

[Cite as *Strassell v. Chapman*, 2010-Ohio-4376.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Frances R. Strassell, | : | |
| | : | |
| Petitioner-Appellee, | : | |
| | : | |
| v. | : | No. 09AP-793 |
| | : | (C.P.C. No. 09DV-05-786) |
| David A. Chapman, | : | (REGULAR CALENDAR) |
| | : | |
| Respondent-Appellant. | : | |

D E C I S I O N

Rendered on September 16, 2010

Stewart E. Roberts, for appellee.

Joel R. Rovito, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

BRYANT, J.

{¶1} Respondent-appellant, David A. Chapman, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting the petition of petitioner-appellee, Frances R. Strassell, for a civil protection order ("CPO"). Because competent, credible evidence supports the trial court's decision, we affirm.

I. Facts and Procedural History

{¶2} Petitioner and respondent lived together as boyfriend and girlfriend from November 1, 2006 to May 1, 2008. Upon termination of their relationship, respondent

moved out of petitioner's home. The couple briefly resumed a romantic relationship but did not cohabit again. Their relationship ultimately ended in November 2008.

{¶3} According to petitioner, respondent became indebted to petitioner in the amount of \$5,200. The parties contracted for respondent to perform remodeling work on petitioner's basement after their relationship terminated so that respondent could work off his debt to her.

{¶4} On May 22, 2009, petitioner filed a petition for a CPO, based on petitioner's allegations that respondent committed various instances of domestic violence or threats of domestic violence between March 5, 2007 and May 18, 2009, many of which respondent disputes. The trial court granted the ex parte petition the day petitioner filed it and set the matter for hearing. Following two continuances at the request of respondent, the trial court conducted a full hearing on July 23, 2009, granted petitioner's petition and issued a CPO against respondent.

II. Assignments of Error

{¶5} Respondent appeals, assigning the following errors:

First Assignment of Error

Whether the trial court erred in issuing a civil protection order based upon RC 3113.31 where Appellee failed to establish by a preponderance of the evidence sufficient credible evidence that respondent engaged in acts or threats of domestic violence.

Second Assignment of Error

Whether the trial court erred in issuing a Civil Protection Order as there was no current incident of domestic violence between the parties sufficient to support a finding that Appellee was in imminent danger of domestic violence at the time of the filing of her petition.

Third Assignment of Error

The trial court erred in characterizing Appellant's statement to Appellee as a threat of rape when Appellee's own testimony was contrary to the court's conclusion.

Respondent's three assignments of error are interrelated and together assert the trial court erred in issuing a CPO against him because petitioner failed to submit evidence that respondent presented an imminent danger to petitioner. Accordingly, we address respondent's assignments of error together.

III. Assignments of Error – Issuance of CPO

A. Statutory Provisions and Standard of Review

{¶6} "A person seeking a CPO must prove domestic violence or threat of domestic violence by a preponderance of the evidence." *Johnson v. Auls*, 10th Dist. No. 08AP-286, 2008-Ohio-6123, ¶5, citing *Felton v. Felton* (1997), 79 Ohio St.3d 34, paragraph two of the syllabus. R.C. 3113.31(A)(1) defines domestic violence, as relevant here, to be "the occurrence of one or more of the following acts against a family or household member":

- attempting to cause or recklessly causing bodily injury;
- placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 or 2911.212 of the Revised Code; and
- committing a sexually oriented offense.

{¶7} "[C]ivil protection orders are intended to prevent violence before it happens." *Young v. Young*, 2d Dist. No. 2005-CA-19, 2006-Ohio-978, ¶105. Where a trial

court grants a CPO based on a petitioner's fear of imminent serious physical harm, "the critical inquiry under [R.C. 3113.31] 'is whether a reasonable person would be placed in fear of imminent (in the sense of unconditional, non-contingent), serious physical harm.'" *Fleckner v. Fleckner*, 10th Dist. No. 07AP-988, 2008-Ohio-4000, ¶20, quoting *Maccabee v. Maccabee* (June 29, 1999), 10th Dist. No. 98AP-1213, quoting *Strong v. Bauman* (May 21, 1999), 2d Dist. No. 17256.

