

2010

# Amy B. Bott v. Jessie Lee Osburn : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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AMY B. BOTT,

Petitioner/Appellee,

v.

JESSIE LEE OSBURN,

Respondent/Appellant.

Appellate Case No. 20100232

District Ct. Case No. 100400395

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**BRIEF OF APPELLEE**

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**UTAH APPELLATE COURTS**

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## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this case under Utah Code Ann. § 78A-4-103(2)(j).

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Osburn's arguments contain significant overlap and raise both legal and factual challenges to the district court's ruling. This Court "review[s] the district court's [factual] findings for clear error and its conclusions of law for correctness, affording the court some discretion in applying the law to the facts." *Arnold v. Arnold*, 2008 UT App 17, ¶ 5, 177 P.3d 89 (alteration in original) (internal quotation marks omitted). Additionally, in stalking cases, "the respondent's conduct must be considered cumulatively in light of all of the facts and circumstances of the case." *Ellison v. Stam*, 2006 UT App 150, ¶ 38, 136 P.3d 1242.

## CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The issuance of civil stalking injunctions is governed by Utah Code section 77-3a-101. *See* Utah Code Ann. § 77-3a-101 (2008). In order to issue a civil stalking injunction, the district court must find that the respondent has committed the offense of stalking the petitioner. *See id.* § 77-3a-101(5), (7). For purposes of the issuance of civil stalking injunctions, "'stalking' means the crime of stalking as defined in [Utah Code

s]ection 76-5-106.5." *See id.* § 77-3a-101(1). Utah's stalking statute, Utah Code section 76-5-106.5, provides:

A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person:

- (a) to fear for the person's own safety or the safety of a third person; or
- (b) to suffer other emotional distress.

Utah Code Ann. § 76-5-106.5(2) (2008). "Course of conduct" is defined as "two or more acts directed at or towards a specific person." *See id.* § 76-5-106.5(1)(b).

#### **STATEMENT OF THE CASE**

At trial, Bott testified that Osburn threatened to shoot her with a gun on December 7, 2009 and again on December 13, 2009. After a hearing in which both Bott and Osburn each testified and called witnesses, the Court weighed the evidence presented and issued a permanent injunction.

Osburn's primary defense at trial was that Bott had initiated the telephone calls in which the threats were made. At the close of testimony, Judge Hansen took a recess to determine whether the fact that Bott had made the phone calls to Osburn would serve as an affirmative defense for Osburn, and concluded that it would not. Trial Transcript at 69-73.

In his ruling, Judge Steven L. Hansen determined that Bott's testimony was more credible than Osburn's. Trial Transcript at 71-73. This entire case boils down to the

district court's evaluation of trial testimony. Osburn lost at trial, and is now attempting to have this Court rule that her testimony is more credible than Bott's.

### **SUMMARY OF THE ARGUMENT**

The trial court's findings satisfy the statutory requirements for issuance of a civil stalking injunction: two or more acts, directed at Bott by Osburn, when she knew or should have known that such acts would reasonably cause Bott fear of harm or emotional distress. *See* Utah Code Ann. § 77-3a-101; *see also* Utah Code Ann. § 76-5-106.5. The trial court found that on December 7, 2009, and again on December 13, 2009, Osburn threatened to shoot Bott.

### **ARGUMENT**

Given the conflicting evidence presented to the district court, Osburn has not demonstrated that the trial court's findings are clearly erroneous. *See generally Pitt v. Taron*, 2009 UT App 113, ¶ 2 n.1, 210 P.3d 962 ("As the trier of fact in a bench trial, the trial court is in the best position to weigh conflicting evidence and the credibility of witnesses." (internal quotation marks omitted)); *In re A.G.*, 2001 UT App 87, ¶ 4, 27 P.3d 562 (upholding factual findings "unless they are clearly erroneous, meaning that they are against the clear weight of the evidence" (internal quotation marks omitted)).

#### **A. Emotional Distress**

Bott testified repeatedly that Osburn's threats to shoot her caused her emotional distress. In *Salt Lake City v. Lopez*, 935 P.2d 1259 (Utah Ct.App.1997), the court clarified the definition of "emotional distress" for purposes of section 76-5-106.5. *See id.* at 1264. In *Lopez*, the defendant claimed that because section 76-5-106.5 did not contain a definition for emotional

distress, it was unconstitutionally vague. *See id.* The court rejected this claim, stating that "the tort of intentional infliction of emotional distress is well established in this state," and therefore "emotional distress is well defined in this state." *Id.* at 1264-65; *see also State v. Martel*, 273 Mont. 143, 902 P.2d 14, 19-20 (1995) (holding that use of the phrase "substantial emotional distress" did not render the relevant statute unconstitutionally vague where that phrase was defined by prior tort law); *Woolfolk v. Commonwealth*, 18 Va.App. 840, 447 S.E.2d 530, 533-36 (1994) (using the phrase "emotional distress"). The *Lopez* court went on to state that "[e]motional distress results from conduct that is 'outrageous and intolerable in that it offends the generally accepted standards of decency and morality.'" *Lopez*, 935 P.2d at 1264 (quoting *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992)). Threatening to shoot someone two times within a week is both "outrageous" and "intolerable".

