

2010

Jessie Lee Osburn v. Amy B. Bott : Addendum to Brief of Appellant

Utah Court of Appeals

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Amy B. Bott; Appellee Pro Se .

Scott H. York; Old World Legal Services PLLC; Attorney for Appellant.

Recommended Citation

Legal Brief, *Jessie Lee Osburn v. Amy B. Bott*, No. 20100313 (Utah Court of Appeals, 2010).
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IN THE UTAH COURT OF APPEALS

JESSIE LEE OSBURN,

Petitioner/Appellee,

vs.

AMY B. BOTT,

Respondent/Appellant.

Appellate Case No. 20100313

District Ct. Case No. 100400395

**ADDENDUM TO
BRIEF OF APPELLANT**

Amy B. Bott
2444 West 960 North
Provo, Utah 84601

Appellee, Pro Se

Scott H. York
Old World Legal Services, PLLC
3341 South 700 East
Salt Lake City, Utah 84106

Attorney for Appellant Jessie Osburn

FILED
UTAH APPELLATE COURTS
OCT 22 2010

IN THE UTAH COURT OF APPEALS

JESSIE LEE OSBURN,

Petitioner/Appellee,

vs.

AMY B. BOTT,

Respondent/Appellant.

Appellate Case No. 20100313

District Ct. Case No. 100400395

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2444 West 960 North
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Scott H. York
Old World Legal Services, PLLC
3341 South 700 East
Salt Lake City, Utah 84106

Attorney for Appellant Jessie Osburn

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4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

JESSIE LEE OSBURN vs. AMY B BOTT

CASE NUMBER 100400395 Civil Stalking

CURRENT ASSIGNED JUDGE
LYNN W. DAVIS
Division 8

PARTIES

Petitioner - JESSIE LEE OSBURN
Represented by: SCOTT H YORK

Respondent - AMY B BOTT

ACCOUNT SUMMARY

| | | |
|---------------|--------------|-------|
| TOTAL REVENUE | Amount Due: | 10.00 |
| | Amount Paid: | 10.00 |
| | Credit: | 0.00 |
| | Balance: | 0.00 |

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

| | | |
|--|----------------|-------|
| | Amount Due: | 10.00 |
| | Amount Paid: | 10.00 |
| | Amount Credit: | 0.00 |
| | Balance: | 0.00 |

CASE NOTE

PROCEEDINGS

02-02-10 Filed: Complaint
02-02-10 Judge LYNN W. DAVIS assigned.
02-02-10 Filed: Request for Civil Stalking Injunction
02-09-10 Issued: Ex Parte Temporary Civil Stalking Injunction
Judge LYNN W. DAVIS
02-10-10 Case Disposition is Granted
Disposition Judge is LYNN W. DAVIS
02-25-10 Filed: Request for Hearing
02-26-10 Filed return: Ex Parte Temporary Civil Stalking Injunction
Party Served: BOTT, AMY B
Service Type: Personal
Service Date: February 25, 2010

CASE NUMBER 100400395 Civil Stalking

02-26-10 Notice - NOTICE for Case 100400395 ID 12794127

STALKING INJUNCTION is scheduled.

Date: 03/09/2010

Time: 10:00 a.m.

Location: Third floor, Rm 301

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: LYNN W. DAVIS

The respondent in this matter has requested a hearing on the civil stalking injunction previously issued. Both parties must be present.

02-26-10 STALKING INJUNCTION scheduled on March 09, 2010 at 10:00 AM in Third floor, Rm 301 with Judge DAVIS.

03-09-10 Fee Account created Total Due: 10.00

03-09-10 AUDIO TAPE COPY Payment Received: 10.00

03-09-10 Minute Entry - Minutes for CIVIL STALKING INJUNCTION

Judge: LYNN W. DAVIS

Clerk: juliea

PRESENT

Petitioner's Attorney: SCOTT H YORK

Petitioner(s): JESSIE LEE OSBURN

Respondent(s): AMY B BOTT

Audio

Tape Number: 10-301 Tape Count: 10:05

HEARING

TAPE: 10-301 COUNT: 10:05

This matter comes before the court for a civil stalking injunction hearing. Mr. York addresses the court. The court notes there is an active stalking case in Salt Lake County. There is also an active case which has been assigned and addressed

by Judge Hansen, case #100400157. The court takes a short recess to confer with Judge Hansen.

After conferring with Judge Hansen the court notes that these issues were addressed in the earlier case. The court strikes this hearing, voids the temporary ex parte stalking injunction, dismisses this case and orders the file closed.

03-09-10 Filed order: Order Vacating Ex Parte Temporary Civil Stalking Injunction and Order Dismissing this Case

Judge LYNN W. DAVIS

Signed March 09, 2010

03-11-10 Case Disposition is Dismissed

Disposition Judge is LYNN W. DAVIS

03-11-10 Case Closed

CASE NUMBER 100400395 Civil Stalking

Disposition Judge is LYNN W. DAVIS

03-12-10 Note: Called Jessie Osburn to have her come to first floor of courthouse and pick up CD recording of 3/9/10 hearing.
03-12-10 Filed: CD Request Completed (picked up on 3/12/10)
03-22-10 Filed: Notice of Appeal (Civil Stalking Injunction)
03-22-10 Filed: Certificate of Service
03-31-10 Note: Archived Physical File CV10-19 DSTRY 9/2010
04-06-10 Note: Notice of Appeal mailed to Utah Court of Appeals by State Mail #55500064586
04-19-10 Filed: Letter from Supreme Court of Utah dated April 15, 2010
05-14-10 Filed: Letter from Utah Court of Appeals
08-19-10 Note: The Court Of Appeals (Crystal) request for the record index due by 9/8/10 has been assigned to Julie A for processing.
09-07-10 Filed: Clerk's Certificate and Judgment Roll and Index
09-07-10 Note: Certified Copy of Clerk's Certificate and Judgment Roll and Index mailed to Court of Appeals, attn: Crystal Cragun; State MailTrac #55500090439
09-07-10 Note: File is at Julie's desk

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

AMY BOTT vs. JESSIE OSBURN

CASE NUMBER 100400157 Civil Stalking

CURRENT ASSIGNED JUDGE
STEVEN L. HANSEN
Division 2

PARTIES

Plaintiff - AMY BOTT

Defendant - JESSIE OSBURN

ACCOUNT SUMMARY

| | | |
|---------------|--------------|--------|
| TOTAL REVENUE | Amount Due: | 246.75 |
| | Amount Paid: | 246.75 |
| | Credit: | 0.00 |
| | Balance: | 0.00 |

| | | |
|-----------------|------------|--------|
| BAIL/CASH BONDS | Posted: | 300.00 |
| | Forfeited: | 0.00 |
| | Refunded: | 0.00 |
| | Balance: | 300.00 |

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

| | | |
|--|----------------|-------|
| | Amount Due: | 10.00 |
| | Amount Paid: | 10.00 |
| | Amount Credit: | 0.00 |
| | Balance: | 0.00 |

REVENUE DETAIL - TYPE: APPEAL

| | | |
|--|----------------|--------|
| | Amount Due: | 225.00 |
| | Amount Paid: | 225.00 |
| | Amount Credit: | 0.00 |
| | Balance: | 0.00 |

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

| | | |
|--|----------------|-------|
| | Amount Due: | 10.00 |
| | Amount Paid: | 10.00 |
| | Amount Credit: | 0.00 |
| | Balance: | 0.00 |

REVENUE DETAIL - TYPE: COPY FEE

Printed: 10/21/10 22:28:45

Page 1

CASE NUMBER 100400157 Civil Stalking

| | |
|----------------|------|
| Amount Due: | 1.75 |
| Amount Paid: | 1.75 |
| Amount Credit: | 0.00 |
| Balance: | 0.00 |

BAIL/CASH BOND DETAIL - TYPE: CASH BOND: Appeals

| | |
|------------|----------------------|
| Posted By: | QUINTANA & YORK P.C. |
| Posted: | 300.00 |
| Forfeited: | 0.00 |
| Refunded: | 0.00 |
| Balance: | 300.00 |

CASE NOTE

PROCEEDINGS

01-19-10 Petition filed by marissac
01-19-10 Judge STEVEN L. HANSEN assigned.
01-19-10 Filed: Request For Civil Stalking Injunction
01-20-10 Issued: Temporary Civil Stalking Injunction Ex Parte Order
(Copy Filed)
Judge STEVEN L. HANSEN
01-20-10 Case Disposition is Granted
Disposition Judge is STEVEN L. HANSEN
01-26-10 Filed return: Temporary Civil Stalking Injunction
Party Served: OSBURN, JESSIE
Service Type: Personal
Service Date: January 21, 2010
01-27-10 Filed: Request for Hearing
01-27-10 Notice - NOTICE for Case 100400157 ID 12717907
CIVIL STALKING INJUNCTION is scheduled.
Date: 02/08/2010
Time: 10:30 a.m.
Location: Second floor, Rm 203
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601
Before Judge: STEVEN L. HANSEN
01-27-10 CIVIL STALKING INJUNCTION scheduled on February 08, 2010 at
10:30 AM in Second floor, Rm 203 with Judge HANSEN.
01-27-10 CIVIL STALKING INJUNCTION scheduled on February 08, 2010 at
01:30 PM in Second floor, Rm 203 with Judge HANSEN.
02-02-10 Filed: Motion for Continuance
Filed by: BOTT, AMY
02-05-10 Filed: Notice of Rescheduled Hearing
02-08-10 Minute Entry - Minutes for CIVIL STALKING INJUNCTION
Judge: STEVEN L. HANSEN
Clerk: krisv

Printed: 10/21/10 22:28:46

Page 2

CASE NUMBER 100400157 Civil Stalking

PRESENT

Plaintiff(s): AMY BOTT

Defendant(s): JESSIE OSBURN

Plaintiff's Attorney(s): GARY L BLATTER

Audio

Tape Number: 10 203 Tape Count: 1:40

HEARING

TAPE: 10 203 COUNT: 1:40

This matter comes before the court for a civil stalking injunction. Plaintiff is present with counsel, Mr. Blatter. Respondent is present and pro se. Mr. Blatter addresses the court and would like the court to evoke the exclusionary rule.

Court asks all the witnesses to leave the courtroom and not to speak to each other about the case. Mr. Blatter calls his first witness to the stand. Amy Bott is sworn in and questioned by counsel.