{¶8} "Threats of violence constitute domestic violence for the purposes of R.C. 3113.31 if the fear resulting from those threats is reasonable." *Fleckner* at ¶21, quoting *Lavery v. Lavery* (Dec. 5, 2001), 9th Dist. No. 20616, appeal not allowed (2002), 95 Ohio St.3d 1409 (internal quotation marks omitted). "The reasonableness of the fear should be determined with reference to the history between the petitioner and the respondent." *Id.*, quoting *Gatt v. Gatt* (Apr. 17, 2002), 9th Dist. No. 3217-M, citing *Eichenberger v. Eichenberger* (1992), 82 Ohio App.3d 809, 816.

{¶9} Courts use both a subjective test and an objective test in determining the reasonableness of the petitioner's fear. The subjective test "inquires whether the respondent's threat of force actually caused the petitioner to fear imminent serious physical harm." *Fleckner* at ¶23 (collecting cases). By contrast, the objective test "inquires whether the petitioner's fear is reasonable under the circumstances." *Id.*

{¶10} "[W]hen reviewing whether a trial court properly granted a CPO, an appellate court must determine whether sufficient, credible evidence supports a finding that the respondent had engaged in acts or threats of domestic violence." *Fleckner* at ¶15, quoting *Kabeer v. Purakaloth*, 10th Dist. No. 05AP-1122, 2006-Ohio-3584, ¶7. "This court will not reverse the trial court's decision for being contrary to the manifest weight of

the evidence so long as there is some competent, credible evidence going to the essential elements of the case." *Johnson* at ¶4, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Thus, "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court." *Downs v. Strouse*, 10th Dist. No. 05AP-312, 2006-Ohio-505, ¶10, quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81. "If the evidence is susceptible to more than one interpretation, the reviewing court must construe the evidence consistently with the trial court's judgment." *Johnson* at ¶4, citing *Downs* at ¶10, citing *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 584.

B. Application of Statutory Factors to Facts

{¶11} Here, respondent contends the trial court erred in granting the CPO because (1) petitioner did not present evidence of incidents that amounted to actual or threatened domestic violence, and (2) the trial court misconstrued or misinterpreted petitioner's testimony in order to find acts of actual or threatened domestic violence.

{¶12} Petitioner testified repeatedly about her emotional response to respondent. Describing an incident from March 2008, petitioner testified respondent "pushed [her] against the foot board of [her] bed." (Tr. 13.) When she tried to call the police, respondent physically removed the phone from her hand and "threw it onto the floor." (Tr. 13.) While she was trying to retrieve the phone to call the police, respondent was "hitting [her] and screaming and yelling at [her]." (Tr. 13.) According to petitioner, a few days later respondent "banged on the door and beat the door open" because petitioner would not let him into the bedroom. (Tr. 14.) At that time, petitioner called the police and filed a police

report. The incident prompted petitioner to seek counseling for what petitioner testified was both physical and emotional abuse. (Tr. 34.) Although respondent notes petitioner did not use the word "fear" in describing the incidents, the totality of the circumstances, including her expressed desire to call the police or her actual call to police, allowed the trial court to conclude petitioner feared respondent at the time of each incident.

{¶13} Petitioner also described a March 2009 incident that was part of an ongoing dispute between petitioner and respondent over ownership of a boat. Standing with his body positioned over her so close to her face that "his saliva was in [her] face," respondent yelled at her, "Fuck with my boat and I'll fuck you like you have never been fucked before." (Tr. 16-17.) Petitioner stated she did not interpret respondent's remark to be sexual in nature, but rather "as a physical threat" because respondent was "up in [her] face" when he said it. (Tr. 16.) Petitioner testified the events that occurred on that day "caused [her] to be extremely afraid." (Tr. 18.) Petitioner added that, throughout their dispute over the boat, respondent told her "he wouldn't finish [her] basement unless [she] gave him sex." (Tr. 18.)

{¶14} Describing another incident that caused her fear, petitioner testified respondent came to her house on March 26, 2009, walked around the outside, peered through all the windows and knocked on the door. When petitioner failed to answer the door, respondent stood in her driveway "talking on his cell phone to [her] answering machine in house." (Tr. 20.) Petitioner told the court she could "hear him" telling her he knew she was in the house because "he saw [her] through the window." (Tr. 20.) The next day, respondent left a letter for petitioner at her place of employment.