The tort definition of emotional distress must be applied in the context of the other elements of a civil stalking claim. The stalking statute expressly incorporates the reasonable person standard, by defining stalking as "intentionally or knowingly engag[ing] in a course of conduct directed at a specific person that would cause a reasonable person ... to suffer emotional distress." *Id.* § 76-5-106.5(2)(a)(ii) (emphasis added). Given the fact that Osburn had already engaged in an extended sexual relationship with Bott's husband of 15 years and, in her opinion, destroyed her family consisting of five children, it was not unreasonable for the district court to conclude that two death threats would cause Bott to suffer emotion distress.

The legislature's use of the term "course of conduct," *id.*, illustrates the essence of a stalking violation. Stalking, by its very nature, is an offense of repetition. The conduct is rendered more offensive and more threatening because it is repeated.

The statute also requires the trier of fact to consider whether a reasonable person would have suffered emotional distress. *See id.* § 76-5-106.5(2)(a)(ii). The merging of the concepts of emotional distress and a reasonable reaction to it, is also present in this state's jurisprudence regarding tort claims based on emotional distress. In *Lopez*, this court stated that "[e]motional distress results from conduct that is 'outrageous and intolerable in that it offends the generally accepted standards of decency and morality.'" *Salt Lake City v. Lopez*, 935 P.2d 1259, 1264 (Utah Ct.App.1997) (quoting *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992)). The consideration of whether someone has acted outrageously must be undertaken in light of all of the facts and circumstances of the particular case.

In *Harnicher v. University of Utah Medical Center*, 962 P.2d 67 (Utah 1998), the Utah Supreme Court explained that "the emotional distress suffered must be severe; it must be such that a reasonable [person,] normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Id.* at 70 (addressing claim for negligent infliction of emotional distress); *see also Hansen v. Mountain Fuel Supply*, 858 P.2d 970, 975 (Utah 1993).

A defendant's knowledge is also relevant to the question of whether the conduct is extreme and outrageous. The extreme and outrageous character of the conduct may arise

from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. In the instant case, the testimony showed that on December 13, 2009, Bott had dialed the number of her husband's cell phone ostensibly to speak to her husband. Trial Transcript at 7. On that occasion, Osburn knew that Bott had called her own husband, took the husband's phone and spoke to Bott, knew that Bott was aware that she was with Bott's husband, and then threatened to shoot Bott for a second time. *Id.* The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know. Restatement (Second) of Torts § 46 cmt. f (1965). While the Restatement goes on to reiterate that the conduct must be objectively outrageous, it clearly recognizes that the character of the conduct should be considered in the context of the facts and circumstances of the individual case. *See id.*

Both the plain language of the statute and accepted concepts of tort law reveal that the phrases "emotional distress" and "reasonable person" are not exclusive concepts, but must be considered together to evaluate whether a defendant has violated the civil stalking statute.

### **B. Course of Conduct**

For a person to be guilty of stalking, she must, among other things, engage in a "course of conduct" that is "directed at a specific person." Utah Code Ann. § 76-5-106.5(2)(a). The definition of "course of conduct" includes "repeatedly conveying verbal

or written threats or threats implied by conduct . . . directed at or toward a person." *Id.* § 76-5-106.5(1)(a) (emphasis added). And "repeatedly" is defined as "two or more occasions." *Id.* § 76-5-106.5(1)(c). Furthermore, subsection 2(a) incorporates a reasonable person standard in the stalking definition. *See Ellison v. Stam*, 2006 UT App 150, ¶ 27, 136 P.3d 1242. Accordingly, a person is guilty of stalking as defined in section 76-5-106.5(2)(a)(i)-(ii), if, on two or more occasions, she intentionally engages in conduct that causes a reasonable person to (1) fear bodily injury or (2) suffer emotional distress. *See Utah Code Ann. § 76-5-106.5(1)-(2)*. After weighing all of the evidence, the district court concluded that these elements were satisfied by Osburn's threats to shoot Bott on December 7, 2009 and December 13, 2009.