Ms. Bott is questioned about the harassment from the respondent. Ms. Bott states Ms. Osburn threatened to shoot her with the gun Mr. Bott bought for her. Nothing further. Ms. Osburn questions Ms. Bott.

Ms. Osburn states the plaintiff has been charged with criminal mischief for keying her car. Ms. Osburn offers exhibit one copy of Springville Police report. Ms. Osburn continues to question the witness about exhibits three, four, five, and six.

Mr. Blatter doesn't object to the exhibits. Mr. Blatter re-calls Ms. Bott to the stand and questions her about the Springville Police report. Ms. Bott states she was at a doctors visit at the time the incident took place.

Mr. Blatter offers plaintiffs exhibit two, copy of receipt from Doctor Steven Hance M.D. time and date on the receipt. Mr. Blatter offers exhibit three, Sprint. Witness excused. Mr. Blatter calls his next witness.

Laurie Ramos is sworn in and question by counsel. Ms. Osburn questions the witness. Witness excused. Ms. Osburn calls her witness to the stand. Mr. Shane Bott is sworn in and questioned by Ms. Osburn. Mr. Blatter questions the witness. Nothing further.

Court will take a short recess to review the evidence before the court. 3:06 p.m. Court is back in session. Judge Hansen addresses the parties and states he finds in favor of the Plaintiff and advises Mr. Blatter to prepare the order for signature.

02-08-10 Filed: Exhibit List

02-18-10 Fee Account created Total Due: 10.00

02-18-10 AUDIO TAPE COPY Payment Received: 10.00

02-25-10 Filed: Notice to Submit for Decision

03-03-10 Filed: Request for Copy of Video/Audio Record - Picked Up

CASE NUMBER 100400157 Civil Stalking

3/3/10

03-09-10 Filed: Notice of Appeal (Civil Stalking Injunction)
 03-09-10 Filed: Certificate of Service
 03-16-10 Issued: Civil Stalking Injunction - Granted (Copy Filed)
 Judge STEVEN L. HANSEN
 03-16-10 Note: Certified copy of the Notice of Appeal sent via MailTrac
 tracking #55500080171 this day.
 03-17-10 Filed return: Return of Service
 Party Served: OSBURN, JESSIE
 Service Type: Personal
 Service Date: March 17, 2010
 03-18-10 Fee Account created Total Due: 225.00
 03-18-10 APPEAL Payment Received: 225.00
 Note: Code Description: APPEAL
 03-18-10 Bond Account created Total Due: 300.00
 03-18-10 Bond Posted Payment Received: 300.00
 03-18-10 Filed: Motion for Stay of Order Pending Appeal
 Filed by: OSBURN, JESSIE
 03-19-10 Filed: Request to Dismiss Civil Stalking Injunction
 03-22-10 Filed: Letter from Supreme Court of Utah Re: Transcript
 03-22-10 Filed: Amended Certificate of Service
 03-24-10 Filed order: Order Dismissing Stalking Injunction -Denied-
 Judge STEVEN L. HANSEN
 Signed March 24, 2010
 03-24-10 Filed return: Civil Stalking Injunction
 Party Served: OSBURN, JESSIE
 Service Type: Personal
 Service Date: March 17, 2010
 03-30-10 Filed: Notice of Lodging of Amended Civil Stalking Injunction
 03-30-10 Filed: Motion for Order Nunc Pro Tunc, or in the alternative,
 Motion for Order to Set Aside
 Filed by: BOTT, AMY
 03-30-10 Filed: Memorandum in Support of Motion for Order Nunc Pro Tunc,
 or in the alternative, Motion for Order to Set Aside
 03-30-10 Fee Account created Total Due: 10.00
 03-30-10 AUDIO TAPE COPY Payment Received: 10.00
 04-02-10 Note: Copy of audio from 2/8/10 was completed and counsel
 notified.
 04-05-10 Filed: Motion for Extension of One Day to File Opposition to
 Motion for Stay of Order Pending Appeal
 Filed by: BOTT, AMY
 04-05-10 Filed: Request for Copy of Video/Audio Record (Picked-up by
 Heather Nelson 4/5/10)
 04-06-10 Fee Account created Total Due: 1.75
 04-06-10 COPY FEE Payment Received: 1.75
 04-06-10 Filed: Notice of Lodging of Transcript of Judge Steven L
 Hansen's Ruling of February 8, 2010 -- On Petitioner's Request
 for Civil Stalking Injunction
 04-06-10 Filed: Opposition to Motion for Stay of Order Pending Appeal

04-09-10 Filed order: Decision
Judge STEVEN L. HANSEN
Signed April 09, 2010

04-14-10 Filed: Notice to Submit for Decision on Amended Civil Stalking
Injunction

04-21-10 Filed order: Amended Civil Stalking Injunction
Judge STEVEN L. HANSEN
Signed April 21, 2010

05-20-10 Filed: Amended Notice of Appeal

05-25-10 Note: Certified copy of the Amended Notice of Appeal sent to
Court of Appeals today via State Mail tracking #55500080073.

08-06-10 Filed: TRANSCRIPT for Hearing of 02-08-2010

08-10-10 Note: Court Of Appeals (Crystal C) request for the record Index
by 8/30/10 assigned to Keri S for processing.

08-24-10 Filed: Judgment Roll and Index

08-24-10 Filed: Clerk's Certificate

08-25-10 Note: Judgment roll and index sent to Court of Appeals via
interoffice mail tracking #55500090222 this day.

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH vs. AMY B BOTT

CASE NUMBER 101400325 State Felony

CHARGES

Charge 1 - 76-6-106(2)(C) - CRIMINAL MISCHIEF:INTENTIONAL
DAMAGE/DEFACE/DESTROY PROPERTY 3rd Degree Felony
Offense Date: January 15, 2010
Mandatory Appearance

CURRENT ASSIGNED JUDGE

DAROLD MCDADE
Division 10

PARTIES

Defendant - AMY B BOTT
Represented by: GARY L BLATTER

Plaintiff - STATE OF UTAH

DEFENDANT INFORMATION

Defendant Name: AMY B BOTT
Offense tracking number: 18301341
Date of Birth: May 15, 1975
Law Enforcement Agency: SPRINGVILLE POLICE
Prosecuting Agency: UTAH COUNTY

ACCOUNT SUMMARY

PROCEEDINGS

01-26-10 Filed: Bail Minute Entry-Defendant appears via video from the
Utah County Jail; Court finds probable cause and defendant
released on her own recognizance. Initial Appearance 2/2/10 at
8:30 a.m.
02-01-10 Case filed
02-01-10 Filed: From an Information
02-01-10 Judge DAROLD MCDADE assigned.
02-01-10 Filed: Information
02-02-10 Notice - WARRANT for Case 101400325 ID 12729666
02-02-10 Minute Entry - Minutes for INITIAL APPEARANCE
Judge: LYNN W. DAVIS

Printed: 10/21/10 22:23:09

Page 1

CASE NUMBER 101400325 State Felony

PRESENT

Clerk: kimo

Prosecutor: PROBERT, LAURENCE G

Defendant not present

Audio

Tape Number: 301 Tape Count: 8:57

HEARING

TAPE: 301 COUNT: 8:57

This matter comes before the court for an initial appearance. The defendant fails to appear. The court orders a non-bailable warrant.

02-02-10 Warrant ordered on: February 02, 2010 Warrant Num: 985187716 No Bail

02-02-10 Warrant issued on: February 02, 2010 Warrant Num: 985187716 No Bail

Judge: LYNN W. DAVIS

Issue reason: Failure to Appear.

02-03-10 Filed: Promise to Appear (Initial Appearance 2/8/10)

02-03-10 Warrant recalled on: February 03, 2010 Warrant num: 985187716

Recall reason: Warrant recalled because defendant appeared.

02-03-10 Note: INITIAL APPEARANCE calendar modified.

02-03-10 INITIAL APPEARANCE scheduled on February 08, 2010 at 08:30 AM in Second Floor, Rm 202 with Judge MCDADE.

02-08-10 Minute Entry - Minutes for Initial Appearance

Judge: DAROLD MCDADE

PRESENT

Clerk: ashleyh

Prosecutor: PETERS, RYAN V

Defendant

Defendant's Attorney(s): GARY L BLATTER

Audio

Tape Number: 10-202 Tape Count: 8.48

INITIAL APPEARANCE

A copy of the Information is given to the defendant.

Defendant waives reading of Information.

The court recalls any pending warrants.

WAIVE PRELIM HEARING is scheduled.

Date: 04/12/2010

Time: 08:30 a.m.

Location: Second Floor, Rm 202

FOURTH DISTRICT COURT

Printed: 10/21/10 22:23:09

Page 2

CASE NUMBER 101400325 State Felony

125 N 100 W
PROVO, UT 84601

Before Judge: DAROLD MCDADE

02-08-10 WAIVE PRELIM HEARING scheduled on April 12, 2010 at 08:30 AM in
Second Floor, Rm 202 with Judge MCDADE.

02-08-10 Filed: Notice of Appearance of Counsel

02-08-10 Filed: Request for Discovery

04-12-10 Minute Entry - WAIVE PRELIM HEARING continued

Judge: DAROLD MCDADE

PRESENT

Clerk: ashleyh

Prosecutor: PETERS, RYAN V

Defendant

Defendant's Attorney(s): BLATTER, GARY L

Audio

Tape Number: 10-202 Tape Count: 9.05

CONTINUANCE

The Stipulation of counsel has made a motion for continuance of
Waive Prelim Hearing.

The motion is granted.

Reason for continuance:

Potential resolution.

Mr. Peters submits a No Contact Order. Mr. Blatter does not
object. The court grants and signs.

WAIVE PRELIM HEARING is scheduled.

Date: 05/17/2010

Time: 08:30 a.m.

Location: Second Floor, Rm 202

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: DAROLD MCDADE

04-12-10 WAIVE PRELIM HEARING Continued.

04-12-10 WAIVE PRELIM HEARING scheduled on May 17, 2010 at 08:30 AM in
Second Floor, Rm 202 with Judge MCDADE.

04-12-10 Filed order: No Contact Order (granted)

Judge DAROLD MCDADE

Signed April 12, 2010

05-17-10 Minute Entry - Minutes for Waive Prelim Hearing

Judge: DAROLD MCDADE

PRESENT

Clerk: ambere

Prosecutor: RHONDA P GIVIDEN

Defendant

Defendant's Attorney(s): BLATTER, GARY L

CASE NUMBER 101400325 State Felony

Audio

Tape Number: 10-202 Tape Count: 8:58

CONTINUANCE

The Defendant's counsel GARY L BLATTER has made a motion for continuance of Waive Prelim Hearing.

