

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2008-000604-001 DT

11/24/2008

COMMISSIONER EARTHA K. WASHINGTON

CLERK OF THE COURT
T. Melius
Deputy

OLGA CHAIKHEEVA
SHIELD FOUNDATION

OLGA CHAIKHEEVA
4601 N 8TH PL
PHOENIX AZ 85014

v.

YEFIM TOYBIN (001)

DAVID R APPLETON

REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

Lower Court Appeal No. 0813781495

This Court has jurisdiction over this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. § 12-124(A). The court has considered the record of the proceedings from the trial court, exhibits made of record, and the memoranda submitted.

On February 27, 2008, Olga Chaikheeva, as an alleged authorized agent of the Shield Foundation, sought an injunction against workplace harassment on behalf of herself, Shield Foundation, the Arizona Russian Center, the employees of these businesses, and all past and present clients of the companies, against the appellant, Yefim Toybin. The petition was filed in Phoenix Municipal Court. It accused the appellant of sending emails, blogs, letters, and publications to Shield Foundation, its ex-clients and partners about Chaikheeva and Shield Foundation that Chaikheeva considered disturbing and harassing. The lower court granted the petition thereby barring the appellant from having any contact with all staff members, clients and ex-clients of the Shield Foundation. He was also barred from going to any place that these individuals happened to be and from the offices of Shield Foundation. The appellant requested a hearing and denied that he committed the acts alleged by Chaikheeva. A hearing was held on

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March 19, 2008. The appellant, Chaikheeva and her witnesses, Tatyana Bagmanova and Tatyana Razumnyi testified at the day long hearing.

The Shield Foundation is a domestic violence help center that serves the needs of the Russian community in the Phoenix area. The Arizona Russian Center apparently provides information on various topics to the Russian community in Arizona. Both the appellant and Chaikheeva are Russian immigrants who are deeply involved in Russian community in the Phoenix area. The appellant has been investigating the Shield Foundation based on what he believes are illegal activities the foundation is involved in. As part of his investigation he has contacted ex-husbands and ex-wives of current and past clients of the foundation. He also has written blogs, published articles, created flyers, and sent emails to people in the Russian community about his investigation and his opinion about Chaikheeva and the foundation and his hope for the closure/downfall of the foundation. Chaikheeva apparently became aware of the appellant's writing through third parties, i.e. Tatyana Bagmanova (president of the Arizona Russian Center and sometime volunteer for Shield Foundation) who received emails from third parties about the flyers and other writings that the appellant was posting throughout the Russian community, she also claimed to have received an email directly from the appellant; and through Sarah Widowski, the statutory agent for Shield Foundation, who did not testify, but whom Chaikheeva claimed was interviewed by the appellant against her wishes (noting that he "takes pictures" probably meaning from a review of the record videotaping the interview). Tatyana Razumnyi, by her testimony, did not have any connection or contact with the appellant, she simply was a person who knew Chaikheeva and had received help from Shield Foundation three years prior. She helped to make people in the Russian community aware of events happening at the Shield Foundation and was upset to hear that someone was bad mouthing the organization.

The appellant told the lower court that Widowski agreed to be interviewed by him and that he recorded the conversation in order to prove it; he however failed to bring the videotape to court with him on the day of the hearing. Widowski's interview appeared in a publication of the appellant's and Chaikheeva claims that the article contained lies. Chaikheeva claimed some of the Shield Foundation employees received the writings of the appellant, and that some of the people receiving the appellant's writings have at times assisted in volunteering their time, businesses and other things to the Shield Foundation. The appellant told the lower court that he distributed his writings to Russian businesses, inside of Russian newspapers, to people who made requests for the information via email, and to friends of his also via email. He did admit that on December 26, 2007, he sent an email to both the Shield Foundation and the Arizona Russian Center requesting information from both organizations (the email that Bagmanova claimed to have received as president of the Arizona Russian Center). He denied having sent any other emails directly to those organizations or to Olga Chaikheeva. The information that was contained in the writings, blogs, etc., Chaikheeva considered damaging and harassing not only to herself but also to Shield Foundation.

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After the hearing the lower court amended the original injunction finding that the appellant contacted Chaikheeva and Bagmanova against their wishes and held that his conduct was harassing. The lower court stated that each side had bad blood against one another and hoped that through the injunction a cooling off period would occur. It also told Chaikheeva that she could not stop the appellant from investigating her organization because he had a right to do so. After the appellant's attorney had left the lower court answered questions posed by him regarding his limitations as imposed by the injunction. The court also took testimony from Mr. Conovaloff's who had not testified in the main hearing; the appellant's attorney was not present for this questioning. After that questioning the lower court stated that it believed that Conovaloff should be listed as a protected person on the injunction and advised the appellant not to have any further contact with him.

