[Cite as *Rauser v. Ghaster*, 2009-Ohio-5698.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92699

LAURIE RAUSER, ET AL.

PLAINTIFFS-APPELLANTS

vs.

PAMELA GHASTER

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-655883

BEFORE: McMonagle, P.J., Blackmon, J., and Stewart, J.

RELEASED: October 29, 2009

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ON RECONSIDERATION[1]

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

I

{¶ 2} Plaintiffs-appellants, Laurie and Richard Rauser, filed a petition under R.C. 2903.214 for a civil stalking protection order against defendant-appellee, Pamela Ghaster, on April 4, 2008. A hearing was held on September 26, 2008, and at the conclusion of the Rausers' case, the court granted Ghaster's motion for a directed verdict; a judgment was issued on September 29. The Rausers requested findings of fact and conclusions of law on October 2; the trial court denied their request on January 13, 2009. The Rausers appeal those judgments.[2] We reverse and remand.

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[1]The original announcement of decision, *Rauser v. Ghaster*, 2009-Ohio-4027, released August 13, 2009, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See S.Ct.Prac.R. II, Section 2(A)(1).

[2]Although the Rausers state in their notice of appeal that they are appealing the January 13 judgment, they have not assigned any error relative to it. The judgment provides in part that the September 29 "entry includes findings of fact upon which the parties may rely for purposes of appeal." We agree.

II

{¶ 3} The Rausers moved into a home on Riverdale Drive in Rocky River, Ohio in July 2005. Ghaster also resided on that street, near the Rausers' home. Initially, the Rausers and Ghaster interacted in a friendly, neighborly way. Their interactions with one another, however, changed in October 2006, when Laurie received a subpoena to testify on Ghaster's behalf in a proceeding involving Ghaster and some other neighbors. Laurie indicated to Ghaster and her attorney that she would not testify and that anything she had to say would not be beneficial to Ghaster. Thereafter, according to the Rausers, Ghaster began her menacing behavior.

{¶ 4} Laurie testified, for example, that Ghaster engaged in the following behavior toward her, Richard, and/or their young daughter: (1) yelling threats and gesturing obscenely as they walked in the neighborhood; (2) standing in the street directly in front of their home (or other areas by their home) for hours at a time yelling threats and taking photos of them; (3) repeatedly calling on the phone saying that Laurie was "going to be sorry" if she did not testify; and (4) leaving a book in the bushes for their daughter.

{¶ 5} Laurie described that Ghaster's behavior made her variously feel "mortified," "in fear," "under duress," and "terrified." Laurie further testified that she obtained professional help and was taking prescription medication because of Ghaster's behavior.

{¶ 6} Richard also testified about Ghaster's behavior toward him and his family. He described Laurie as being "very distressed" over the situation, and stated that he was "very concerned" for the safety of his wife and daughter.

III

{¶ 7} The Rausers present four assignments of error for our review, the sum and substance of which are that the trial court erred by denying their petition.[3] We agree.

{¶ 8} Initially, we clarify our standard of review (the Rauser's argue that "[a] preponderance-of-the evidence standard controls[,]" while Ghaster argues that "[t]he decision whether to grant a civil protection order is well within the sound discretion of the trial court[.]").

{¶ 9} In *Abuhamda-Sliman v. Sliman*, 161 Ohio App.3d 541, 2005-Ohio-2836, 831 N.E.2d 453, this court stated the following in regard to

[3]The Rausers argue in their first assignment of error that the doctrines of res judicata and issue preclusion apply because Ghaster was previously convicted of menacing by stalking, for which they were the victims, in a criminal case in the Rocky River Municipal Court. Those doctrines, however, are relevant to actions by the same parties or their privies. See *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 1998-Ohio-435, 692 N.E.2d 140. This case was a civil case, and the Rocky River case was a criminal case; therefore, the parties were not the same and res judicata and issue preclusion are not relevant here.

the standard of review of the trial court's judgment granting a domestic violence civil protection order under R.C. 3113.31:

{¶ 10} "We think our standard of review must depend on the nature of the challenge to the protection order. Because R.C. 3113.31 expressly authorizes the courts to craft protection orders that are tailored to the particular circumstances, it follows that the trial court has discretion in establishing the scope of a protection order and that judgment ought not be disturbed absent an abuse of discretion. When the issue is whether a protection order should have issued at all, however, the resolution of that question depends on whether the petitioner has shown by a preponderance of the evidence that the petitioner or the petitioner's family or household member was entitled to relief." Id. at ¶9, citing *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, 679 N.E.2d 672, paragraph two of the syllabus.