The motion is granted.

Reason for continuance:

Counsel's request.

HEARING

This matter comes before the court for a waiver hearing. Mr. Blatter requests a continuance. No objection, the court grants the request. Mr. Blatter addresses a condition of the no contact order. The state responds.

The court amends the no contact order by interlineation by striking the no contact with with household members due to Ms. Bott needing to have contact with her husband, who is the victims boyfriend and lives with her.

A copy of the order with the amendments is served in open court.

WAIVE PRELIM HEARING.

Date: 06/21/2010

Time: 08:30 a.m.

Location: Second Floor, Rm 202

FOURTH DISTRICT COURT

125 N 100 W

PROVO, UT 84601

Before Judge: DAROLD MCDADE

05-17-10 WAIVE PRELIM HEARING Continued.

05-17-10 WAIVE PRELIM HEARING scheduled on June 21, 2010 at 08:30 AM in Second Floor, Rm 202 with Judge MCDADE.

06-21-10 Minute Entry - WAIVE PRELIM HEARING continued

Judge: DAROLD MCDADE

PRESENT

Clerk: ambere

Prosecutor: GIVIDEN, RHONDA P

Defendant

Defendant's Attorney(s): BLATTER, GARY L

Audio

Tape Number: 10-202 Tape Count: 9:11

CONTINUANCE

The Defendant's counsel GARY L BLATTER has made a motion for continuance of Waive Prelim Hearing.

The motion is granted.

Reason for continuance:

Counsel's request.

WAIVE PRELIM HEARING is scheduled.

Date: 07/12/2010

Time: 08:30 a.m.

Location: Second Floor, Rm 202
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: DAROLD MCDADE

06-21-10 WAIVE PRELIM HEARING Continued.

06-21-10 WAIVE PRELIM HEARING scheduled on July 12, 2010 at 08:30 AM in
Second Floor, Rm 202 with Judge MCDADE.

07-12-10 PRELIMINARY HEARING scheduled on September 13, 2010 at 10:30 AM
in Second Floor, Rm 202 with Judge MCDADE.

07-12-10 Minute Entry - Minutes for Waive Prelim Hearing

Judge: DAROLD MCDADE

PRESENT

Clerk: raelenec

Prosecutor: GIVIDEN, RHONDA P

Defendant

Defendant's Attorney(s): BLATTER, GARY L

Audio

Tape Number: 10-202 Tape Count: 9.10

HEARING

TAPE: 10-202 COUNT: 9.10

This matter comes before the Court for Waiver Hearing. The
defendant waives right to speedy trial. Preliminary hearing is
requested and scheduled.

PRELIMINARY HEARING is scheduled.

Date: 09/13/2010

Time: 10:30 a.m.

Location: Second Floor, Rm 202
FOURTH DISTRICT COURT
125 N 100 W
PROVO, UT 84601

Before Judge: DAROLD MCDADE

09-10-10 Filed: Motion to Continue

Filed by: STATE OF UTAH,

09-22-10 Filed order: Order for Continuance (10/4/10 at 10:30 am)

Judge DAROLD MCDADE

Signed September 21, 2010

09-22-10 PRELIMINARY HEARING scheduled on October 04, 2010 at 10:30 AM
in Second Floor, Rm 202 with Judge MCDADE.

09-30-10 Filed: Stipulated Motion for Continuance

Filed by: BOTT, AMY B

10-06-10 Filed order: Order of Continuance (11/8/2010 at 10:30 am)

Judge DAROLD MCDADE

Signed October 04, 2010

10-06-10 PRELIMINARY HEARING scheduled on November 08, 2010 at 10:30 AM
in Second Floor, Rm 202 with Judge MCDADE.

1 IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT

2 UTAH COUNTY, STATE OF UTAH

3

=====

| | | | |
|---|----------------|---|---------------------------|
| 4 | AMY BOTT, |) | CIVIL STALKING INJUNCTION |
| | |) | |
| 5 | RESPONDENT, |) | |
| | |) | |
| 6 | vs. |) | |
| | |) | |
| 7 | JESSIE OSBURN, |) | CASE 100400157 |
| | |) | APPEAL 20100232 |
| 8 | |) | |
| | PETITIONER. |) | JUDGE STEVEN L. HANSEN |
| 9 | _____ |) | |

10

11 BE IT REMEMBERED that this matter came on for hearing
12 before the above-named court on February 8, 2010.

13 WHEREUPON, the parties appearing and represented by
14 counsel, the following proceedings were held:

15

16

17 OFFICIAL CERTIFIED TRANSCRIPT

18 (From Electronic Recording)

19

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REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded proceedings in the matter of Bott vs. Osburn, hearing date February 8, 2010, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 75, inclusive, including where it is indicated that the recording was inaudible.

I further certify that I am not of kin nor otherwise associated with any of the parties to this cause of action and am not interested in the event thereof.

WITNESS my hand and official seal this 5th day of August, 2010.

PENNY C. ABBOTT, COURT REPORTER/NOTARY
License 22-102811-7801
Notary Public, Comm Exp 9-24-12

1 as follows:

2 THE JUDGE: Right here.

3 DIRECT BY MR. BLATTER

4 Q. (MR. BLATTER:) Will you state your name for the
5 record?

6 A. (THE WITNESS:) Amy Brown Bott.

7 Q. And your address?

8 A. 2444 West 960 North, Provo Utah, 84601.

9 Q. And a, can you describe for me what happened on
10 December 7th, 2009?

11 A. On December 7th, do you want the whole day or
12 just--

13 Q. No. Regarding the respondent.

14 A. Okay. On December 7th I found out the respondent
15 was having an affair with my husband, which she adamantly
16 had denied the night before. And so I placed a phone call
17 to her. And during that phone conversation, since I had
18 helped her with, I asked her how she could do this to me
19 after helping her with her EKG. She had sent them to me
20 telling me she had heart problems. And how she could turn
21 around and do this to someone that would help her out with
22 all of that. And she told me to stop bothering her, and
23 that Shane had bought her a gun, and that she would shoot my

24 ass if she had the chance.

25 Q. Did you ever have any further conversations with

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1 the respondent?

2 A. One other conversation around the 13th when she was

3 staying with my husband out in a trailer in Elko.

4 Q. When you say the 13th, what month?

5 A. Of December.

6 Q. Okay. What happened?

7 A. And she a, was on his telephone, like got on his,

8 answered his, and more or less said the same thing to leave

9 Shane alone, that she was with Shane now and that if she had

10 a chance she would shoot me with,--

11 Q. And--

12 A. -- with the gun that my husband had purchased

13 her.

14 Q. And how did you react?

15 A. Just more or less like after, just I was emotion,

16 like the whole thing has been an emotional roller coaster for

17 me. I think the, like after she said it, both times she had

18 hung up on me.

19 Q. And did you a, ever talk to the a, respondent

20 again?

21 A. I'm unsure. I think I might have talked to her
22 one other time after that but I'm not clear. I haven't seen
23 her in person until she came to my husband's first court
24 appearance with him a, when we came back in January, that was
25 the first time that I've ever physically seen Jessie.

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1 Although she has been by my home before, she knew where I
2 lived. I've never known her whereabouts, her address or
3 anything but she has always known where I've lived. And in
4 fact, has been able to see the inside of my home, drove my
5 vehicles and stuff like that.

6 Q. You filed a previous request for a stalking
7 injunction, did you not?

8 A. I did.

9 Q. And when was that?

10 A. That was in I think August of 2008.

11 Q. And what happened in that, to that request for a
12 stalking injunction?

13 A. My husband actually came home to me and told me
14 that he wanted to make things work between us and asked me
15 so that everything could calm down and stuff if, because
16 Jessie had also filed one so we were filing against each
17 other, and he said that if a, he talked her into dropping

18 hers if I would drop mine.

19 Q. So what did you do?

20 A. And so I proceeded to drop mine. And I did it
21 without the court, like I had been instructed to do it
22 without prejudice so that I could bring the past stuff that
23 she had done to me if I needed to.

24 Q. And what were those past things that she had done
25 to you?

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1 A. She had made threats as well. Like I said, she
2 had been by my home, she had asked Shane to show her where I
3 lived, she knew my whereabouts.

4 She at that time like, all along has repeatedly
5 like lied to me. I.

6 Found nude photos of her on my home computer which
7 was so easily found that my kids could have found them and
8 seen them as well which totally, I found nude pictures of my
9 husband as well that he obviously hadn't been sending to me
10 but had been sending to her.

11 It made me emotionally scared, emotionally, I
12 mean, I missed several, I lost 50 pounds in six weeks.
13 It has turned my kids, me and my kids' lives upside-down.
14 She did the same at that time, made threatening,

15 she's the one that told me she knew where I lived and that,
16 you know, she could have, you know, my ass taken care of if
17 I had to. She's made all sorts of just different claimers
18 (phonetic). You know, she'll, when it first came out she
19 told me, lied and said that no it had ended, it was just a
20 short fling and everything. And then I had found out that
21 it had been going on longer.

22 And like I said, this time this girl, like I
23 called her several times and asked her to please tell me
24 if it was going on. I would let my husband go. I just
25 begged him not to do this to me again because I didn't want
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1 my kids to have to go through it. And every time I called
2 her, and I have documentation of it, she denied the fact
3 that he was seeing her. On July 24 he took her to the
4 movies. Called her, she denied it, said she was out with a
5 new boyfriend and her new boyfriend was upset. He took her
6 to the State Fair. He went and seen her prior to a Cabo
7 trip.

8 In September she was in Missouri so she, and sent
9 me copies of her EKGs and stuff because I work for a
10 cardiologist. At that point I thought that this was the way
11 that it was just going to end everything. I had two

12 cardiologists, not just one, look on her EKGs because I
13 thought this was the girl that had broke my heart and I
14 didn't want, you know, to take chances. Even though I work
15 for like the best cardiologist, and she knows that, I had
16 two cardiologists look at it and they just gave the advice
17 to tell her to, that she was having PAC, she needed to watch
18 her caffeine intake, watch her chocolate intake and a,
19 increase her fluids while she was out there. They had told
20 her she needed a pacemaker, my two doctors said that she did
21 not need a pacemaker.

22 I kept following up with her. Never once did she,
23 you know, asking her, checking on her, seeing how she was
24 doing. And I, all the time thinking I told her that this
25 was our way of saying sorry, amends and all that. And then
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1 finding out that she had continued to sleep with my
2 husband.

3 And like I said, I called her. Our friends
4 finally that my husband works with finally came out and
5 told me on December 6th that they were together. I called
6 her. I have a friend that was sitting right next to me,
7 heard the whole conversation and listened to everything
8 that she said. She said she would never do that to me and

9 that she wanted nothing to do with Shane, and that she had
10 left Utah because of the drama. And that another wife had
11 also called her and accused her of sleeping with her
12 husband. And that she had also heard a rumor that she had
13 been fired and hadn't quit from her job. And she said this
14 all.

15 And when I got off the phone my friend Wendy told
16 me she is either telling the truth or she's is a very good
17 actress for what she, you know, because she sounded like she,
18 she told me she wanted nothing to do with Shane.

19 I found the credit card bill a couple days later
20 that showed that he had spent the whole weekend with her down
21 in California.

22 Q. You've mentioned that there were some pictures on
23 your computer. Do you know how they got there?

24 A. From her sending them to my husband and him
25 looking them up on his Sprint picture mail, which our kids
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1 can access and everything as well, they all knew the
2 password. And they were in Sprint picture mail. It had
3 pictures of her fingers in her--

4 Q. We don't need to go into the graphic details but
5 they were--

6 A. They were very graphic. Breasts, other parts of
7 her body, different things like that that was accessible for
8 my children and totally devastated me to find them.

9 Q. And how do your children feel about Jessie Osburn?

10 A. They are frightened kind of of her. One of my
11 kids, Tyson, doesn't believe in God anymore because he says
12 that he prayed last time that this all happened, and Dad came
13 home and we made everything work out the right. And now he
14 ~~no longer believes in God because God wouldn't have done~~
15 this to us, he says.

16 Especially because me and Shane discussed, you
17 know, I didn't want Shane to think I was keeping secrets
18 from him. And since like when I got Jessie's EKG it was
19 discussed that I was helping them out and trying to, like
20 in front of my kids I was letting my kids know that even
21 though someone wrongs us and does something in the past
22 there are correct ways to right a wrong. And so I was
23 helping her by helping her with her EKGs and helping her
24 with her condition. Because she told me she was in some
25 backwoods place and they wanted to put a pacemaker in her.

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1 My cardiologist said she didn't need that pacemaker, you
2 know.

3 And so I was just showing, we were trying to
4 set an example I thought that, you know, you can, even though
5 someone does you wrong you can still forgive them and move
6 on forward from there.

7 And so my kids are frightened of her. There was
8 one weekend when I was away that a, they took my daughter and
9 promised my daughter that she would be able to call her
10 sister, or that someone would take her home if she did not
11 feel comfortable staying there. And when it came time that
12 she did not feel comfortable staying there they told them
13 that it was 10:00 o'clock and it was too late for her and
14 that they were watching a movie and they weren't going to
15 take her home and that she couldn't go home.

16 My youngest son... They are just, they are all
17 frightened of her and frightened about the different things
18 that they know about her that me and Shane have openly
19 discussed because of a DCFS case that was involved and when
20 this first happened the previous year. And so unfortunately
21 the kids are aware, you know, of the affair and Dad's
22 promises.

23 I have letters, you know, that the kids have seen
24 that shows Shane promising that this would never happen again
25 and this girl telling me every time I called her that no, she

1 IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT

2 UTAH COUNTY, STATE OF UTAH

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4  AMY BOTT,                               ) CIVIL STALKING INJUNCTION
5                                     )
6                                     )
6      vs.                               )
7  JESSIE OSBURN,                         ) CASE      100400157
8                                     ) APPEAL    20100232
8                                     )
8      PETITIONER.                       ) JUDGE STEVEN L. HANSEN
9  _____)
10
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11 BE IT REMEMBERED that this matter came on for hearing
12 before the above-named court on February 8, 2010.

13 WHEREUPON, the parties appearing and represented by
14 counsel, the following proceedings were held:

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17 OFFICIAL CERTIFIED TRANSCRIPT

18 (From Electronic Recording)

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REPORTER'S CERTIFICATION

STATE OF UTAH)
) SS.
COUNTY OF UTAH)

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded proceedings in the matter of Bott vs. Osburn, hearing date February 8, 2010, and that I transcribed it into typewriting and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 75, inclusive, including where it is indicated that the recording was inaudible.

I further certify that I am not of kin nor otherwise associated with any of the parties to this cause of action and am not interested in the event thereof.

WITNESS my hand and official seal this 5th day of August, 2010.

PENNY C. ABBOTT, COURT REPORTER/NOTARY
License 22-102811-7801
Notary Public, Comm Exp 9-24-12

1 thinking in this case.

2 So based on the evidence that's been presented the
3 a, civil stalking injunction is granted in favor of the
4 petitioner Amy Bott against Jessie Osburn.

5 And the reasons for that, Ms. Osburn, is a lot of
6 time and effort has been made here about the number of phone
7 calls, the affairs that had gone on and a, and who called
8 who and those types of things. I thought that was important
9 to listen to because it, it had evidentiary weight in terms
10 of a, determining in my mind whether or not Amy Bott was
11 telling the truth about the two most important facts in this
12 case which is what this case is about. It's not about the
13 affair, and it's not about all of the a, photographs that
14 were sent back and forth, it's not about your car that was
15 allegedly damaged by Ms. Bott. Those are important, but they
16 are for another day and another courtroom under different
17 circumstances.

18 What this case is about is did you commit stalking
19 as defined under the law. And a, stalking means that you
20 made a verbal, among other things, a verbal threat. And
21 that's... It's my turn now. Okay?

22 MS. OSBURN: I'm sorry.

23 THE JUDGE: All right. I have to make a decision
24 and I'm just, I'm giving you the reason for it.

25 So did she make a verbal threat to you or did,

1 IN THE FOURTH JUDICIAL DISTRICT - PROVO COURT
2 UTAH COUNTY, STATE OF UTAH
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|---|----------------|---|---------------------------|
| 4 | AMY BOTT, |) | CIVIL STALKING INJUNCTION |
| | |) | |
| 5 | RESPONDENT, |) | |
| | |) | |
| 6 | vs. |) | |
| | |) | |
| 7 | JESSIE OSBURN, |) | CASE 100400157 |
| | |) | APPEAL 20100232 |
| 8 | |) | |
| | PETITIONER. |) | JUDGE STEVEN L. HANSEN |
| 9 | _____ |) | |

10
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17 OFFICIAL CERTIFIED TRANSCRIPT
18 (From Electronic Recording)

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PENNY C. ABBOTT, COURT REPORTER/NOTARY
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Notary Public, Comm Exp 9-24-12

1 A. I talk to Amy all the time.

2 Q. And have you been around her and observed her?

3 A. I have.

4 Q. Can you tell me a, in December of 2009 a, what her
5 demeanor was like, how she, how she responded to the, Jessie
6 Osburn?

7 A. Amy has been a nervous wreck. She is severely
8 distraught by communication with Jessie.

9 Q. And do you know a, did you know Amy in 2005?

10 A. I did.

11 Q. Or 2008. Excuse me.

12 A. Yes.

13 Q. And in a, the summer of 2008 do you know if she had
14 any trouble with Jessie Osburn?

15 A. She's... I don't know the dates exactly. But for
16 as long as a, I guess ever since she found out that her
17 husband was having an affair on her she has a been severely
18 distraught.

19 Q. No other questions, Your Honor.

20 THE JUDGE: You may cross-examine.

21 CROSS BY MS. OSBURN.

22 Q. (MS. OSBURN:) When is the first time you met me?

23 A. (THE WITNESS:) Oh, I met you probably--

24 Q. Was it the--

25 A. -- a month ago.

1 Q. -- weekend that Amy was in jail on the 15th?

2 A. It was that weekend.

3 Q. Was that when we were all at Amy's house with the

4 kids and Shane was trying to fix the Excursion?

5 A. Yes.

6 Q. Okay. Did you see me interacting with the kids

7 then?

8 A. I did.

9 Q. Did you see Derek asking me to play football with

10 him and Natasha asking me to dance with her?

11 A. I did.

12 Q. Did they seem scared of me at all?

13 A. No.

14 Q. No questions.

15 THE JUDGE: You may step down.

16 MR. BLATTER: Yes. No other questions for this

17 witness.

18 THE JUDGE: Does that conclude your testimony?

19 MR. BLATTER: Yes, Your Honor.

20 THE JUDGE: All right. It's your turn now,

21 ma'am. Please raise your right hand and be sworn.

22 WHEREUPON,

23 JESSIE OSBURN

24 having been duly placed under oath by the clerk of the court

25 and sworn to testify truthfully, upon examination testified

1 as follows:.

2 THE JUDGE: You may a, move around if you'd like
3 since you have exhibits on the table. So you can use the
4 podium, you can use the table. Or if you don't have any
5 exhibits I'll have you take the witness stand. Okay?

6 MS. OSBURN: Okay.

7 THE JUDGE: So whatever you prefer.

8 DIRECT TESTIMONY BY MS. OSBURN

9 MS. OSBURN: Your Honor, I want to talk first
10 about the continuing harassment that I've experienced
11 since--

12 THE JUDGE: Okay. Go ahead.

13 MS. OSBURN: -- these reports were filed.
14 Unfortunately Officer Martin I have been in contact with her
15 by cell phone--

16 THE JUDGE: What reports are you referring to
17 now?

18 MS. OSBURN: I'm referring to exhibit, what is
19 that, #5?

20 THE JUDGE: The last one that was received?
21 Okay.

22 MS. OSBURN: Yes, the police reports.

23 THE JUDGE: All right.

24 MS. OSBURN: Officer Martin was assigned to this,
25 this complaint that I made about Amy harassing me on

1 12-15-09.

2 THE JUDGE: Uh-huh (affirmative).

3 MS. OSBURN: And I had been in contact with her
4 several times after that date. And unfortunately, I was
5 unaware that when dispatch just transfers somebody to an
6 officer's cell phone they don't write calls of service so
7 I don't have any evidence for that, and Officer Martin
8 wasn't available to write a letter to me saying how many
9 times I've, I've called her in, in such a short notice.
10 But she did say that she would be willing to write a letter
11 saying how that I've called her repeatedly when Amy has
12 called me and harassed me on the telephone. And I just
13 wanted, I just wanted to make note of that because I was
14 working with only one officer that those, those extra calls
15 of service are not in that exhibit.