Having filed a timely notice of appeal the appellant brings the matter before this court for review. The appellant raises several issues on appeal regarding the propriety of the injunction, the questioning of the appellant and witnesses after his counsel was excused from the hearing and alleged bias by the court in favor of the appellant. The focus by this Court will be on whether there was sufficient evidence presented to the lower court that a series of acts occurred which would warrant the issuance of the injunctive order that restricts the appellant's contact with the appellee, Shield Foundation, Andrew Conovaloff, Tatyana Bagmanova (President of the Arizona Russian Center), and emails to the Arizona Russian Center. "We review orders granting injunctions under a clear abuse of discretion standard. *Ariz. Dep't of Pub. Safety v. Superior Court*, 190 Ariz. 490, 494, 949 P.2d 983, 987 (App.1997).¹

An appellate court affords great weight to the trial court's assessment of witnesses' credibility and will not reverse the trial court's weighing of evidence absent clear error.² When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court examines the record only to determine whether substantial evidence exists to support the action of the lower court.³ The Arizona Supreme Court has explained in *State v. Tison*⁴ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is

¹ *La Faro v. Cahill*, 203 Ariz. 482, 485, 56 P.3d 56, 59 (Ariz.App. 2002).

² *In re: Estate of Shumway*, 197 Ariz. 57, 64, 3 P.3d 977, 984 (1999), review granted in part, opinion vacated in part, 198 Ariz. 323, 9 P.3d 1062 (2000).

³ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 52, 961 P.2d 449, 450 (1998); *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

⁴ *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

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directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.

This Court must view the evidence in a light most favorable in sustaining the judgment, and will not substitute its judgment for the lower court.⁵ If conflicts in evidence exist, the appellate court resolves such conflicts in favor of sustaining the judgment and against the appellant.⁶

A.R.S. § 12-1810 permits a court to issue injunctions against harassment in order to prevent workplace harassment.

A.R.S. § 12-1810 Injunction against workplace harassment...

A. An employer or an authorized agent of an employer may file a written verified petition with a magistrate, justice of the peace or superior court judge for an injunction against workplace harassment. . . .

C. The injunction prohibiting petition shall state all of the following:

1. The name of the employer.
2. The name and address, if known, of the defendant.
3. A specific statement showing the events and dates of the acts that constitute harassment toward the employer or any person who enters the employer's property or who is performing official work duties.. . .

F. If the court grants an injunction against workplace harassment, the court may do any of the following:

1. Restrain the defendant from coming near the employer's property or place of business and restrain the defendant from contacting the employer, or other person while that person is on or at the employer's property or place of business or is performing official work duties.
2. Grant any other relief necessary for the protection of the employer, the workplace, the employer's employees or any other person who is on or at the employer's property or place of business or is performing official work duties. . . .

R. For the purposes of this section:

1. "Employer" means an individual, partnership, association or corporation or a person or

⁵ *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

⁶ *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

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group of persons who act, directly or indirectly, on behalf of or in the interest of an employer and with the consent of the employer. employer includes this state, a political subdivision of this state and any school district or other special district.

2. "Harassment" means a single threat or act of physical harm or damage or a series of acts over any period of time that would cause a reasonable person to be seriously alarmed or annoyed.

Viewing the evidence relied upon by the lower court in relation to the proof needed to uphold the injunctive order against the appellant, this Court finds that the order should not have been upheld. Tatyana Bagmanova is not an employee of the Shield Foundation, she told the lower court that she supported and volunteered herself to the organization. There was no proof that Bagmanova ever performed any official work on behalf of Shield. Besides that she only testified that she received one email from the appellant requesting information on the Shield Foundation and the Arizona Russian Center. The writings about the two organizations and the people who ran them that Bagmanova found offensive and untrue she received from third parties. In the same way Chaikheeva testified to only having received a direct email from the appellant in December of 2007; she too objected to the dissemination of information and contact by the appellant to ex-clients, a past president and volunteers of the Shield Foundation. The lower court expressly stated that it was not preventing the appellant from contacting Shield Foundation volunteers but included Conovaloff on the injunction because in his capacity as volunteer, he performed the work of a webmaster. There was no evidence presented by Conovaloff that the appellant had contacted or harassed him in any capacity since 2004, so any inclusion of Conovaloff was improper. There was no specific evidence presented by Chaikheeva that Shield Foundation or any of its employees (to include volunteer employees) were ever directly contacted by the appellant. Although the organization, its members and friends were annoyed by the appellant's writings and disseminations in the Russian community, there was no evidence presented to the lower court that his conduct amounted to the statutory definition of harassment in A.R.S. § 12-1810. The lower court therefore abused its discretion in modifying and upholding in part the injunction granted on February 27, 2008.

IT IS ORDERED reversing the order upholding the injunction against harassment and remanding the matter to the Phoenix Municipal Court for all further appropriate proceedings consistent with this ruling.