

2010

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

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**JESSIE LEE OSBURN,**

Petitioner/Appellee,

vs.

**AMY B. BOTT,**

Respondent/Appellant.

Appellate Case No. 20100313

District Ct. Case No. 100400395

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**BRIEF OF APPELLANT**

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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 ISSUES

**Issue 1:** Did the trial court err in striking Appellant Osburn's evidentiary hearing on March 9, 2010, voiding the temporary ex parte stalking injunction against Appellee Bott, summarily dismissing Osburn's case, and ordering the file closed on the same date?

**Standard of Review:** " [The Utah Supreme Court] review[s] the district court's legal conclusions for correctness without deference to the lower court. *Myers v. State*, 2004 UT 31, ¶ 19, 94 P.3d 211. We will disturb the district court's factual findings only if they lack a rational basis. *Id.*; *see also Rudolph v. Galetka*, 2002 UT 7, ¶ 4, 43 P.3d 467; *Medina v. Cook* TO [sic] P.2d 658, 658 (Utah 1989)."

**Issue 2:** Did the trial court deprive Appellant Osburn of her constitutionally protected rights to due process of law and accesses to the courts?

**Standard or Review:** "This issue presents a question of law that we review for correctness. *See Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P.3d 1177 "Constitutional issues, including question regarding due process, are questions of law that we review for correctness.". When our review of such questions involves

underlying factual issues, "we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations." *Id.*"

## **DETERMINATIVE PROVISIONS**

(Cases and Statutes set forth verbatim in the Addendum to this Brief)

### **Cases**

*Allen v Friel*, 2008 UT 56, 194 P.3d 903, 907: "We review the district court's legal conclusions for correctness without deference to the lower court. *Myers v. State*, 2004 UT 31, ¶ 19, 94 P.3d 211. We will disturb the district court's factual findings only if they lack a rational basis. *Id.*; see also *Rudolph v. Galetka*, 2002 UT 7, ¶ 4, 43 P.3d 467; *Medina v. Cook* TO [sic] P.2d 658, 658 (Utah 1989)."

*D.A.B. v State*, 2009 UT App 169, 214 P.3d 878.: "See *State v. Spillers*, 2007 UT 13, ¶ 24, 152 P.3d 315 (defining harmless error as "an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings").

*Jenkins v Weis*, 868 P.2d 1374 (UT App. 1994) (Bench, J., *dissenting*) (full verbatim opinion provided in Addendum)

*State ex rel. D.B.*, 2010 UT App. 111, 231 P. 3d 819, 821: "This issue presents a question of law that we review for correctness. See *Chen v. Stewart*, 2004 UT 82, ¶ 25, 100 P.3d 1177 ("Constitutional issues, including question

regarding due process, are questions of law that we review for correctness." ).  
When our review of such questions involves underlying factual issues, "we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations." *Id.*"

### **Constitutional Provisions**

Utah Constitution, Art. I, Sec. 7:

No person shall be deprived of life, liberty or property, without due process of law.

Utah Constitution, Art. I, Sec 11:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

United States Constitution, Amendment 14:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

## **STATEMENT OF THE CASE**

### **Nature of the Case**

This is an appeal from the sua sponte dismissal of a civil stalking injunction by the Honorable Lynn W. Davis of the Fourth Judicial District Court on March 9, 2010.

### **Course of Proceedings**

The Appellee Amy Bott [“Bott”] filed a petition for a civil stalking injunction and request for a temporary order against the Appellant Jessie Osburn on January 19, 2010. The Fourth District Court issued a temporary civil stalking injunction ex parte order on January 20, 2010. A bench trial was held on February 8, 2010 before Judge Steven Hansen.

The Appellant Jessie Osburn [“Osburn”] filed a civil stalking injunction against Bott on February 2, 2010. The Fourth District Court issued a temporary civil stalking injunction ex parte order against Bott on February 10, 2010. A bench trial on Osburn’s petition was scheduled for March 9, 2010.

On March 9, 2010 and before the hearing on Osburn’s petition began, Judge Lynn W. Davis summarily struck the hearing, voided the temporary ex parte stalking injunction against Bott, dismissed Osburn’s case, and ordering the file closed. Osburn orally objected and filed a notice of appeal on March 22, 2010.

## **Disposition of Trial Court**

On March 9, 2010, the trial court summarily struck the evidentiary hearing on Osburn's civil stalking claim, voided the temporary ex parte stalking injunction against Bott, dismissed Osburn's case, and ordered the file closed.

