[Cite as *Welborn-Harlow v. Fuller*, 2013-Ohio-54.]

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

Sara Welborn-Harlow	Court of Appeals No. WD-11-013
Appellee	Trial Court No. 2010ST0025
v.	
Dan Fuller	**DECISION AND JUDGMENT**
Appellant	Decided: January 11, 2013

* * * * *

George R. Royer, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas which granted plaintiff-appellee Sara Welborn-Harlow's request for a civil stalking protection order ("CSPO") against defendant-appellant Dan Fuller. Appellant now challenges that judgment through the following assignments of error:

Assignment of Error Number One

The court improperly granted an anti-stalking order under the circumstances of this case.

Defendant's Second Assignment of Error [sic]

The court erred by not granting defendant the right to call plaintiff's attorney as a witness in this case.

Assignment of Error Number 3 [sic]

The court erred by not permitting defendant to file a jury demand and have a jury trial in the subject case.

{¶ 2} The facts of this case are as follows. Appellee is a resident of Perrysburg, Ohio. Appellant is a resident of Northwood, Ohio, but works as a pharmacist at a grocery store in Perrysburg. The parties came to casually know each other as appellee had prescriptions filled at the pharmacy where appellant works. In the fall of 2009, the parties began a casual dating relationship in which they went out for drinks and attended sporting events and concerts. On November 29, 2009, the parties went out for dinner before attending a concert. Appellee testified at the hearing below that during that dinner she explained to appellant that she was not interested in a relationship with him and suggested that he see other people. Appellant denied that appellee ever stated on that evening that she did not want to date him.

{¶ 3} On December 1, 2009, appellee notified appellant that she would not be able to attend a wedding with him the following Saturday due to a work commitment and

encouraged him to ask someone else. Shortly thereafter, appellee began receiving anonymous letters and phone calls.

{¶ 4} At approximately 4:00 a.m. on Christmas morning, appellant left presents for appellee and her family on appellee's lawn. Although a note indicated that they were from Santa, appellee subsequently learned that they were from appellant. She then sent him a short text message thanking him for the gifts.

{¶ 5} The parties had no further contact during 2009, but on January 4, 2010, which was appellee's birthday, appellant sent appellee a text message wishing her a happy birthday. Appellant admitted at the hearing below that he knew it was appellee's birthday because he had access to appellee's pharmacy records.

{¶ 6} The next contact between the parties occurred by emails exchanged on January 11, 2010. At around 7:30 that morning, appellant sent appellee an email that reads in part as follows:

> I hope you had a wonderful holiday. I hope this included spending lots of time with Zach and Adam and also yor [sic] mom. I was checking my e-mails, text messages and phone calls. From the 1st week in October to the 1st week in December we talked talked [sic] with each other just about every other day. All of a sudden we stopped. I am trying to figure out why. I can't think of anything that I said or did. If I did I am sorry. This is a very busy time of the year. I know with your boys coming home you wanted to spend as much time as you can with them. I know that you

stated that you were helping your mom. I know that you had shopping to do, decorating your home for the holidays and you are working a full time job. Zach had a birthday just before Christmas and you had a birthday on January 4th. Again Happy Birthday. Time is at a premium. This is the reason that I did not try to get in touch with you. I did leave a couple of text messages on New Years Day and one on your birthday. I have not heard from you and I am hoping that you are not mad at me. I have been racking my mind trying to think of something that I might have done. The only think [sic] that I could think of was that maybe you did not like your Keepsake ornament. Your mom came into the store after Christmas and I was able to talk to her. She thanked me for the ornament saying that she liked it. Last wednesday [sic] Zach came into the store to get a prescription filled. I got a chance to talk to him for a few minutes. Sara he is a very nice young man. From what I could tell he is working very hard on his degree in psychology. He said that he liked his ornament. Keepsake ornaments date back to 1973. Yours was very hard to pick just one. There is one called Fashion Queen. I almost chose this one because your [sic] are a very good dresser. Since you went to charm school when you were younger I tried to find you one with this theme in mind. Sara you do not know how many hours I spent on the computer trying to find one with this theme in mind. I went back every year to 1973 to see if I could find an

