications was submitted at the ex parte hearing. No record of that hearing was made. In *Felton, supra* at 37, the Supreme Court of Ohio noted, "R.C. 3113.31 authorizes a court in an ex parte hearing to issue a temporary protection order when the court finds there to be an 'immediate and present danger of domestic violence to the family or household member.' R.C. 3113.31(D). Subsequent to this, the court proceeds as in a normal civil action and grants a full hearing."

{¶ 20} R.C. 3113.31 does not define the term "full hearing." *Deacon, supra* at 29. Several courts have held, however, that "the words 'full hearing' as used in R.C. 3113.31 mean the same thing as the word 'trial' as used in the Civil Rules." *Stanton v. Guerrero*, 2d Dist. No. 14407, 1994 WL 472104, *2 (Aug. 31, 1994); *Spigos v. Spigos*, 10th Dist. No. 03AP-682, 2004-Ohio-757, ¶ 15-16. That is, "[a] 'full hearing' is one in which ample opportunity is afforded all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety of the step asked to be taken." *Deacon* at 30, citing *Akron, C. & Y. Ry. Co. v. United States*, 261 U.S. 184, 200, 43 S.Ct. 270, 67 L.Ed. 605 (1923).

{¶ 21} In the proceedings below, at the full hearing, no evidence was presented as to threats that appellant had made to appellee since she moved to Ohio. All of the testimony dealt with appellant's history of threatening behavior while the parties lived in

other states. The lower court then essentially "tacked" the evidence from the ex parte hearing onto the evidence from the full hearing to find the minimum contacts necessary to grant the full CPO. In light of *Deacon* and *Stanton*, we do not believe that R.C. 3113.31 allows for such "tacking." Moreover, while the stipulation indicated that calls and text messages from appellant to appellee were made after appellee moved to Ohio, the stipulation does not address the content of those communications. When the issue is minimum contacts for the issuance of a domestic violence CPO, and the contact is through electronic or telephonic means, the content of those communications is an essential element. That is, it is the content that creates the threat and thereby establishes the minimum contacts necessary to effectuate jurisdiction under R.C. 2307.382.

{¶ 22} Accordingly, the lower court erred in granting appellee's petition for a domestic violence CPO and appellant's sole assignment of error is well-taken.

{¶ 23} On consideration whereof, the court finds that substantial justice has not been done the party complaining and the judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, issuing a domestic violence civil protection order is reversed. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed.

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. _____
JUDGE

Stephen A. Yarbrough, J.
CONCUR. _____
JUDGE

Arlene Singer, P.J., dissents.

SINGER, P.J.

{¶ 24} I respectfully dissent from the majority's decision to reverse the trial court's grant of the civil protection order. The majority's decision implies that to have the requisite minimum contacts with Ohio to gain personal jurisdiction over appellant, he had to have been either physically in the state of Ohio when the threats were made or that the history of violent acts must have occurred within the state of Ohio. I disagree.

{¶ 25} In an age where electronic communication eliminates the need for a defendant to physically appear in a state before establishing personal jurisdiction over him, Ohio courts have found the minimum contacts exists when a nonresident uses the phone or email to contact persons within the state. *See Sobieniak v. Chapdelaine*, 6th Dist. No. L-08-1173, 2008-Ohio-6403 (Connecticut resident respondent who sent emails to Ohio company about petitioner, her neighbor and also a Connecticut resident,

established sufficient contacts with Ohio to establish personal jurisdiction to seek a civil protection order in Ohio court); *Dobos v. Dobos*, 179 Ohio App.3d 173, 2008-Ohio-5665, ¶27, 901 N.E. 2d 248 (12th Dist.) (personal jurisdiction over Hungarian resident husband could be established by evidence of his contacts because of the parties' former residence in Ohio *or* by his calling and contacting people in Ohio, since he "avails himself to Ohio by deliberately trying to find his wife and children, thereby engaging in activities directed towards this state.").

{¶ 26} The majority cites *Haas v. Semrad* in support of its conclusions. In *Haas*, we stated that "[a]ppellant's action-telephoning appellee in Ohio and threatening to return to inflict harm after having established a history of violent acts-was tortious in nature, was committed by an act outside of Ohio, and should have led appellant to expect that appellee would be threatened." *Haas*, 6th Dist. No. L-06-1294, 2007-Ohio-2828, ¶ 16. Although in that case, the history of violence between the parties had taken place in Ohio, I do not agree that minimum contacts *requires* such history to have occurred in the same place that the petitioner seeks the civil protection order.

{¶ 27} The majority's decision would prevent the grant of a civil protection order based only on telephone, text or email threats to an abused spouse, who flees in fear to Ohio from the abusive spouse in another state. Instead, the majority decision requires the abused spouse to remain in the jurisdiction where the history of violence has occurred, to take his or her chances of finding a place of safety while seeking the civil protection order. This view is both impractical and unsupported by the law.

{¶ 28} The majority also states that the record does not contain the content of the texts which were the basis of the trial court's finding the requisite minimum contacts existed to confer personal jurisdiction over appellant. The trial court specifically found, however, that appellant had sent text message threats to appellee while she resided in Ohio which constituted tortious conduct by appellant within Ohio. Apparently this information was presented at the initial *ex parte* hearing to obtain the civil protection order. The court may rely on all evidence presented either at the *ex parte* hearing or at the final hearing. See *Gannon v. Gannon*, 6th Dist. No. WD-07-078, 2008-Ohio-4484, ¶ 39 (trial court had sufficient evidence from ex parte and final hearings to justify issuing civil protection order). These allegations were not rebutted by appellant at either of the subsequent hearings. Rather, appellee submitted a stipulation as to the telephone records and other electronic correspondence without objection by appellant. Therefore, we must defer to the trial court's findings regarding the text messages. Evidence was also presented that, although not in Ohio, a history of abuse and threatening behavior by appellant against appellee existed. As a result, I would affirm the trial court's jurisdiction and determinations that the threatening text messages along with the history of threats by appellant against appellee, warranted the imposition of the civil protection order.