## **RELEVANT FACTS**

At some point in 2008, Bott learned that her husband was having an affair with Osburn.<sup>1</sup> Bott reacted toward Osburn and on June 26, 2008, Osburn filed a telephone harassment complaint with the Provo City Police Department; who responded by instructing Bott not to contact Osburn anymore. Both Bott and Osburn filed civil stalking claims against each other in August 2008. Both women voluntarily dismissed their petitions when Bott's husband decided to reconcile with Bott and return home.

The relationship between Bott and Osburn calmed until Bott learned that her husband was once again seeing Osburn in December 2009.<sup>2</sup> Bott again responded by calling Osburn 8 times on December 6<sup>th</sup>; 3 times on the 7<sup>th</sup>; twice on the 10<sup>th</sup>; once on the 11<sup>th</sup>; and, once on the 13<sup>th</sup>. On December 15, 2009, Osburn again filed a complaint with the Provo City Police Department, who responded by instructing Bott not to have any contact with Osburn. On January 15, 2010, Bott was arrested for allegedly trying to enter Osburn's residence and for doing \$2,320 of damage to

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<sup>1</sup> Addendum, p. 15-25: Trial Transcript, p. 6-13.

<sup>2</sup> Addendum, p. 17: Trial Transcript, P. 6, l. 14-16.

Osburn's vehicle. The 3<sup>rd</sup> degree felony case against Bott is still pending at the time of this writing.<sup>3</sup>

Once Bott was released from jail, she again filed for a civil stalking injunction against Osburn on January 19, 2010; which is recorded as Fourth Judicial District Case No. 100400157. On February 2, 2010, Osburn filed a civil stalking injunction petition in the Fourth Judicial District Court, which is recorded as Fourth Judicial District Case No. 100400395. Thus, as in August 2008, both women had pending petitions and ex parte orders against one another, only this time both were in the Fourth Judicial District Court in Provo, Utah. However, Bott's petition was assigned to Judge Steven Hansen and Osburn's petition was assigned to Judge Lynn W. Davis.

Bott's petition was heard by Judge Hansen on February 8, 2010, and granted. Osburn's appeal of that judgment is pending as Appellate No. 20100232. Osburn's petition was scheduled to be heard one month later on March 9, 2010. Before the hearing on Osburn's civil stalking claim against Bott started, Judge Lynn W. Davis decided Judge Hansen had heard and ruled on the merits of Osburn's petition at the hearing on Bott's petition before Judge Hansen in Fourth Judicial District Case No. 100400157, and therefore summarily dismissed

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<sup>3</sup> Addendum p. 9: Docket, Fourth Judicial District Criminal No. 101400325.

Osburn's claim, the ex parte order against Bott, and struck the hearing on Osburn's civil stalking claim against Bott.

No motion for dismissal was submitted by either party and no notice that anything but the evidentiary hearing on Osburn's petition was provided to either party. There was no notice to either party that the trial court was contemplating dismissal before its pronouncement that Osburn's case was in fact being dismissed. Before going on the record at Osburn's hearing against Bott on March 9, 2010, Judge Davis excused himself to consult with Judge Hansen and asked the parties to wait. When he returned, Judge Davis announced his decision without discussion or debate by either party.

Because the case was dismissed before it began, there is no record or transcript of the proceedings. Instead, the trial court's ruling and dismissal are found in the terse minute entry found in the docket sheet in Case No. 100400395:

"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 brief 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."<sup>4</sup>

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<sup>4</sup> Addendum p. 1, Docket Sheet, *Osburn v Bott*, (100400395), p. 3.

Notably, most of the evidence necessary for this appeal is found in the trial transcripts of Case no. 10400157, which have also been submitted to the Utah Court of Appeals in Appellate Case No. 20100232. The plain language of Judge Hansen's ruling in Case No. 100400157, on February 8, 2010, renders Judge Davis' decision on March 9, 2010 erroneous.

Osburn filed notice of appeal from Judge Hansen's decision on March 9, 2010 and Judge Davis' decision on March 22, 2010. Both appeals are currently pending before this Court of Appeals. As noted in the docketing statements for Appellate Case No. 20100232 and this Appellate Case No. 20100313, both cases are related in that they involve the same parties and the facts are identical and relevant to each case, and certain of the facts are relevant to each appeal.

### **SUMMARY OF ARGUMENT**

Judge Davis' sua sponte, summary dismissal of Osburn's civil stalking claim deprived Osburn of due process of law and equal access to the courts for redress of injuries, and the prevention of new ones.

As terse as the minute entry in the docketing statement may be, it accurately reflects the substance of what occurred in the courtroom the day Ms. Osburn's petition against Ms. Bott was to be heard before Judge Davis on March 9, 2010; with the exception of Mr. York's statement that he 'respectfully disagreed' with the court's decision.