ornament with this theme in mind. They did not have any Barbie charm school ornaments at all otherwise this would have been your ornament. So I went with the Harley. My only complaint with you is this. Who does not put out milk and cookies for Santa Claus? Sara it was 4 in the morning when I delivered your presents. It was starting to rain and it was cold. I am carring [sic] a milk grate [sic] and a storge box trying to keep the presents from getting wet. I am lucky a cop did not drive by and ask me what the hell are you doing. I looked for the milk and cookies but could not find any. So let me know if you would still like to go out. I enjoy talking to you as you are very easy to talk to. Maybe you you [sic] found another guy or are seeing an old boyfriend again. With the boys back in school hopefully you have some time to go out. So let me know one way or the other. Hope to hear from you soon.

{¶ 7} Appellee responded to appellant's email later that day, by return email. She explained that she was not mad at him, but that she did not have "dating feelings" for him and that it was a matter of chemistry. She also encouraged him to seek other dating opportunities.

{¶ 8} On February 6, 2010, appellee and a friend, Mark Gibaldi, returned to her home in the evening, after having spent the day together. As they were standing in appellee's foyer, Gibaldi noticed a person crouched down by his car in the driveway. Gibaldi pressed his key fob which caused his lights to flash. With that, the person

jumped up and quickly walked away down the sidewalk. Appellee then took off on foot after the person, following him down the sidewalk and Gibaldi got in his car to follow. Appellee then got in Gibaldi's car and they followed the individual, never taking their eyes off of him. The individual eventually got into a black Jeep that had been parked around the corner and took off. Appellee and Gibaldi continued to follow him and were able to obtain a license number from the car. They then called the police to report the incident. The police subsequently confirmed that the car was registered to appellant and appellant admitted that he had been parked on the street near appellee's home. However, the explanation that he gave to officers as to why he was there, and which he confirmed at the hearing below, was found by the lower court magistrate to be not credible.

{¶ 9} Instead of filing charges against appellant, appellee contacted an attorney, Richard Karcher, and directed him to send appellant a strongly worded letter. Appellee believed that by sending such a letter from an attorney, appellant would leave her alone and she would feel safe. Mr. Karcher then drafted a letter which was approved by appellee. The letter itself, however, was ultimately signed by another attorney in Mr. Karcher's office. In pertinent part, the letter, which was dated February 16, 2010, reviews the history of the parties' relationship, notes the disturbing anonymous letters appellee received in December and January, and recaps the trespassing incident of February 6, 2010. The letter then admonishes appellant as follows:

> You are a licensed professional. The filing of criminal charges, the issuance of criminal or civil protection orders, a report to the State

> Pharmacy Board * * * all of those place you and your livelihood in jeopardy. Such a result is the last thing my client wants to see happen. Instead, my client wants to be secure in the knowledge that you will cease all contact, regardless of form or method. You have too much to lose and Ms. Welborn, whose sense of vulnerability is heightened exponentially by these events, simply wishes assurance that she will be left alone, now and into the future.

{¶ 10} Subsequently, on or about April 8, 2010, appellee received an eight-page handwritten letter from appellant. Appellant testified at the hearing below that despite the warning in the letter from appellee's attorney, he sent her the April letter because he felt that he needed to defend himself. Although the letter does not contain any threats, appellant states throughout the letter that he would never hurt appellee, reminisces in great detail about times that the two spent together, and mentions appellee's family members and pets. After receiving this letter, appellee filed a petition for a CSPO, seeking protection for herself, her mother, her two sons and her ex-husband's daughter. In the petition, appellee described the pattern of conduct that caused her to believe that appellant has caused her or will cause her mental distress: (1) anonymous phone calls, (2) anonymous inappropriate letters, (3) gifts left outside of home at 4:00 a.m. Christmas morning, (5) appellant crouched down by car in appellee's driveway, then fleeing to his car parked nearby, (6) an eight-page handwritten letter sent after he was told by her

attorney to cease contact. Appellee then stated, "He mentions my 2 sons, my mother, my dogs and my ex's daughter. He won't leave me alone and I am fearful!"