{¶ 11} Recently, in reviewing a trial court's disposition of a petition for a civil stalking protection order under R.C. 2903.214, the Seventh Appellate District, citing *Abuhamda-Sliman*, stated the following:

{¶ 12} "Our standard of review for whether the protection order should have been granted and thus whether the elements of menacing by stalking were established by the preponderance of the evidence entails a manifest weight of the evidence review. If there is a question as to the restrictions imposed by the court, however, we review the court's decision for an abuse of

discretion." (Citations omitted.) *Caban v. Ransome*, Mahoning App. No. 08 MA 36, 2009-Ohio-1034, ¶7.

{¶ 13} Here, the issue is whether the Rausers' petition should have survived a directed verdict and, thus, on the authority of *Abuhamda-Sliman* and *Caban*, we decide whether the Rausers presented competent, credible evidence on each element of menacing by stalking such that a directed verdict was error.

{¶ 14} "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. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶26, 865 N.E.2d 1264. Thus, civil judgments supported by some competent and credible evidence cannot be reversed on appeal as being contrary to the manifest weight of the evidence. Id. at ¶24, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578. Thus, we must evaluate whether there was some competent, credible evidence on each element of menacing by stalking." *Caban* at ¶8. We find that there was.

{¶ 15} The menacing by stalking statute provides:

{¶ 16} "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." R.C. 2903.211(A)(1).

{¶ 17} The trial court's September 29 judgment provides in relevant part:

{¶ 18} "To prevail, plaintiff must establish by a preponderance of the evidence that the respondent's conduct amounted to persistent and threatening harassment that left the petitioner in constant fear of physical danger. *Olenik v. Huff*, [Ashland App. No. 02-COA-058, 2003-Ohio-4621]. O.R.C. 2903.[2]14 is not intended to alleviate uncomfortable situations. *Nwosu v. Underwood*, [Marion App. No. 9-06-53, 2007-Ohio-1907]. The petitioner testified that the respondent never threatened physical harm. The petitioner also testified about a couple of instances wherein the petitioner and respondent were on a roadway at the same time and the respondent waved at her. Furthermore, these instances occurred more than a year before the filing of this action. The conduct complained of, while if true would undoubtedly be an annoyance, does not rise to the level of persistent and threatening harassment. There simply is no evidence of threatening conduct. As such, the petition is denied."

{¶ 19} In *Olenik*, the Fifth Appellate District *upheld* the granting of a civil stalking protection order. The court held that "to be entitled to a stalking civil protection order, the petitioner must show, by a preponderance

of the evidence that the respondent engaged in a violation of R.C. §2903.211, the menacing by stalking statute, against the person seeking the order." Id. at ¶23. The court went on to note that:

{¶ 20} "At the hearing, appellee provided a significant amount of evidence showing that a number of *threatening incidents* took place between August 25, 2002 and September 6, 2002. The trial court found that these incidents constituted threats of bodily harm which individually and collectively caused Appellee mental distress and that Appellee's fear was reasonable in light of same. Moreover, the trial court found Appellee's allegations to be credible. The trial court concluded that this conduct was sufficient to cause Appellee to believe that Appellant would cause her physical harm." (Emphasis added.) Id. at ¶25.

{¶ 21} Similarly in this case, the testimony revealed that Ghaster engaged in a pattern of *threatening incidents*. Although, the trial court found that Ghaster never threatened physical harm against the Rausers, "explicit or direct threats of physical harm are not necessary to establish a violation of R.C. 2903.211(A). Rather, the test is whether the offender, by engaging in a pattern of conduct, knowingly caused another to believe the offender would cause physical harm to him or her." *Kramer v. Kramer*, Seneca App. No. 13-02-03, 2002-Ohio-4383, ¶15. Ghaster repeatedly told the Rausers such things as "you will be sorry" and "pay back will be a b----,"

as she camped near their house for hours at a time. Her behavior amounted to "a pattern of conduct" of knowingly causing the Rausers to believe she would cause them physical harm.