Neither party was privy to the conference Judge Davis had with Judge Hansen and apparently no record was made. Whatever the conversation between them, Judge Davis returned to the courtroom and summarily dismissed Osburn's claim without further discussion; stating as noted in the Minute Entry; "[T]hese issues were already addressed in the earlier case;" specifically Case No. 100400157.<sup>5</sup>

Since there is no question but to accept Judge Davis' word that he did in fact consult with Judge Hansen about this matter, Osburn can only presume that there was a miscommunication, or Judge Hansen simply forgot about his ruling one month prior in Case No. 100400157. In that case, Judge Hansen was totally aware of Osburn's pending civil stalking claim against Bott, and the pending criminal charges against Bott; as the trial transcript in Case No. 100400157 demonstrates. Judge Hansen specifically stated in his ruling that he was not ruling on Osburn's civil stalking claim or the felony criminal charge against Bott and that these issues were "for another day and another courtroom under different circumstances."

Osburn's counsel came to court on March 9, 2010 prepared to present evidence to support every element of Osburn's civil stalking claim; a substantial amount of evidence which thankfully need not be duplicated or argued here. However, a transcript of Judge Hansen's decision in Case No. 100400157 was not

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<sup>5</sup> Addendum p. 1, Docketing Statement (100400395).

part of that evidence. Had Osburn's counsel been provided notice that the trial court was considering a motion to dismiss based on the basis of issue or claim preclusion, even a sua sponte motion, at the March 9, 2010 hearing, he would have had the transcript of Judge Hansen's ruling at the ready and, if allowed, would have refuted Judge Davis' conclusion following his out-of-courtroom consultation with Judge Hansen. Since notice was not provided, the proof was not readily at hand and all Mr. York could do was 'respectfully disagree' with Judge Davis.

### **DETAIL OF ARGUMENT**

Osburn recognizes her duty to muster the evidence in favor to Judge Davis' ruling; however, as the record notes, whatever evidence Judge Davis' ruling was based upon was obtained outside of the influence of the parties and off the record. Osburn has no evidence to challenge Judge Davis' representation that he personally spoke with Judge Hansen and no explanation for why Judge Davis would have concluded from that conversation that Osburn's claim in Case No. 100400395 would be precluded by Judge Hansen's previous ruling in Case No. 100400157.

On the contrary, Osburn was told by Judge Hansen one month earlier that he was not ruling on Osburn's pending civil stalking petition against Bott. Judge Hansen also stated in his ruling that the only reason that he allowed and considered the evidence which Osburn presented was because he "thought that it was

important to listen to it because it, it had evidentiary weight in terms of a, determining in [his] mind whether or not Amy Bott was telling the truth about the two most important facts in [that] case which is what [that] case was about.”<sup>6</sup>

Judge Hansen’s findings with regard to Osburn’s evidence of Bott’s stalking reached no further than a determination of the credibility of witnesses in Bott’s case against Osburn. The trial transcript from Judge Hansen’s decision in Case No. 100400157 provides the best evidence of what a true conference between he and Judge Davis should have entailed. First, Judge Hansen was made aware that Osburn has a pending Civil stalking claim against Bott;

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.  
0048  
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--

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<sup>6</sup> Addendum p. 28: Trial Transcript (100400157), p. 70, l. 8-12.

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.  
0049  
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.<sup>7</sup>

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<sup>7</sup> Addendum p. 31-41, Trial Trascript 100400157, p. 40- 50.

Judge Hansen then specifically excluded Osburn's civil stalking claim in his ruling in Case no. 100400157; a brief ruling; which is duplicated verbatim for the Court's convenience:

22 THE JUDGE: Come forward. You may be seated.

23 Thank you.

24 All right. Well, I wanted to go back and

25 double-check the law to make sure I was correct in my  
0069

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,

0070

1 that caused her emotional distress. And so all of it,

2 everything that has gone on is important for me to listen to

3 to decide if she's telling the truth and to give that weight

4 to that testimony, and that's what I listened for and  
5 balanced and a, and took into consideration.  
6 What I wanted to look at under the law is was  
7 there any kind of a defense that you might have that she  
8 made the calls to you, which is what you've placed a lot of  
9 weight on here today that she's been calling you and that  
10 she called you and so, therefore, you didn't stalk her  
11 because she called you. And that really isn't a defense  
12 under the law. If someone calls you and then while you are  
13 on the telephone you threaten to shoot them twice on two  
14 different days, that's stalking.  
15 And so my, my challenge today was who do I  
16 believe. Do I believe Amy Bott or do I believe you and a,  
17 and Mr. Bott as to the circumstances of what went on.  
18 I'm not passing judgment on what's happened  
19 between you in your personal lives whatsoever. That's not  
20 before me today. But I have to decide was there persuasive  
21 evidence by a preponderance of the evidence, that's just a  
22 little bit more than the other side. Beyond a reasonable  
23 doubt is a higher standard of evidence.  
24 Today we're just determining is there a little bit  
25 more in Amy Bott's favor than there is you. And I think  
0071