{¶15} Incidents on May 16 and 18, 2009 prompted petitioner to seek a CPO. Respondent was at her house, working on the basement. He became "very angry at [her], calling [her] a bitch." (Tr. 22.) Respondent then grabbed a five-gallon bucket of water and threw it on petitioner's leg. Two days later, on May 18, 2009, petitioner talked to respondent about the boat and told him she would not relinquish the boat to him until he finished his work on the basement. Respondent threatened to go to court over the boat, causing petitioner to be "scared half to death" due to respondent's prior remark that he was going to "fuck [her] like [she] had never been fucked before" if she interfered with the boat. (Tr. 23.)

{¶16} Petitioner stated May 18, 2009 "was the day of [her] extreme fear" because, even though respondent's threat "to fuck her" was earlier, she felt he at that point would make good on the threat since she could no longer delay action regarding the boat. (Tr. 32.) Indeed, when respondent told petitioner he would take her to court over the boat, "he did quite a bit of yelling and screaming at [her], and he slammed [the boat] so loud the neighbors heard it. He was really, really mad at me." (Tr. 33-34.) Petitioner added that each time respondent screamed at her, he moved very close to her face, which is "very threatening, because it's violent." (Tr. 24.) Although petitioner said respondent never punched her, she said "[h]e has pulled [his fist] back like he was going to" during the March 2009 incident involving the argument about the boat. (Tr. 24.)

{¶17} Petitioner testified that, based on respondent's behavior but prior to her seeking the CPO on May 22, 2009, she started parking under surveillance cameras at work, increased her security at home, and did not "go anywhere alone," taking "it very seriously to stay away from any place" she knew respondent "will be." (Tr. 28.) When

asked directly whether she was afraid of respondent, petitioner answered, "Yes." (Tr. 28-29.)

{¶18} Although respondent denied many of petitioner's allegations, the trial court is charged with the responsibility to assess the credibility of the witnesses. See, e.g., *Downs* at ¶10. Based on both petitioner's and respondent's testimony, the trial court found cause to issue the CPO. The court noted respondent threatened force to petitioner, "physically ripped phones from her hands when she tried to call the police," "threw liquid in anger at her" and "threatened to rape her, the way I understood the testimony." (Tr. 51.) Indeed, the court found her in "fear of imminent physical harm" such that she sought counseling. (Tr. 51.)

{¶19} Relying on *Fleckner*, supra, respondent disputes the trial court's conclusion and asserts the trial court could not rely on past occasions of domestic violence to support its decision to issue a CPO. Rather, respondent argues, petitioner was required to present some current incident of domestic violence causing petitioner to believe she was in imminent danger of harm. *Id.* at ¶27, quoting *Bahr v. Bahr*, 5th Dist. No. 03 COA 011, 2003-Ohio-5024, ¶29 (stating "the reasonableness of [a petitioner's] fear of imminent serious physical harm may not be determined by incidents of prior domestic violence absent an initial, explicit indication that she was in fear of imminent serious physical harm on the date contained in the petition").

{¶20} Respondent's argument misapplies *Fleckner*. Petitioner testified she was in "extreme fear" of respondent on May 18, 2009, just prior to filing her petition on May 22, 2009. The basis for her fear was both respondent's behavior in screaming and slamming the boat, as well as petitioner's recollection of respondent's previous threats of physical

violence towards her should she interfere with his use of the boat. Petitioner having explicitly indicated she was in fear of serious physical harm on the date contained in the petition, the trial court then could consider prior incidents of domestic violence to determine the reasonableness of petitioner's fear. Since petitioner testified respondent previously had been physically violent toward her when he slammed her into the footboard of her bed and ripped phones away from her as she tried to call the police, the court could conclude petitioner's fear of respondent was reasonable in light of the history between the parties.

{¶21} Moreover, although *Fleckner* clarifies that "[a] threat to take legal action does not meet the R.C. 3113.31(A)(1)(b) definition of domestic violence," petitioner explicitly stated she did not fear respondent because he threatened to go to court; rather, she feared what respondent would do to her as a result of any further dispute regarding the boat. Given the history between the parties, as well as respondent's very specific threat if petitioner were to interfere with the boat, the trial court could conclude petitioner's fear of imminent physical harm following the events of May 18, 2009 was reasonable.