16 I also wanted to offer one more piece of evidence
17 if possible. This is the previous stalking injunction I
18 have from Salt Lake County that was dropped.

19 While he looks at that can I tell you what
20 happened, my side?

21 THE JUDGE: Go ahead.

22 MS. OSBURN: Around February of 2008 I did meet
23 Amy's husband and we did start talking. And unfortunately he
24 did have that affair with me. And we are actually still
25 together to this day and they are in the process of getting a

1 divorce. I admit to all of that. And I have told Amy
2 repeatedly how badly I feel about that.

3 However, after she discovered that she, and I
4 understand partially her behavior because she was hurt, but
5 she kind of went off the deep end. She began stalking me on
6 my, on my phone, calling me constantly, constantly,
7 constantly, constantly. And I've got in that exhibit some,
8 some evidence that I'd like to talk about when we get
9 there. But it's, it's been a constant stream until he went
10 back to her for a few months.

11 And I didn't want anything to do with either of
12 them at that point because by this point she had called
13 my sister, had a conversation with my sister about me. She
14 had sent those pictures that she actually hacked onto
15 Shane's Sprint PCS account and downloaded which were only
16 meant for him, and she had sent those to my mother via text
17 message. That was when I finally broke down and filed that
18 stalking injunction was when my mother called me and told me
19 that she just received dirty pictures on her cell phone of me
20 from Amy Bott.

21 That was what made me cross the line and I couldn't
22 take anymore so I filed that injunction.

23 After that Shane decided, he was afraid that Amy
24 was going to hurt me if we saw each other in court. That's
25 why he went back to her. And I do want to call him as a

1 witness when I'm done.

2 You said--

3 THE JUDGE: Is that who that was?

4 MS. OSBURN: That's who that was, yes.

5 THE JUDGE: All right. Let's call him.

6 MS. OSBURN: Can I call him now?

7 THE JUDGE: Whatever you'd like. It's your case.

8 MS. OSBURN: Well, I'm just telling you my side

9 first.

10 THE JUDGE: Okay.

11 MS. OSBURN: He went back to her because he was

12 afraid she was going to hurt me in court. She had never

13 seen me and she didn't know where I lived at this point.

14 And she was acting so irrationally towards me that he was

15 afraid for my safety. So he went back to her so that he

16 could convince her to drop hers and I would drop mine so we

17 wouldn't have to meet each other in court.

18 He stayed with her for a few months, maybe a year

19 I think, I'm not the sure exactly how long. And me and him

20 didn't have a very much contact. He called me every now

21 and then to see how I was doing. But at that point I was,

22 I was pretty upset about everything that had gone on and so

23 I didn't really want to have anything to do with him.

24 Well, eventually he decided that he was still in

25 love with me and he wanted to be with me.

1 When she found out, when Amy found out that he
2 still wanted to be with me and he left her again, she went
3 as bad as it was before only worse this time, and she was
4 harassing me on the phone, she was posting messages on her
5 Facebook about what a whore I am, that I'm a baby killer.

6 Oh, actually can I submit one more piece of
7 evidence? Is it okay to you?

8 MR. BLATTER: I don't know what it is.

9 MS. OSBURN: It's that a, that thing with all the
10 highlights. That's a transcript actually cut and pasted
11 from Amy's Facebook page by a friend of mine who is on her
12 friends list.

13 MR. BLATTER: Uh-huh (affirmative). No
14 objection.

15 THE CLERK: (Short inaudible, no mic).

16 MS. OSBURN: The kinds of things she was telling
17 me and the only reason I'm submitting this is because it's
18 just written evidence of the kinds of things she's been
19 calling my friends and telling them about me, telling her
20 own children about me, and basically anybody who will listen
21 including people from my work and a, basically anyone she can
22 get ahold of.

23 It's highlighted on that, on that piece, on that
24 exhibit several pieces where she calls me a whore, a baby
25 killer. At the very top of that--

1 THE JUDGE: Any objection did I hear? None?

2 MR. BLATTER: No. No objection, Your Honor.

3 THE JUDGE: Okay. EXHIBIT #6 is received.

4 MS. OSBURN: Now, be aware that this is posted on

5 her Facebook page for anybody on her friends list to read and

6 she has very many people on her friends list.

7 Having her twins and aborted them, Pat didn't even

8 know he had twins. Later in that she calls me a baby killer

9 a, things like that.

10 Her son actually when I first met him, eight years

11 old, he asked me if I was a baby killer. And I thought that

12 was pretty, pretty messed up to be telling an eight year old

13 and I had to try and figure out how to explain to him that my

14 own personal decisions and my past from years ago really

15 don't have anything to do with anybody else.

16 Unfortunately she found out about such a thing

17 and a, proceeded to tell the entire universe about it

18 including my family and people I worked with.

19 She caused a lot of drama with me at work because

20 she would call my work. And I've actually got some phone

21 records in what he's looking at right now showing her calling

22 my work.

23 And it caused a lot of stress between me and

24 everybody I worked with and my family because she was

25 harassing me and harassing my entire family and everybody on

1 my friends lights

2 Last year back in 2008 she actually got onto my
3 MySpace page and emailed every single person on my friends
4 list telling them that I'm a whore and a home wrecker and all
5 kinds of things like that.

6 Now, I don't, I'm not standing up for what I did.
7 I'm with her husband and that was wrong of me. But I really
8 don't think it deserved the harassment and the constant
9 emotional turmoil that I was in with all of my family, all of
10 my friends, everybody I know.

11 It didn't stop. She kept on, she kept harassing
12 me, kept harassing me. That's why I was trying to make
13 her believe that I lived in California because I was afraid
14 that if she knew that I was in Utah she would come and hurt
15 me because--

16 THE JUDGE: Now have you, have you obtained an
17 injunction against her?

18 MS. OSBURN: I have. And actually they said
19 that they were going for some... I submitted it on the
20 2nd. My attorney, who is Shane's attorney, told me that
21 after she was arrested for the felony for my car there would
22 automatically be an injunction filed against her.
23 Unfortunately he was inaccurate and I didn't find out about
24 that until I talked to Officer Martin after that and she said
25 no, no, you have to file an injunction.

1 THE JUDGE: You say the 2nd. You mean the 2nd of
2 March?

3 MS. OSBURN: End of, no, 2nd of February.

4 THE JUDGE: One has been filed then?

5 MS. OSBURN: It's been sat on. I asked about it
6 this morning and they said that it was up in Judge Davis's
7 office for over a week. So I asked them if it would be
8 possible to bring them up here for you to look at but I don't
9 know whether they ever--

10 THE JUDGE: So you have filed one?

11 MS. OSBURN: Yes, I am--

12 THE JUDGE: You just don't know if its been
13 signed.

14 MS. OSBURN: Right. I have the case number for it
15 but...

16 THE JUDGE: Even though it hasn't been signed
17 then. Okay.

18 MS. OSBURN: And it's got all of the same evidence
19 on it.

20 THE JUDGE: And that's your position what you've
21 stated--

22 MS. OSBURN: Right.

23 THE JUDGE: -- why you want one. Right?

24 MS. OSBURN: Right. Exactly.

25 THE JUDGE: Okay.

1 MS. OSBURN: And I would have filed one earlier,,
2 however,--

3 MR. BLATTER: Your Honor--

4 MS. OSBURN: -- I was under the false impression
5 that a felony would, against me would create a protective
6 order.

7 THE JUDGE: I understand what you said.

8 MR. BLATTER: I want to object. I'm not sure
9 we're here today on her a, her request.

10 MS. OSBURN: I have a reason for going about
11 this.

12 THE JUDGE: No we're not, no we're not. But
13 she's offered it to show some justification for the contact
14 between the two parties. It has some relevancy to show a
15 tendency of a fact that's before me as to whether or not she
16 said what she claims she said.

17 Let me get to the point here, both of you, when
18 I--

19 MS. OSBURN: My point is basically... And I'm
20 sorry to interrupt you. My point is that I'm not the
21 stalker here, I'm the victim. And this file that she did is
22 the last thing that she was able to do in order to harass me
23 and it hurt me, because she was arrested on a felony for
24 destroying my car.

25 THE JUDGE: Okay.

JENKINS v. WEIS, 868 P.2d 1374 (Utah App. 1994)
Lynn A. JENKINS, Plaintiff and Appellant, v. Elaine B. WEIS, Defendant
and
Appellee.
No. 920652-CA.
Utah Court of Appeals.
January 7, 1994.
Rehearing Denied February 14, 1994.

Appeal from the Third District Court, Salt Lake County, Scott
Daniels, J.
Page 1375

John Michael Coombs, Salt Lake City, for plaintiff and
appellant.

Jan Graham and Debra J. Moore, Salt Lake City, for defendant
and appellee.

Before BENCH, JACKSON and GARFF,[fn1] JJ.

[fn1] Senior Judge Regnal W. Garff, acting pursuant to appointment
under Utah Code Ann. § 78-3-24(10) (1992).

OPINION

JACKSON, Judge:

Appellant Lynn Jenkins brought an action against Elaine Weis
for defamation, intentional infliction of emotional distress,
and invasion of privacy. Jenkins appeals the jury verdict in
favor of Weis. He also challenges several rulings by the trial
court. We affirm.

FACTS

On January 16, 1987, a local television station aired a story
concerning Utah's thrift crisis, which involved the insolvency
of several savings and loan institutions in Utah along with
state-owned corporations that guaranteed their deposits. The

broadcast included the following portions of a pre-taped
interview with Elaine Weis, Commissioner of Financial
Institutions:

MICHELLE KING: Neither depositors nor state
officials are happy about this latest turn of
events. It's sure to strain even further the
already difficult relations between both sides. As
KUTV's Rick Shenkman reports the controversy has
now turned openly bitter, pitting the key leader
of depositors against Financial Commissioner
Elaine Weis.

RICK SHENKMAN: They were never friendly but now
they're virtual enemies. Elaine Weis, Commissioner
of Financial Institutions, Lynn Jenkins, one of
the key leaders of the thrift depositors.

LYNN JENKINS: I don't like the word "liar." I
like to just say that she has been less than
honest. There has been a complete conspiracy of
silence by the Commissioner in the financial
institution [sic] since the day she came on board.

ELAINE WEIS: I would feel sorry for Lynn Jenkins
because I think he's a mentally deranged person.