1 there is, I think there is. I think that because of this  
2 intense communication that's gone on for an extended period  
3 of time here, and the anger and frustration that's gone on  
4 between the two of you over this affair and a, what's  
5 happened, it is reasonable for me to believe her and a,  
6 and that this is highly unlikely she would make something  
7 up of this magnitude in light of a, she could have made up a  
8 lot worse if she was a make up kind of story person, she  
9 could have made up a lot worse. This is bad but it could  
10 have been a lot more dramatic. She could have said it  
11 happened more than two times, she could have exaggerated it,  
12 she could have made a lot up if she was not telling the  
13 truth.  
14 On the 7th and the 13th I find that she made those  
15 statements, one that she would, you said what she said you  
16 said that you would shoot my ass, and on the 13th she would  
17 shoot me. Both of those are clearly verbal threats that

18 would cause a reasonable person to be afraid of you and cause  
19 her a great emotional distress.

20 She's established her burden of proof today by  
21 the evidence presented, therefore, she's entitled to a  
22 stalking injunction. That means nothing other than that's  
23 what I decide today. And apparently there's another stalking  
24 injunction pending that you're trying to get against her and  
25 that's for another day. And protective orders that have

0072

1 been issued, and those are not from me, those are for what  
2 happened. And there's a criminal--

3 MS. OSBURN: May I ask you a question,

4 Your Honor?

5 THE JUDGE: -- criminal prosecution that's

6 pending and that will take its course.

7 But yes, ma'am. I've given you the reason for my

8 decision. I don't like to argue with either side but I'd be

9 happy to answer your question to help explain to you my

10 decision.

11 MS. OSBURN: I'm just wondering with all of the

12 evidence I showed that she has been the one harassing me, I

13 just don't see how she showed any evidence that I, that I

14 said that because I never did.

15 THE JUDGE: Okay. Well, I explained to you that

16 that was evidence that I listened to and weighed and

17 balanced to determine whether she was telling the truth as to

18 those two statements. It's not whether or not she made

19 those calls to you or that she was harassing you. Okay.

20 That's not really, it's not really determinative of what I

21 have to decide, and I don't have to decide that. It was a

22 lot of evidence, it had some weight. I listened to it and

23 I looked at it. But the bottom line was, it didn't really

24 matter to me that much if she would have been the one that

25 called you. It was important. What I had to decide is did

0073

1 you say what she said you said, that's what's important.

2 Threatening language, shoot someone on two occasions is a

3 verbal threat, under the law it's stalking, and it's not, not

4 permissible under the law so--

5 MS. OSBURN: But it never happened.

6 THE JUDGE: So that's the reason for my decision.  
7 And obviously I understand you're frustrated, both sides  
8 usually are when they don't prevail, one side or the other.  
9 So that's the decision.

In Judge Hansen's mind, a stalking victim cannot defend themselves from a stalker with harsh words without themselves being labeled a stalker. As noted, that decision is presently under appeal in Appellate Case No. 20100232 on its own merits and different legal grounds. However, what is relevant to this appeal is that Judge Hansen's decision specifically excluded a determination of Osburn's civil stalking claim against Bott in Case No 100400395 and the criminal charges against Bott in Case No. 101400235. Whatever unrecorded factual determinations Judge Davis might have concluded from his brief conference with Judge Hansen, those conclusions do not comport with the record objectively on file with the Fourth Judicial District Court on the same date. Thus, Judge Davis' legal conclusions were equally flawed.

The Minute Entry of Judge Davis' decision shows that by the time of the March 9, 2010 hearing, Bott appeared pro se and made no motion for summary dismissal of Bott's stalking claim.<sup>8</sup> Despite Bott's lack of counsel, both parties appeared, with witnesses, ready to argue the merits of Osburn's claim. Imagine everyone's surprise when Judge Davis reemerged from his conference and summarily announced that Bott had won.

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<sup>8</sup> Addendum p. 1-3: Docket Sheet (100400395).

In *Jenkins v Weis*, 868 P.2d 1374 (UT App. 1994), the majority of the Court decided against Jenkins on the ground that he had not preserved the relevant issues for appeal; however, the dissent and legal opinions of Judge Bench are directly on point, legally correct and persuasive with regard to Osburn's arguments here. This case provides the Court of Appeals with the opportunity to address Judge Bench's reasoning;

"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. "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.