{¶ 11} The lower court denied an ex parte civil protection order but set the matter for a full hearing. That hearing proceeded on May 13 and 28, 2010. On June 14, 2010, the lower court magistrate issued a decision finding that appellee had established a pattern of conduct by appellant that caused appellee mental distress. The court therefore issued a CSPO against appellant to be in full force and effect until April 11, 2011. Appellant responded by filing objections and a request for a rehearing. Appellant also filed a motion for leave to file a transcript of the hearing and supplemental objections. Subsequently, however, the court determined that due to a malfunction in the court's new recording system, no recording of the May 28 hearing date was available. The court ultimately held a rehearing of the May 28 portion of the hearing for the sole purpose of making a record. Thereafter, appellant filed his brief in support of his objections. On January 18, 2011, the lower court filed a judgment entry in which it overruled appellant's objections and found that the circumstances as a whole warranted the issuance of the CSPO. The court therefore affirmed the magistrate's decision. It is from that judgment that appellant now appeals.

{¶ 12} We will first address appellant's third assignment of error in which he asserts that the lower court erred in denying his request for a jury trial.

{¶ 13} Appellee filed her request for a CSPO pursuant to R.C. 2903.214. That statute provides under R.C. 2903.214(D)(3) that "* * * if a person requests an ex parte

order but the court does not issue an ex parte order after an ex parte hearing, the court shall proceed as in a normal civil action and grant a full hearing on the matter." R.C. 2903.214(E)(1)(a) then reads: "After an ex parte or full hearing, the court may issue any protection order, with or without bond, that contains terms designated to ensure the safety and protection of the person to be protected by the protection order * * * ." Accordingly, under the applicable statute, it is the court, not a jury, that makes the relevant determinations.

{¶ 14} Appellant has not cited any legal authority for the proposition that a respondent has a right to a trial by jury in a proceeding seeking a CSPO. The Ohio Constitution, Article I, Section 5, provides that "[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." The commentary to that section, however, explains:

> This section preserves the right to a jury trial in those cases to which it applied at common law at the time the 1802 Constitution was adopted. *Belding v. State ex rel. Heifner*, 121 OS 393, 169 NE 301 (1929). Thus, the section guarantees the right to a jury in traditional actions at law (most suits for money only, and certain real property actions), and in all felony and serious misdemeanor cases, but not in equity actions, guardianship, probate, and domestic relations matters, suits in admiralty, or petty civil and

criminal cases. Also, the right does not apply to statutory actions unknown at common law unless the statute provides the right to jury trial.

{¶ 15} In our view, an action seeking a CSPO is a statutory action unknown at common law. Accordingly, appellant had no right to a jury trial and the lower court did not err in denying his demand for such. The third assignment of error is not well-taken.

{¶ 16} In his second assignment of error, appellant asserts that the lower court erred in denying his request to call appellee's attorney, Richard Karcher, as a witness in the case. Appellant sought to call Karcher as a witness because Karcher drafted the February 16, 2010 letter admonishing appellant to cease all contact with appellee. Appellant contends that he was entitled to call Karcher to testify so that Karcher could explain the content and purpose of the letter and the meaning of the language used therein.

{¶ 17} Again, appellant has cited no authority for his argument. In the hearing below, the court denied appellant's request to call Karcher as a witness on the grounds that the letter speaks for itself and anything outside of the letter would be protected by the attorney-client privilege.