{¶ 22} Further, we find the trial court's citation to *Nwosu* is misplaced. In that case, a civil stalking protection order was granted against the respondent mother and in favor of stepmother petitioner. The evidence at the hearing demonstrated that on three occasions the respondent mother went to the petitioner's home to get her son for her visitation with him. The first time, by petitioner's own admission, petitioner and respondent had a friendly interaction. The second and third times, petitioner was not at home, but learned of respondent's presence at her home from other family members. On each of the three occasions, respondent was accompanied by a local police officer to document what was occurring because she and her child's father had had problems in the past with visitation. By petitioner's own admission, respondent was "wise" for bringing a police officer.

{¶ 23} In reversing the trial court's judgment granting a civil stalking protection order, the court stated the following:

{¶ 24} "The testimony clearly shows that the crux of this issue centers around [the father's and respondent mother's] visitation schedule, to which [petitioner] is not a party, and to which she acknowledges no involvement. We do not doubt that [petitioner] has been placed in an uncomfortable

situation due to the circumstances between [respondent mother and father] and that she is troubled by the police coming to her home three times within seven days; however, we have previously noted that 'R.C. 2903.211 and R.C. 2903.214 were not enacted for the purpose of alleviating uncomfortable situations, but to prevent the type of persistent and threatening harassment that leaves victims in constant fear of physical danger.' *Kramer* at ¶17. [Respondent mother's] request for a police officer's presence is both legitimate and lawful, and [petitioner] acknowledged that such a plan is a good idea. [Petitioner's] claimed reaction to the visits with the police is neither reasonable nor foreseeable. Moreover, requesting the presence of police to keep the peace should never form the basis for a CSPO. On this record, there is insufficient evidence to support the issuance of a CSPO." *Nwosu* at ¶16.

{¶ 25} Ghaster's behavior toward the Rausers was more than an "uncomfortable situation"; it was "persistent and threatening harassment" that left the Rausers "in constant fear of physical danger." Moreover, Ghaster's behavior also caused the Rausers mental distress. Laurie had to seek professional help and use prescription medicine. As an example of her mental distress, Laurie told the court:

{¶ 26} "I don't sleep through the night. I get up every two, three hours and check all my doors, even though I know I locked them and I checked them

already. [Our daughter] has French doors that open directly facing [Ghaster's] house. I get up probably every couple hours and make sure that the doors are locked and that the alarms are on. And I don't ever leave her out of my sight."

{¶ 27} As to Richard's mental distress, he aptly summed it up: "If anyone in your family is unhappy, it affects everybody."

{¶ 28} In regard to the trial court's insinuation of friendly encounters between Laurie and Ghaster while they were on the same roadway, the occurrences must be put in context. Specifically, the encounters occurred in April 2008, approximately a year-and-a-half after the Rausers' relationship with Ghaster had soured, just days prior to the criminal trial against Ghaster on charges relative to her behavior toward the Rausers, and while the Rausers had a temporary protection order against Ghaster.

{¶ 29} Laurie described the encounters as follows. As she was driving on a roadway with light traffic on a Saturday morning, she "noticed a car following pretty close behind" her. While she was stopped at a light, the car pulled up behind her, "then really slowly pulled around over to the side of [her], very close, on the passenger's side[.]" Laurie was then able to see that the car was driven by Ghaster, who rolled down her window and waved to Laurie. Laurie testified that she was "mortified," and called Richard and the Rocky River prosecutor, who advised her to file a police report, which she did.

While driving later that same day, Laurie saw Ghaster again, who waved at her again. Under the totality of the circumstances, the encounters were not friendly; they were more of Ghaster's menacing behavior toward the Rausers.

{¶ 30} Finally, we comment on the trial court's finding that the complained-of behavior occurred more than a year before the filing of this action. The record however, demonstrates that although Ghaster's menacing behavior toward the Rausers started in October 2006, it more or less persisted up until the time of the filing of this action.[4]

IV

{¶ 31} In light of the above, the Rausers presented competent, credible evidence on each element of menacing by stalking and, therefore, the directed verdict at the close of their evidence was error.

{¶ 32} Reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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[4]The Rausers had a reprieve from Ghaster's behavior during the winter and spring of 2006-2007, and again from the end of 2007 through April 2008 (the record indicates that Ghaster was incarcerated on unrelated charges during the time of the second reprieve).

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MELODY J. STEWART, J., CONCUR