RICK SHENKMAN: From the beginning of the thrift
controversy it was almost certain to turn bitter.
The state says depositors should only receive
between 27 cents and 68 cents on the dollar,
depositors feel the state set up the now-defunct
corporation that was supposed to guarantee their
money, but no one could have predicted that it
would get this bad.

ELAINE WEIS: In my opinion, he's a paranoid
schizophrenic, and I would feel sorry for him, but
he's such a vicious, vicious person that I can't
and I wish I could.

LYNN JENKINS I need Commissioner Elaine Weis under oath because she
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fails to live up to anything that she says verbally She needs to be more forthright and honest with the people

ELAINE WEIS I hope he's not prone to violence because I really am afraid, of some, a, you know, not attack on me but my family

LYNN JENKINS I have never had a violent record in my life She has nothing to fear from me except for the truth

In April 1987, Jenkins filed a complaint against Weis alleging defamation, intentional infliction of emotional distress, and invasion of privacy based on the above remarks On May 29, 1990, Weis filed a motion for designation of Jenkins as a public figure On May 31, 1990, the trial court ruled by minute entry that Jenkins was a public figure The case was tried before a jury and after Jenkins presented his evidence and rested his case, Weis moved for a directed verdict The parties argued the motion and the court ruled As part of its ruling, the court, on its own motion, dismissed Jenkins's claims of invasion of privacy and intentional infliction of emotional distress Weis presented her evidence, including several witnesses who testified concerning Jenkins's behavior

The jury returned a verdict of no cause of action on the defamation claim, finding that although Weis had published defamatory statements about Jenkins, the statements were true After entry of judgment, Jenkins's motions for new trial and judgment notwithstanding the verdict were denied Jenkins appeals

ISSUES

Jenkins claims the trial court improperly: (1) determined

that he was a public figure, (2) dismissed two of his causes of action sua sponte, (3) submitted erroneous jury instructions, (4) allowed the state attorney general's office to represent Weis and allowed members of the attorney general's staff to testify at trial, and (5) decided pretrial motions within five days of trial

ANALYSIS

Public Figure Ruling

Jenkins claims the trial court improperly determined he was a public figure Weis claims that even if the trial court improperly determined Jenkins was a public figure, its ruling was harmless and thus, should not be disturbed See Utah R Civ P 61 (1992), *Huston v Lewis*, 818 P 2d 531, 533 (Utah 1991), *State v Verde*, 770 P 2d 116, 120 (Utah 1989), *Steffensen v Smith's Management Corp*, 820 P 2d 482, 489 (Utah App 1992), *aff'd*, 862 P 2d 1342 (Utah 1993) We agree

An error is harmful only if there is a "reasonable likelihood that the error affected the outcome of the proceedings " *Steffensen*, 820 P 2d at 489 The jury found that Weis's statements were true and truth is an absolute defense to a defamation claim *Brehany v Norstrom, Inc*, 812 P 2d 49, 57 (Utah 1991) Thus, regardless of whether Jenkins is a public figure, if Weis's statements were true, Jenkins has no claim for defamation Accordingly, a ruling that Jenkins was not a public figure would not have changed the outcome of the trial and any error by the trial court in its public figure ruling would be harmless

In the middle of Jenkins's public figure argument in his brief, he alleges that all testimony was opinion testimony and was "not supported by any scientific conclusion or expert testimony " The dissent takes this statement and completely recasts Jenkins's public figure argument into a challenge to the sufficiency of evidence supporting the jury verdict that Weis's defamatory statements were true The dissent states that "Jenkins asserts that there is no evidence" to support the

verdict of truth. (Emphasis added.)

That statement is contrary to the assertions that Jenkins makes in his brief albeit in his "public figure" argument. Jenkins asserts in his brief that "it must be pointed out that all testimony [to support the truth of the statements] was opinion and not supported by any scientific conclusion or expert testimony." Further, Jenkins states that "[i]t is beyond the stretch of imagination in reviewing [Weis's] statements to conclude that [the statements] were proven truthful based on Page 1377

the opinions of the witnesses who were called to testify." Jenkins does not say there is no evidence; he says evidence exists but he does not believe it because it is not scientific or expert.^[fn2] Neither Jenkins nor the dissent cites any legal authority to support the conclusion that the jury could not consider testimony of lay persons regarding the truth of the statements.^[fn3]

Although Jenkins failed to supply us with a transcript of any of the trial proceedings or testimony (an indication that he was not making a direct challenge to the sufficiency of the evidence, because we need a transcript to review the evidence on such a challenge), he did insert in his brief a summary of the trial testimony supporting the truth of Weis's statements. This evidentiary summary was prepared by Weis's counsel in connection with the post-trial motions and is found in the record on appeal. Moreover, in Jenkins's brief he "accepts the summary of the witnesses' testimony which was submitted." Accordingly, we set forth his evidentiary summary in full:

"I hope he's not prone to violence because I really am afraid, of a, you know, not attack on me but my family."

1. Weis testified that she observed Jenkins express anger and rage in her presence.

2. Weis testified that Jenkins verbally abused her secretary at the Department of Financial

Institutions.

3. Weis testified that Jenkins publicly accused her of being a criminal at the October, 1986 meeting of the depositors of the failed thrifts.

4. Jenkins and others stated that Jenkins sought the excommunication of Assistant Attorney General Bryce Pettey and attorney Don Allen from the L.D.S. Church.

5. Jenkins sought a criminal investigation of Elaine Weis.

6. Robert Eves testified that Jenkins slandered the title to property his company sought to develop.

7. Weis and George Sutton testified about incidents in which security guards were called to Department of Financial Institutions offices to deal with Jenkins.

8. Weis, Allen and Pettey all testified they feared Jenkins would harm their families.

9. Jenkins called Weis a criminal on the April 1986 KTKK radio broadcast.

10. An employee of the Utah Lt. Governor's office required Jenkins to bring a security guard with him when he visited the office.

"I think he's a mentally deranged person."

Weis testified that by saying this she meant Jenkins had disorganized thinking. The following is evidence that demonstrates the truth of that statement.

1 Weis testified that Jenkins' writings were incomprehensible

2 Weis testified that Jenkins' plan to reorganize the failed thrifts violated every banking canon

3 George Sutton testified that Jenkins is irrational and crazy
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4 Robert Eves testified that Jenkins is an "angry kook" and is the kind of person who tells himself the same story so many times that he starts to believe it

5 Don Allen testified that Jenkins cannot process information without twisting facts and attacking people

6 Jenkins was given opportunity to receive title to the house he lost in foreclosure but refused the offer on principle

7 Jenkins buried his invented satellite dish in a garbage dump to preserve the secrecy of the invention

8 At a time Jenkins was in default on his house mortgage he settled a property dispute and recovered \$80,000. He invested the \$80,000 in a business, Iron Star Manufacturing, instead of curing the default. He eventually abandoned the business a few months later.

"In my opinion he's a paranoid schizophrenic."

Weis testified that by saying this she meant Jenkins was a person who sees plots because of his irrational thinking. The following is substantial

evidence of the truth of this statement

1 Plaintiff spoke of international criminal conspiracies on the KTKK radio broadcast. The conspiracies involved Weis, Judges of the Third District Court, federal judges, the FBI and organized crime.

2 Plaintiff told Robert Eves that Weis and Judge D. Frank Wilkins were conspiring against Eves to cheat him out of a \$4 million real estate investment.

3 Dr. [Mohr], plaintiff's expert, testified (sic) that people with disordered thinking patterns have a tendency to see conspiracies against them.

Contrary to the dissent's claim of no evidence, the foregoing reveals an evidentiary basis for the jury's truth verdict [fn4]. "We accord due deference to the jury as the fact finder and do not substitute ourselves in this role." *Evans ex rel. Evans v. Doty*, 824 P.2d 460, 468-69 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992) (quoting *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 793 (Utah App. 1987), cert. dismissed, 771 P.2d 1032 (Utah 1989)). We will not overturn a jury verdict unless "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." See *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1982) (quoting *McCloud v. Baum*, 569 P.2d 1125, 1127 (Utah 1977)).

Directed Verdict: Emotional Distress and Invasion of Privacy

Jenkins claims the trial court improperly dismissed his causes of action for emotional distress and invasion of privacy before he was afforded a full and complete opportunity for a hearing. However, the full text of the minute entry regarding the dismissal reveals that it occurred following Weis's motion for a directed verdict, argument by counsel, and consideration by the trial court. The directed verdict motion was made at the

end of the second day of trial. At that point in the trial, Jenkins had rested his case and Don Allen, Eleanor Kent, Val Edwards, and George Sutton had testified on behalf of Weis. The minute entry states:

The jury having left the courtroom, comes now respective counsel and argue the defendant's motion for a directed verdict. Based upon the arguments of respective counsel, court orders that the motion for a directed verdict is granted in part on the issues of damages resulting from the heart attack and damages resulting from the loss of the home. Court further orders, on its own motion, that the 2nd and 3rd causes of action are dismissed.

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Jenkins has not challenged the substance of the trial court ruling. His brief on this point consists of barely more than one page and relies on a single procedural argument, i.e., the trial court did not comply with "Rule 4-501 Motions" of the Utah Code of Judicial Administration.[fn5] However, this rule has to do with pre-trial and post-trial motions when there is time for research, deliberation, preparation of legal memorandum, and time for advance notice of hearing, rather than "in trial" motions made in the heat of the courtroom struggle.

A motion for directed verdict is typically made orally during trial, immediately after the court and counsel have heard plaintiff's evidence and deemed it insufficient to support plaintiff's case or some necessary element of the claim. Jenkins argues that a directed verdict must not be considered when notice and a hearing are lacking. But, Jenkins had the usual notice for the motion and hearing. He does not contend that he objected to the motion, objected to the ruling, asked that the motion proceedings be placed on the record, or requested additional time to respond. Jenkins, by his failure to take any affirmative actions at trial, has not preserved the issue for appeal. See *In re Estate of Justheim*, 824 P.2d 432, 434-35 (Utah App. 1991); *LeBaron & Assocs., Inc. v. Rebel*

Enters., Inc., 823 P.2d 479, 482-83 (Utah App. 1991).

Moreover, he has not supplied us with a trial transcript or a transcript of the motion proceedings which took place at the end of the second day. Thus, he has prevented us from reviewing either the procedural or substantive aspects of the action taken by either court or counsel.[fn6] Even if he had preserved this issue for appeal, we cannot review the absent trial court record to determine whether his claims are meritorious.

Jury Instructions

Jenkins alleges that the trial court's jury instructions "at best, must have been confusing to the jury." Weis asserts that because Jenkins failed to properly object to the jury instructions below, he is precluded from raising an objection to the instructions on appeal. We agree. Failure to properly object to a jury instruction below bars an appellant from raising the issue on appeal. *Hansen v. Stewart*, 761 P.2d 14, 16 (Utah 1988); *In re Estate of Justheim*, 824 P.2d 432, 438 (Utah App. 1991). Jenkins has failed to show anywhere in the record where he made any objection to the jury instructions. Accordingly, we will not consider this issue on appeal.

Involvement of Attorney General's Staff

Jenkins asserts that because he sued Weis in her individual capacity, the trial court improperly allowed counsel from the state attorney general's office to represent Weis. Jenkins also alleges the trial court improperly allowed members of the attorney general's staff to testify at trial.

Jenkins did not adequately raise this issue before the trial court. Jenkins refers to a letter sent by his counsel to the attorney general's office challenging its representation of Weis. Jenkins submitted this letter and the response from the attorney general's office

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as part of his response to a motion for summary judgment. However, Jenkins never submitted any request or motion to the

court to disqualify the attorney general's office from representing Weis or to prevent members of the attorney general's staff from testifying. Further, the record does not reveal any objection by Jenkins when attorney general staff members appeared as witnesses in court. We will not decide an issue unless the trial court has first had the opportunity to address the issue. *Smith v. Iversen*, 848 P.2d 677, 677 (Utah 1993), *Jolivet v. Cook* 784 P.2d 1148, 1151 (Utah 1989). Accordingly, because Jenkins failed to properly present these issues to the trial court for resolution, we will not consider them on appeal.

Pretrial Motions

Jenkins asserts that the trial court abused its discretion in ruling on untimely pretrial motions. Specifically, Jenkins challenges the trial judge's ruling, four days before trial, that Jenkins was a public figure. Again, Jenkins failed to preserve this issue for appeal. He has not identified any part of the record showing that he made any objection to the ruling, which he now claims was untimely. Further, Jenkins could have filed a motion for continuance of the trial if, as he now asserts, it was "humanly impossible for his attorney to prepare" for trial in the days remaining because of the public figure ruling.

CONCLUSION

Because the jury found Weis's statements to be true, the trial court's ruling that Jenkins was a public figure, if improper, was harmless. The trial court also properly dismissed Jenkins's other causes of action. Further, we do not address the following issues because Jenkins did not properly preserve them for appeal: whether the trial court submitted an erroneous jury instruction, whether the trial court improperly allowed counsel from the state attorney general's office to represent Weis and improperly allowed members of the attorney general's staff to testify at trial, and whether the trial court improperly decided a pretrial motion within five days of trial.

GARFF, J., concurs

[fn2] In fact, Jenkins's expert witness, Dr. Mohr, testified that "people with disordered thinking patterns have a tendency to see conspiracies against them." Thus, the jury could infer from the testimony of Jenkins's expert that because there was testimony that Jenkins saw conspiracies against him, his thinking patterns were disordered.

[fn3] The dissent cites one bench trial case, *Alpar v. Weyerhaeuser Co.*, 20 N.C. App. 340, 201 S.E.2d 503, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974), for the proposition that calling an individual "clinically paranoid" is a diagnosis that requires expert testimony to verify the condition. However, contrary to the dissent's representations, Alpar does not suggest that expert testimony is required to establish or rebut truth. Further, the case does not state that the judge could not consider lay testimony in his determination of truth. Moreover, unlike the statements made in Alpar, Weis never alleged Jenkins was "clinically" paranoid or schizophrenic.

Further, we disagree with the dissent's assertion that calling an individual a "paranoid schizophrenic" is necessarily a clinical diagnosis.

[fn4] The dissent also suggests that the above evidence goes only to the validity of Weis's opinion, not to the truth of her assertions. This assumption can be made if expert testimony were the only way to prove the truth of the statements. However, neither the dissent nor Jenkins has pointed to any cases which require only the use of expert testimony to prove truth. Further, as stated above, along with the lay testimony presented, Jenkins's own expert's testimony could be used by the jury to conclude that Jenkins's thinking patterns were disordered.

[fn5] Rule 4-501 of the Code of Judicial Administration provides the appropriate method for submitting motions to the court. Rule 4-501(1)(a) states that "[a]ll motions shall be accompanied by a memorandum of points and authorities.

appropriate affidavits, and copies of or citations by page number to relevant portions of depositions. Memoranda . . . shall not exceed ten pages." Subsection (b) goes on to state that "[t]he responding party shall then file and serve upon all parties within ten days . . . a memorandum in opposition to the motion, and all supporting documentation." Subsection (c) then provides that "[t]he moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum." Subsection (d) states that either party may submit the matter to the court for decision upon the expiration of the five-day period to file the reply memorandum.

[fn6] The dissent argues that only the damage issue relating to Jenkins's heart attack and loss of his home were discussed at the motion proceedings at the end of the second day of trial. However, this seems impossible to determine without a transcript of the motion proceedings.

BENCH, Judge (dissenting):

I respectfully dissent. I would reverse the trial court's denial of Jenkins's motion for a new trial on the defamation claim because the evidence does not establish the truthfulness of the defamatory statements. I would also reverse the trial court's dismissal of the claims of intentional infliction of emotional distress and invasion of privacy because Jenkins had no notice and opportunity to be heard on the court's sua sponte action. In view of these crucial errors, I would reverse and remand the case for further proceedings.

Truth of Defamatory Statements

Jenkins challenged the jury's verdict in his motion for a new trial, claiming that there was insufficient evidence to support the jury's conclusion that the defamatory statements made by Weis were in fact true. The trial court denied his motion.

Where the trial court has denied the motion for new trial, its decision will be sustained on appeal if there was "an evidentiary basis for the jury's

decision. . . ." The trial court's denial of a motion for a new trial will be reversed only if "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust."

Nelson v. Trujillo, 657 P.2d 730, 732 (Utah 1982) (quoting McCloud v. Baum, 569 P.2d 1125, 1127 (Utah 1977)); see also Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985) ("we will not substitute our judgment for that of the jury where a verdict is supported by substantial and competent evidence").

Typically, an appellant challenging the sufficiency of the evidence must first marshal the evidence in support of the jury verdict and then show how the evidence is insufficient.

Crookston v. Fire Ins. Exch.,

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817 P.2d 789, 799 (Utah 1991). In this case, however, Jenkins asserts that there is no evidence that establishes the truthfulness of the defamatory statements.[fn1] Since there is purportedly nothing to marshal, the marshaling requirement is satisfied without rehearsing the evidence. Inasmuch as Weis does not assert that there is evidence to establish that Jenkins was in fact a "paranoid schizophrenic," "mentally deranged," or "a vicious, vicious person," we should accept Jenkins's assertion that there is no such evidence.

Weis acknowledges that she did not present at trial any expert testimony or any other evidence that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person. She argues, however, that Jenkins misconstrues her defense, which is that she did not use those terms in a clinical sense. She contends that she used the terms only as "street expressions," much like saying a person is "nuts" or "crazy." In other words, she claims she did not really mean that Jenkins actually met the "psychiatric diagnostic criteria of a 'paranoid schizophrenic.'" Although claiming truth as a defense, Weis asserts that she had no burden to prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person. Weis's argument fails as a

matter of law.

While Weis's subjective intent may have some relevancy to whether she acted with malice, it has no relevancy to the question of whether her statements were in fact true.^[fn2] It is not the truth of her privately-intended, subjective message that is at issue — it is the message that damages the plaintiff's public reputation that must be true.

"Libel" means a malicious defamation, expressed either by printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.

Utah Code Ann. § 45-2-2(1) (1993).

To say that a person is mentally deranged, and then to provide a specific clinical diagnosis such as paranoid schizophrenia, and to accuse the person of being so vicious that the speaker fears for her family's safety, cannot be dismissed as mere "street expressions" simply because Weis subjectively intended that they be so interpreted.^[fn3] Such statements do not convey any objective message Page 1382 other than the plain meaning of the words used. They are not "rhetorical hyperbole." See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988) (rhetorical hyperbole is protected because it cannot "reasonably [be] interpreted as stating actual facts" about an individual); accord *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 1541-42, 26 L.Ed.2d 6 (1970). A reasonable person, taking Weis's statements, as a whole, would objectively assume that she was saying that Jenkins was in fact a paranoid schizophrenic, mentally deranged, and a vicious person. The jury itself held that the statements were defamatory, a conclusion it would not likely draw from simple "street expressions."

Because of Weis's strategic failure to present any expert evidence to prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person, the special jury verdict completely lacks supporting evidence.^[fn4] The trial court erred as a matter of law in not vacating the special verdict and granting a new trial. Because I would remand for a new trial, I would also hold that the trial court erred in ruling that Jenkins was a public figure in view of Weis's failure to establish the bases for the privilege. Specifically, Weis did not sufficiently identify a public controversy or show that Jenkins had voluntarily and successfully placed himself at the forefront of the controversy in an attempt to order society. See generally *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 128 (1980).

Sua Sponte Dismissal

Jenkins asserts that the trial court abused its discretion by dismissing, on its own motion, his causes of action for intentional infliction of emotional distress and invasion of privacy. The trial court did not explain under what authority or for what reason it dismissed Jenkins's causes of action. We do know, however, that the court dismissed the causes of action "on its own motion."