{¶ 18} Questions involving the admissibility of evidence are left to the sound discretion of the trial court, and a trial court's ruling on an evidentiary issue will not be reversed on appeal absent a showing that the court abused its discretion. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. An abuse of discretion is more than mere error of law; it "implies that the court's attitude is

unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 19} In the proceeding below, the letter of February 16, 2010, authored by Attorney Karcher at the direction of appellee and signed by an attorney in Karcher's office, was admitted into evidence. Appellant sought to call Karcher as a witness to explore the intent and scope of the letter. The scope of the letter, however, speaks for itself and the intent of the letter would have required Karcher to reveal privileged communications he had with appellee. R.C. 2317.02 provides that an attorney shall not testify concerning communications between himself and his client except under very specific exceptions. We fail to see how the trial court abused its discretion in denying appellant's request to call Karcher as a witness. The second assignment of error is not well-taken.

{¶ 20} In his first assignment of error, appellant essentially contends that the lower court's issuance of the CSPO was not supported by sufficient evidence. Appellant asserts that there was no evidence that he ever physically threatened appellee, that appellee ever felt that she was in physical danger or that appellee experienced genuine fear from the incidents about which she testified.

{¶ 21} A CSPO is preventative in nature, allowing a court to act before an alleged stalker can harm his or her victim. *Gruber v. Hart*, 6th Dist. No. OT-06-011, 2007-Ohio-873, ¶ 13, citing *Short v. Walker*, 12th Dist. No. CA2000-08-009, 2001 WL 32808, *2

(Jan. 16, 2001). Appellee filed her petition for a CSPO pursuant to R.C. 2903.214, which reads in relevant part

> (C) A person may seek relief under this section for the person * * * by filing a petition with the court. The petition shall contain or state all of the following:
>
> (1) An allegation that the respondent engaged in a violation of section 2903.211 [2903.21.1] 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 [.]

{¶ 22} 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. No. WD-02-031, 2003-Ohio-794, ¶ 10. When reviewing the issuance of a CSPO on appeal, we apply the civil manifest weight of the evidence standard. *Gruber* at ¶ 17. That is, "[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 Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 23} 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. No. L-09-1313, 2010-Ohio-6219, ¶ 22. "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 * * * 'some of the person's actions may not, in isolation, seem particularly threatening.'" *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 10 (12th Dist.), quoting *Guthrie v. Long*, 10th Dist. No. 04AP-913, 2005-Ohio-1541, ¶ 12; *Miller v. Francisco*, 11th Dist. No. 2002-L-097, 2003-Ohio-1978, ¶ 11.

{¶ 24} 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.*

{¶ 25} 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.

{¶ 26} 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. No. 2007-COA-050, 2008-Ohio-4564, ¶ 11, citing *State v. Horsley*, 10th Dist. 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.

{¶ 27} The lower court determined that appellant's appearance in appellee's driveway on the night of February 6, 2010, and his letter to her in April 2010, constituted a pattern of conduct that caused appellee mental distress and, accordingly, issued the CSPO. Upon a thorough review of the record, we find the court's decision is supported by competent, credible evidence. Appellee testified that she felt fear because of appellant's words and actions, and that she discussed the situation with a counselor at work. She also stated that after the incident when appellant was in her driveway, she talked to the city prosecutor but decided not to file charges against him because she was afraid of retaliation. That incident, however, made her fearful, to the point where her neighbors helped her put new light bulbs in a sensor light and she kept the light right outside her door on all night. Then she received the eight-page letter. The letter made

her feel very uncomfortable in that appellant was overly familiar with her dogs, her family, her mother and her ex-husband's daughter.

{¶ 28} These incidents, taken together, along with appellant's unsettling email to appellee on January 11, 2010, demonstrate what can only be viewed as an increasing obsession. They further support a finding that appellant engaged in a pattern of conduct that caused appellee mental distress, and, therefore, support the trial court's issuance of the CSPO. The first assignment of error is not well-taken.

{¶ 29} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is 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

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE