

[Cite as *Smith v. Hein*, 2015-Ohio-2749.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

SHAWN J. SMITH,	:	APPEAL NO. C-140529
	:	TRIAL NO. SK-1400393
Petitioner-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
BARBARA HEIN,	:	
Respondent-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: July 8, 2015

Roetzel & Andress and *David G. Kern*, for Petitioner-Appellee,

Arnold Law Firm and *James S. Arnold*, for Respondent-Appellant.

Please note: this case has been removed from the accelerated calendar.

Mock, Judge.

{¶1} Bringing forth two assignments of error, respondent-appellant Barbara Hein appeals the trial court’s judgment issuing a civil protection order (“CPO”) requiring her to stay 500 feet away from petitioner Shawn Smith and his wife, Lori Smith. For the following reasons, we affirm in part and reverse in part.

{¶2} In 2013, Ms. Hein and Mr. Smith, who were then coworkers, had an affair. Mrs. Smith discovered the affair, which Mr. Smith ended in December 2013. Mr. Smith then filed a petition for a CPO against Ms. Hein after she did not comply with his requests to stop contacting him. The magistrate granted an ex parte CPO, and set the matter for a full hearing. Following the hearing, where both Mr. Smith and Ms. Hein testified, the magistrate granted a CPO that expires on May 6, 2019, which was adopted by the trial court. The CPO lists both Mr. and Mrs. Smith as protected persons. Ms. Hein filed objections to the trial court’s adoption of the magistrate’s grant of the CPO, basically challenging the length of the CPO and arguing that the evidence did not demonstrate that she was stalking the Smiths. The trial court overruled the objections. Ms. Hein now appeals.

{¶3} In her first assignment of error, Ms. Hein challenges the sufficiency and weight of the evidence underlying the issuance of the CPO. This assignment of error is not well-taken.

{¶4} To obtain a CPO under R.C. 2903.214, a petitioner must show by a preponderance of the evidence that the respondent engaged in conduct constituting menacing by stalking. R.C. 2903.214(C)(1); *Mullen v. Hobbs*, 1st Dist. Hamilton No. C-120362, 2012-Ohio-6098, ¶ 11. R.C. 2903.211(A)(1) provides, “[N]o 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.”

{¶5} We review a trial court’s grant of a CPO for an abuse of discretion. *Griga v. DiBenedetto*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6097, ¶ 15. An abuse of discretion 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). A trial court’s decision to grant a CPO, if supported by competent, credible evidence, is not unreasonable. Additionally, this court will not reverse a trial court’s judgment on manifest-weight-of-the-evidence grounds unless, after reviewing all evidence and reasonable inferences and considering the credibility of the witnesses, we determine that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse its judgment. *Hobbs* at ¶ 12, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 14-23.

{¶6} After reviewing the record, we hold that there was competent, credible evidence presented to show that Ms. Hein had engaged in a pattern of conduct knowing that she was causing mental distress to Mr. Smith. At the hearing, Mr. Smith testified that despite his requests to Ms. Hein, via text messages and a written letter, to stop contacting him, she continued to do so over the next several weeks by calling his cell phone and sending him text messages numerous times and calling his home phone once. Some of the text messages were sent from a smart phone application that allows a user to send texts anonymously, and several of the phone calls were made from numbers in the Philippines, where Ms. Hein had been working. Eventually, Mrs. Smith had to involve herself in the matter and sent an electronic

mail to Ms. Hein asking her to cease contact with Mr. Smith, and told Ms. Hein that she had “done enough damage” to their family. The record demonstrates that the Smiths have a son. But Ms. Hein still continued to contact Mr. Smith. Mr. Smith then contacted the police, and after the police had told Ms. Hein to cease contact, she once again telephoned Mr. Smith, leaving a voicemail. Mr. Smith testified that Ms. Hein’s continued attempts to contact him were causing him mental distress because he was trying to save his marriage and, “it w[ould] not happen if [contact from Ms. Hein] continue[d].” At the hearing, Ms. Hein did not dispute that she had tried to contact Mr. Smith by phone and text messages, but instead attempted to explain why she still wanted to talk to Mr. Smith.

{¶7} Although Ms. Hein did not offer any rebuttal at the hearing to Mr. Smith’s assertion that he was suffering mental distress, Ms. Hein argues on appeal that she did not cause him “mental distress.” We are unpersuaded. This court held in *Griga* that mental distress need not actually have been caused in order for a CPO to issue, and that a petitioner need only show that an offender, by engaging in a pattern of conduct, knowingly caused the petitioner to believe that they would suffer mental distress. *See Griga* at ¶ 21-22. But that portion of our holding in *Griga* is not implicated in this case because here there was competent, credible evidence to establish that Ms. Hein’s actions actually caused Mr. Smith mental distress as defined in R.C. 2903.211(D)(2)(b).

{¶8} R.C. 2903.211(D)(2)(b) defines “mental distress” as “ * * * [a]ny 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.”