"Generally, a trial court may not dismiss an action when neither party has sought dismissal and there is no notice or hearing on whether there exists a justifiable cause for dismissal." *Rubins v. Plummer*, 813 P.2d 778, 778 (Colo.App. 1990). Unless expressly granted authority to act on its own motion, a trial court must typically limit its rulings to the motions placed before it. "[A] trial court has no authority to render a decision on issues not presented for determination. Any findings rendered outside the issues [presented] are a nullity." *Combe v. Warren's Family Drive-Inns, Inc.*, 680 P.2d 733, 736 (Utah 1984); see also Utah R.Civ.P. 7(b)(1)

("application to the court for an order shall be by motion")
Because Weis did not make a motion for a directed verdict, the trial court plainly erred when it dismissed Jenkins's
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causes of action without first giving Jenkins notice and an opportunity to argue against dismissal Cf Preuss v Wilkerson, 858 P 2d 1362, 1362-63 (Utah 1993) (trial court must give notice and opportunity to be heard before dismissing claim for failure to prosecute)

Weis nevertheless asserts that any "procedural error" committed by the trial court was harmless because insofar as the merits of the trial court's ruling are concerned, directed verdicts were appropriate Regardless of whether a directed verdict might have been granted had the motion been properly made, noticed, and heard, the trial court's ruling was void at its inception A judgment is void "if the court that rendered it acted in a manner inconsistent with due process " Richins v Delbert Chipman & Sons Co , 817 P 2d 382, 385 (Utah App 1991) (quoting Automatic Feeder Co v Tobey, 221 Kan 17, 558 P 2d 101, 104 (1976)), accord In Re Estate of Jones, 858 P 2d 983, 985 (Utah 1993), Brimhall v Mecham, 27 Utah 2d 222, 224, 494 P 2d 525, 526 (1972), Workman v Nagle Constr , Inc , 802 P 2d 749, 753 (Utah App 1990)

In our judicial system, except in extraordinary circumstances that are not present here, all parties are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision The failure to give adequate notice and opportunity to participate can constitute a denial of due process under article I, section 7 of the Utah Constitution

Plumb v State, 809 P 2d 734, 743 (Utah 1990) (citations omitted)

Sua sponte decisions by trial courts are inconsistent with the notion of due process when parties are not provided advance

notice that the court is considering a given course of action, and the losing party is not allowed to be heard thereon [fn5] "The right to prior notice and an opportunity to be heard is a critical part of our judicial system A method of resolving cases that bypasses this requirement can not be accepted as a fair, neutral, and rational process " Rubins, 813 P 2d at 780 (citing Goldberg v Kelly, 397 U S 254, 90 S Ct 1011, 25 L Ed 2d 287 (1970)), see also Nelson v Jacobsen, 669 P 2d 1207, 1211 (Utah 1983) ("Timely and adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness ")

A trial court should normally refrain from dismissing a complaint for failure to state a claim unless such a deficiency is brought to its attention by way of pleadings or motions by the parties If the court is inclined to dismiss sua sponte, it must afford the plaintiff an opportunity to be heard While we agree that circumstances might arise when a trial court is justified in raising the dismissal sua sponte, it should, as a matter of fundamental fairness, if not procedural due process, give plaintiff an opportunity to persuade the court that dismissal is not proper

Rubins, 813 P 2d at 779 (citations omitted)

The lack of notice and opportunity to be heard are further aggravated by the fact that a trial court acting sua sponte has abandoned its impartial position and has become an advocate for one party over the other See Ricketts v Midwest Nat Bank, 874 F 2d 1177, 1184 (7th Cir 1989) "Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy [T]he interests of justice are not
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enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead " Girard v Appleby, 660 P 2d 245, 247 (Utah 1983)

Since the sua sponte dismissal of Jenkins's causes of action was void, it cannot be affirmed, regardless of whether a directed verdict would have been permissible had the motion been properly made. Cf. *Birch Creek Irrigation v. Prothero*, 858 P.2d 990, 993 (Utah 1993) (trial court erred in granting permanent injunction on motion for preliminary injunction, regardless of whether permanent injunction would have been appropriate upon proper motion). A void judgment cannot subsequently become a valid judgment. "Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly." *Garcia v. Garcia*, 712 P.2d 288, 291 (Utah 1986) (quoting 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2862 (1973)). I would therefore vacate the trial court's sua sponte dismissal of Jenkins's second and third causes of action.

[fn1] Contrary to the majority's suggestion as to how this case was argued in his brief on appeal, Jenkins directly challenged the sufficiency of the evidence. In challenging the court's decision to submit Weis's affirmative defense to the jury, Jenkins urged that "there was no expert testimony provided by the appellee" to establish that the defamatory statements were true.

[fn2] The fact that Weis couched her statements in opinion language does not allow her to escape liability for her comments by merely showing that she in fact believed what she said she believed. Opinions regarding facts are not unconditionally privileged. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-20, 110 S.Ct. 2695, 2705-06, 111 L.Ed.2d 1 (1990). The Supreme Court expressly acknowledged in *Milkovich* that the statement, "[i]n my opinion John Jones is a liar" implies "a knowledge of facts which lead to the conclusion that Jones told an untruth." *Id.* This statement is therefore just as damaging as a direct assertion that "Jones is a liar." The Supreme Court explained that if the substance of a statement couched in opinion language is capable of being proven true or false, it is subject to suit. *Id.*, see also *West v. Thomson Newspapers*,

835 P.2d 179, 183-87 (Utah App.) (interpreting *Milkovich*), cert. granted, 843 P.2d 1042 (Utah 1992).

Weis's statements imply knowledge of conduct that leads to a conclusion that Jenkins is in fact a paranoid schizophrenic, mentally deranged, and a vicious person. These assertions are capable of being proven true or false and are therefore subject to suit for defamation. The evidence summarized by the majority goes not to the truth of Weis's statements, but only to the validity of her opinion. In order to assert truth as a defense, Weis must prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, and a vicious person, not merely that she believed him to be so. Her subjective beliefs go only to the question of malice. See *Milkovich*, 497 U.S. at 20 n. 7, 110 S.Ct. at 2706 n. 7.

[fn3] Calling an individual "clinically paranoid" is a diagnosis that requires expert testimony to verify the condition. See, e.g., *Alpar v. Weyerhaeuser Co.*, 20 N.C.App. 340, 201 S.E.2d 503, 507 (defendant's pleading alleging both nonutterance and defense of truth for libelous interoffice letter, which accused plaintiff of being "clinically paranoid," prompted plaintiff to have expert witness to rebut defendant's clinical diagnosis), cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974). Similarly, as in the instant case, calling an individual a "paranoid schizophrenic" is a clinical diagnosis that requires expert testimony to verify the condition. Cf. *Webster's Medical Desk Dictionary* 640 (1986) (defining "schizophrenia" as a "psychotic disorder," or psychosis), *id.* at 588 (defining psychosis as a "serious mental illness (as schizophrenia)"). To say that a person has a "serious mental illness" is not merely street language, but clearly requires an expert witness to verify the truthfulness of the diagnosis. Cf. *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 57 (Utah 1991) (defense of truth can only be established if defamatory charge is "true in substance"). Therefore, since terms such as "paranoid schizophrenic" are specific clinical diagnoses, the only way they can be "true in substance" is if an expert witness verifies such diagnoses.

[fn4] The majority points to Jenkins's own expert, Dr. Mohr, to

establish that Jenkins had a disordered thinking pattern
Unlike the majority, I do not believe that Dr. Mohr's testimony that "people with disordered thinking patterns have a tendency to see conspiracies against them" in any way infers that Jenkins had a disordered thinking pattern. The other evidence summarized by the majority does not prove that Jenkins was in fact a paranoid schizophrenic, mentally deranged, or a vicious person. While I do not concede that the evidence is even admissible, I believe it can only go to the validity of Weis's opinion. See note 2.

[fn5] From all that appears in the record, Jenkins had no notice and hearing on the court's sua sponte dismissal of his causes of action for intentional infliction of emotional distress and invasion of privacy. Jenkins claims that the dismissal was "without findings and on the Judge's own motion in his chambers without a court reporter present." In any event, the minute entry itself indicates

Based upon the arguments of respective counsel, court orders that the motion for a directed verdict is granted in part on the issues of damages resulting from the heart attack and damages resulting from the loss of the home. Court further orders, on its own motion, that the 2nd and 3rd causes of action are dismissed.

(Emphasis added.)

PREUSS v WILKERSON, 858 P 2d 1362 (Utah 1993)
Michael John PREUSS, Plaintiff and Appellant, v Roger K WILKERSON,
Defendant and Appellee
No 920156
Supreme Court of Utah
August 11, 1993

Appeal from the District Court, Third District, Salt Lake
County, David S Young, J
George M McCune, Salt Lake City, for plaintiff and
appellant.
Roger K Wilkerson, pro se

PER CURIAM

This matter is before the court on plaintiff's motion for
summary reversal of a district court order dismissing the
complaint for lack of prosecution under rule 4-103 of the Utah
Code of Judicial Administration. We reverse and remand for a
hearing at which plaintiff will be allowed to show good cause,
if any he has, for his failure to prosecute the action within
the time limits of the rule.

The complaint was filed in this case on October 10, 1991, and
the summons and complaint were served on defendant on October
28, 1991. The return of service was filed November 11, 1991. No
answer was filed by defendant, and no default against defendant
was taken by plaintiff. On February 20, 1992, the court,
without notice to plaintiff and without giving him an
opportunity to be heard, dismissed the complaint for lack of
prosecution.

The pertinent part of rule 4-103 provides

(1) If a default judgment has not been entered
by the plaintiff within 60 days of the
availability of default and absent a showing of
good cause, the court shall dismiss the case
without prejudice for lack of prosecution.

Plaintiff asserts that he was never given notice that
dismissal of his complaint was under consideration and that he

was not given an opportunity to present evidence and argument
that he had good cause for not taking a default within sixty
days. He argues that he was deprived of due process by the
district court's sua sponte action without notice to him.
However, we see no need to reach the constitutional question,
as such, because the issue may be decided as a matter of
statutory construction. Rules, like statutes, are to be
construed to avoid constitutional interpretation.
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where possible [fn1] In the past we have said
In our judicial system, except in extraordinary
circumstances that are not present here, all
parties are entitled to notice that a particular
issue is being considered by a court and to an
opportunity to present evidence and argument on
that issue before decision. The failure to give
adequate notice and opportunity to participate can
constitute a denial of due process under article
I, section 7, of the Utah Constitution.

Plumb v State, 809 P 2d 734, 743 (Utah 1990) (citations
omitted)

Construing rule 4-103 in this light, we note that it provides
for dismissal of the complaint "absent a showing of good
cause." Implicit in that language is the concept that the
plaintiff should have notice of the court's consideration of
dismissal before a matter is dismissed and also should have an
opportunity to show good cause why this should not occur. In
the present case, the court was in error in failing to give
notice and an opportunity to be heard. Therefore, the dismissal
was improper.

Reversed and remanded for further proceedings consistent with
this opinion.

[fn1] Provo City Corp v State, 795 P 2d 1120, 1125 (Utah 1990),
Crawford v Tilley, 780 P 2d 1248, 1252 (Utah 1989), State v
Wood, 648 P 2d 71, 82 (Utah 1982)