Osburn argues that the district court ruled against her because of her affair with Bott's husband. But the transcript reveals that the opposite is true. At the end of the trial, the district court stated on the record, "I'm not passing judgment on what's happened between you in your personal lives whatsoever. That's not before me today." Transcript at 71. Osburn's conduct, however, must be considered cumulatively in light of all of the facts and circumstances of the case. It would be inappropriate to consider each incident separately, without weighing the effect of the prior encounters between the parties. The failure to analyze the entire course of conduct between the parties is also inappropriate in determining whether Osburn's conduct was "directed at" Bott. *Id.* § 76-5-106.5(2)(a).

### **C. Osburn Has Failed To Marshall the Evidence.**

Osburn has failed to carry her heavy burden of marshaling the evidence in support of the trial court's ruling and showing that the evidence, viewed in the light most favorable to the appellee, is insufficient. *Tingey v. Christensen*, 1999 UT 68, ¶ 7, 987 P.2d 588; *accord Harding v. Bell*, 2002 UT 108, ¶ 19, 57 P.3d 1093; Utah R. App. P. 24(a)(9).

Osburn's brief reads like a post-judgment motions to reconsider. *See Ron Shepherd Ins., Inc. v. Shields*, 882 P.2d 650, 653 n.4 (Utah 1994) ("[T]his court has consistently held that our rules of civil procedure do not provide for a motion for reconsideration of a trial court's order or judgment . . . ."); *Watkiss & Campbell v. FOA & Son*, 808 P.2d 1061, 1064 (Utah 1991) (recognizing that the Utah Rules of Civil Procedure do not technically allow motions to reconsider); *Peay v. Peay*, 607 P.2d 841, 842-43 (Utah 1980).

### **D. Weight of the Evidence.**

Osburn's chief complaint is that the district court did not believe her testimony. Trial courts are afforded broad discretion in deciding to admit or exclude evidence. *See Jensen v. Intermountain Power Agency*, 977 P.2d 474, 477 (Utah 1999). Appellate courts "presume that the discretion of the trial court was properly exercised unless the record clearly shows to the contrary." *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah Ct. App. 1991). Although decisions have varied, the standard of review for the admissibility of evidence is typically an abuse-of discretion. *See, e.g., Stevenett*, 977 P.2d at 511 (stating abuse of discretion as appropriate standard when rule of evidence requires trial court to balance factors). Abuse of discretion has been defined as acting beyond the bounds of reasonability. *See Alonzo*, 932 P.2d at 613.

Appellate courts review factual questions under the clearly erroneous standard, and legal questions under the correctness standard. *See Jeffs v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998), *cert. denied*, 119 S. Ct. 1803 (1999). Although legal questions are reviewed for correctness, appellate courts "may still grant a trial court discretion in its application of the law to a given fact situation." *Jeffs*, 970 P.2d at 1244. This is the "mixed question" category.

"Factual questions are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind." *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). A trial court's findings of fact are reviewed under a clearly erroneous standard. *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998). This comes from Rule 52(a), which provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A finding is clearly erroneous if it is so lacking in support as to be against the clear weight of the evidence. *See Pennington*, 973 P.2d at 937. If, viewing the evidence in the light most favorable to the trial court's determination, a factual finding is based on sufficient evidence, the finding is not clearly erroneous. *See Joufflas v. Fox Television Stations, Inc.*, 927 P.2d 170, 174 (Utah 1996).

Legal determinations are "those which are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar

circumstances." *Pena*, 869 P.2d at 935. "[A]ppellate review of a trial court's determination of the law is usually characterized by the term 'correctness.'" *Id.* at 936. "Utah case law teaches that 'correctness' means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *Pena*, 869 P.2d at 935. "Appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction." *Pena*, 869 P.2d at 936.

### CONCLUSION

The trial court did find all the requirements needed to grant Bott's stalking injunction. There is ample evidence in the record to support the district court's findings and conclusions. Bott testified that based on Osburn's threats to shoot her, she has feared for the safety of herself and her children. Osburn's threats would cause emotional distress to any normal person, and did cause Bott's emotional distress and fear of bodily harm. The trial court made sufficient findings to support a determination that the elements of the civil stalking claim had been met.

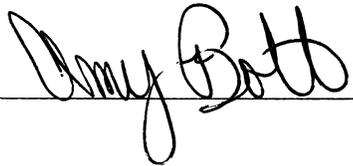
Dated this 15<sup>th</sup> day of November, 2010.

  
\_\_\_\_\_  
Amy B. Bott  
Appellee, Pro Se

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing **BRIEF OF APPELLEE** was served via U.S. First Class Mail, postage prepaid on the 15<sup>th</sup> day of November, 2010, to the following:

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