{¶9} To meet the statutory definition of mental distress, a petitioner does not need to present expert testimony and, further, a trier of fact may refer to its own experiences in determining whether the petitioner was suffering from mental distress. *See, e.g., State v. Horsley*, 10th Franklin Dist. No. 05AP-350, 2006-Ohio-1208, ¶ 46.

{¶10} Given the facts in this case, we conclude that the trial court did not err in determining that Mr. Smith had met the statutory definition of “mental distress.” The Smiths were married and had a child together. Mr. Smith was in the process of trying to save his marriage to Mrs. Smith and ultimately his family after he had had an affair. Compounding this situation, Mr. Smith’s wife, and eventually the police, had to get involved in an attempt to stop Ms. Hein from contacting Mr. Smith. And despite their efforts, Ms. Hein continued to contact Mr. Smith. Under these circumstances, a trier of fact could reasonably conclude that Mr. Smith was suffering from significant stress and/or anxiety, two conditions that normally require mental-health services such as counseling.

{¶11} Finally, Ms. Hein contends that even if the court finds that Mr. Smith provided sufficient evidence to demonstrate that he suffered mental distress, Mr. Smith did not show that she had knowingly caused the mental distress. We disagree. R.C. 2901.22(B) provides that “[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.”

{¶12} Here, Ms. Hein did not dispute that Mr. Smith asked her to stop contacting him because he was trying to reconcile with his wife. And Ms. Hein does not dispute that she defied Mr. Smith’s request, and even the police’s request, to cease contact with Mr. Smith. Thus, based on the foregoing, we find that there was sufficient evidence in the record from which the trial court could have determined that Ms. Hein had acted knowingly for purposes of R.C. 2903.211.

{¶13} Because competent, credible evidence existed to support the trial court’s finding that Ms. Hein, by engaging in a pattern of conduct, had knowingly caused Mr. Smith to suffer mental distress, we cannot say that the trial court abused its discretion in granting the CPO. Further, we hold that the court did not lose its way and create a manifest miscarriage of justice by issuing the CPO against Ms. Hein. The first assignment of error is overruled.

{¶14} In her second assignment of error, Ms. Hein maintains that the trial court erred by granting a CPO on behalf of a person not included in the definition of household or family member as set forth in R.C. 2903.214. We agree.

{¶15} Under R.C. 2903.214(C), a petitioner may seek relief for himself or may seek relief on behalf of a “family or household member.” Under the CPO statute, “family or household member” is a legal term of art, as defined in R.C. 3113.31(A)(3). *See* R.C. 2903.214(A)(3). Under R.C. 3113.31(A)(3), Mr. Smith had to prove that Lori Smith was a “family member” that lived or had lived with him. At the hearing, Mr. Smith presented no evidence that his wife, Lori, lived or had lived with him. Thus, she could not be listed as a protected person under the CPO. *See Griga*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6093, at ¶ 21 (holding that petitioner’s wife and children could not be listed as protected persons on the CPO when there

was no evidence presented that wife or children lived or had lived with petitioner). And even if there was evidence that Mr. Smith lived or had lived with his wife, there was no evidence presented that Ms. Hein had attempted to contact Mr. Smith's wife, Lori, let alone stalk her. *See id.* at ¶ 22.

{¶16} Accordingly, we sustain the second assignment of error and remand this cause to the trial court with instructions to remove Lori Smith as a protected person on the CPO issued against Ms. Hein. The trial court's judgment is affirmed in all other respects.

Affirmed in part, reversed in part, and cause remanded.

CUNNINGHAM, P.J., concurs separately.

DEWINE, J., concurs separately.

CUNNINGHAM, P.J., concurring separately.

{¶17} While I agree with the lead opinion's analysis supporting our judgment, I do not agree with this court's holding in *Griga v. DiBenedetto*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6097, cited in the lead opinion. For the reasons advanced in my concurrence in judgment only in *Mullen v. Hobbs*, 1st Dist. Hamilton No. C-120362, 2012-Ohio-6098, I would overrule our holding in *Griga* that where mental distress is alleged under R.C. 2903.211(A), a petitioner's burden of proof is met when it is shown that the respondent, by engaging in a pattern of conduct, knowingly caused the petitioner to believe that the respondent would cause mental distress.

DEWINE, J., concurring separately.

{¶18} I agree with the holding and analysis of the lead opinion, but I write separately because, like Judge Cunningham, I am uncomfortable with the result this

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court reached in *Griga v. DiBenedetto*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6097. In my view, the most natural reading of the language of the anti-stalking statute is that it requires that the offender knowingly caused mental distress to the victim. See R.C. 2903.211(A)(1). But we need not revisit *Griga* here because in this case the facts are sufficient to establish that Ms. Hein knowingly caused mental distress to Mr. Smith.

Please note:

The court has recorded its own entry on the date of the release of this opinion.