*Jenkins v Weis*, 868 P.2d 1374, 1382-84 (UT App. 1994).<sup>9</sup> Judge Bench's reasoning in *Jenkins* closely followed the Utah Supreme Court's decisions in *Plumb v. State*, 809 P.2d 734, 743 (UT1990) and its decision in *Pruess v Wilkerson*, 858 p.2d 1362, (UT 1993). Here, the same principles apply. It is noteworthy that the record shows Mr. York was only allowed to address the trial

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<sup>9</sup> Addendum p. 49-52: *Jenkins v Weis*, 868 P.2d 1374 (UT App. 1994)(*Dissent*).

court once, and not again after Judge Davis had consulted with Judge Hansen and reached the decision to summarily dismiss the case.

One cannot help but surprised by the trial court's decision to rule on an issue that is not before it and thereby deny a party access to the courts. Without proof in hand of Judge Hansen's prior ruling, Osburn was in no position to refute Judge Ward's assertion that he got his information 'straight from the horse's mouth.' Despite Judge Hansen's assurances a month earlier that the substantial evidence Osburn presented of Bott's stalking would be considered 'by another court on a different day,' Judge Davis's ruling deprived Osburn of that opportunity and her 'day in court.' Her civil stalking claim against Bott is barred forever and she has no redress for the undisputed fact that Bott called incessantly and the City of Springville believes Bott tried to invade Osburn's home and did \$2,300 in damage to Osburn's car.

Osburn cannot recover if Judge Davis' error was harmless, which is "an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings".<sup>10</sup> Here, the record is too scant for the Court of Appeals to determine her claim on the merits; since Judge Davis precluded Osburn's opportunity to present any evidence at all. But what the Court of Appeals can decide is whether Osburn had any right at all to present her stalking claim

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<sup>10</sup> *D.A.B. v State*, 2009 UT App 169, 214 P.3d 878, 880, (*quoting State v. Spillers*, 2007 UT 13, ¶ 24, 152 P.3d 315.

against Bott. Without any compulsion from anyone, except perhaps Judge Hansen, Judge Davis decided that she did not have any recourse to the law.

Under Article I, Section 7 of the Utah Constitution and Amendment 14 of the United States Constitution, Osburn is entitled to due process and equal protection of the laws. Under Article I, Section 11 of the Utah Constitution, Osburn is entitled to redress any ‘injury’ done to her “without denial or unnecessary delay.”<sup>11</sup>

Since the record plainly shows that the issues presented in Osburn’s appeal were not decided in Case No 100400157, Judge Davis erred in summarily dismissing Osburn’s petition. And since Judge Davis chose to initiate this dismissal without any notice whatsoever, Osburn was deprived of the notice necessary to prevent Judge Davis from committing this error. This error directly and proximately caused Osburn to be deprived of the opportunity to present her arguments and evidence in court on March 9, 2010. Osburn’s constitutionally protected legal rights have been violated and her equal access to the courts denied. On his own initiative and without explanation, other than that he had spoken to Judge Hansen, Judge Davis denied Osburn’s right to a regularly scheduled trial.

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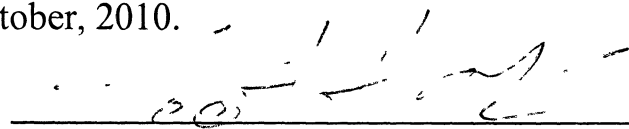
<sup>11</sup> Utah Constitution, Article 1, Section 11.

## CONCLUSION

Judge Davis of the Fourth Judicial District Court erred when he sua sponte summarily dismissed Appellant Osburn's civil stalking claim against the Appellee Amy Bott. Judge Davis wrongfully dismissed Osburn's claim without notice or hearing. For the reasons enumerated and argued above, the Utah Court of Appeals must overturn Judge Davis' sua sponte dismissal of Appellant Jessie Osburn's petition for a civil stalking injunction against the Appellee Amy Bott.

WHEREFORE, the Appellant Jessie Osburn respectfully requests the Utah Court of Appeals overturn the decision of the Fourth Judicial District Court issued on March 9, 2010 and restore her civil stalking claim against Bott.

Dated this 22<sup>st</sup> day of October, 2010.

  
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Scott H. York, Old World Legal Services, PLLC  
Attorney for Appellant Jessie Osburn

## CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing Appellant's Brief were mailed by first class mail this 22<sup>st</sup> day of October, 2010 to the following:

Amy Bott  
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