{¶22} Respondent also contends the trial court erred in construing respondent's act of throwing a bucket of water on petitioner as sufficient to cause petitioner fear, especially since petitioner testified the act only "alarmed" her. (Tr. 35.) To the extent respondent's contention argues more than semantics, petitioner testified she found respondent's act of throwing water "extremely threatening," supporting the trial court's decision to interpret it to be an act or threat of domestic violence. (Tr. 22.)

{¶23} Respondent nonetheless argues that, under an objective test, no reasonable person would interpret the act of throwing water on someone as sufficient to

cause fear of imminent serious physical harm. Again, the history between the parties allowed the trial court to conclude otherwise, as petitioner testified to respondent's violent outbursts prior to this incident. Although respondent's act of throwing water may not have been sufficient in itself to support the trial court's granting a CPO, it was only one of several incidents leading petitioner to seek a CPO.

{¶24} Respondent further argues the trial court erred in construing respondent's statement, "Fuck with my boat and I'll fuck you like you have never been fucked before." Respondent notes that although the trial court construed it as a threat of rape, petitioner testified she did not consider it to be sexual in nature. Initially, although petitioner did not consider the statement to be a literal threat of rape, petitioner testified respondent previously threatened not to finish work on her basement unless petitioner would give him sex. Given that context, the trial court's interpretation of respondent's remark as at least partially sexual in nature does not appear unreasonable.

{¶25} Secondly, even if respondent did not intend the statement as a threat of actual rape, petitioner testified she "took that as a physical threat," especially since respondent positioned himself in a menacing posture as he made the remarks. Considered as a whole, the statement allowed the trial court reasonably to interpret respondent's statement as a threat of physical violence, which is a premise for issuing a CPO. See *Thomas v. Thomas* (1988), 44 Ohio App.3d 6, 8 (stating "[t]he statutory criterion to determine whether or not to grant a civil protection order pursuant to R.C. 3113.31 is the existence or threatened existence of domestic violence"). Thus, even if the trial court erred in interpreting that statement as a threat of rape, the error was harmless

in that, whether or not the remark was sexual, the court perceived it as a threat of, at the least, physical violence.

{¶26} Perhaps respondent's strongest argument against a finding that petitioner suffered fear of "imminent" physical harm at his hands is the undisputed fact that petitioner allowed respondent to return to her house to work on her basement after he made the threatening statement to her about what would happen if she interfered with his possessing the boat. Respondent argues petitioner could not possibly have been in fear of imminent serious physical harm when she allowed respondent to return to her home after the threat.

{¶27} The meaning of "imminent" as used in R.C. 3113.31 is not necessarily restricted to the actual timing of the threat. See, e.g., *Strong*, supra (explaining the imminence requirement in R.C. 3113.31 does not require "that the offender carry out the threat immediately or be in the process of carrying it out" because "[i]f that were the case, a man could threaten to kill his wife at some time in the near future" and not be subject to a CPO). Rather, since a CPO is intended to prevent domestic violence, courts construe the imminence requirement to ask whether a reasonable person would be placed in fear of an unconditional, non-contingent serious physical harm. *Id.*, citing *Siouffi v. Siouffi* (Dec. 18, 1998), 2d Dist. No. 17113. Essentially, the requirement of "imminent" fear addresses the reality of the threat rather than the timing of the threat. In that context, and in light of petitioner's testimony that her fear materialized when she believed respondent reached the breaking point in their dispute over the boat, the trial court could conclude petitioner's fear of respondent was reasonable.

{¶28} Because the evidence is sufficient to support the trial court's conclusion that respondent's threats created subjectively and objectively reasonable fear, respondent's second and third assignments of error are overruled. For the same reasons, the record contains competent, credible evidence to support the trial court's conclusion to issue a CPO in this case. The trial court made permissible inferences from the evidence to conclude petitioner had a reasonable fear of imminent serious physical harm. We therefore overrule respondent's first assignment of error.

IV. Disposition

{¶29} In sum, the trial court did not err in granting petitioner's petition for a CPO against respondent, as competent, credible evidence supports that decision. Having overruled respondent's three assignments of error, we affirm the decision of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
