

2011

Lori Blum v. Rainer Dahl : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LORI BLUM,

Plaintiff/Appellant,

vs.

RAINER DAHL,

Defendant/Appellee.

Case No. 20110116-CA

BRIEF OF APPELLEE

Appeal from a Final Judgment and a Final Order of the
Third District Court, Salt Lake County, State of Utah,
the Honorable Robin W. Reese Presiding

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction to decide this appeal pursuant to Utah Code section 78A-4-103(2) and Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether there is sufficient evidence to support the trial court's finding of bad faith in awarding Defendant his reasonable attorney fees and costs pursuant to Utah Code section 78B-5-825.¹

Standard of Review: "The question of whether, under the second prerequisite of 78-27-56, a claim was brought in 'bad faith' is a 'question of fact' [that appellate courts] review . . . under a clearly erroneous standard."² *Still Standing Stable, LLC v. Allen*, 2005 UT 46, ¶ 8, 122 P.3d 556. Moreover, appellate courts should give district courts "relatively broad discretion in concluding that bad faith has been shown." *In re Sonnenreich*, 2004 UT 3, ¶ 50, 86 P.3d 712 (citations omitted).

Preservation of Issue: Plaintiff/Appellant preserved this issue below. R. 666, 728, 730, and 747.

¹ The statute requires that the action be both "without merit" and not brought in "good faith." UTAH CODE ANN. § 78B-5-825. However, only the factual question of bad faith is at issue on this appeal, as Appellant neither contests the jury verdict nor the trial court's determination that the action was without merit. In the context of the attorney fee statute, the terms "bad faith" and "lack of good faith" are synonymous. *Cady v. Johnson*, 671 P.2d 149, 151-52 (Utah 1983).

² Utah Code section 78-27-56 was renumbered as section 78B-5-825. *See Gallegos v. Lloyd*, 2008 UT App 40, ¶ 9, 178 P.3d 922.

2. Whether this Court should consider the merits of this appeal in light of Plaintiff/Appellant's failure to marshal the evidence.

Standard of Review: Not applicable.

Preservation of Issue: Not applicable.

CONSTITUTIONAL PROVISIONS AND DETERMINATIVE STATUTES

The interpretation of the following statute and rule is determinative of or of central importance to the issue raised in this appeal:

Utah Code section 78B-5-825:

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

UTAH CODE ANN. § 78B-5-825.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure:

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged

finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

UTAH R. APP. P. 24(a)(9).

STATEMENT OF THE CASE

I. Nature of the Case.

This appeal arises out of a claim for assault and battery brought by a member of a homeowners association ("Ms. Blum") against the president of that association ("Mr. Dahl"). Ms. Blum alleged that Mr. Dahl lunged at and spat on her during an argument following a homeowners meeting. The trial court and jury rejected Ms. Blum's allegations. The appeal concerns whether the trial court properly awarded Mr. Dahl his reasonable attorney fees and costs incurred in defending against the lawsuit in light of evidence that Ms. Blum knew there was no merit to her lawsuit but pursued it anyway because she was unhappy with the way she was being treated by the homeowners association.

II. The Course of Proceedings.

Ms. Blum filed her complaint against Mr. Dahl on October 4, 2007. R. 1–5. The complaint alleged that during an argument between Ms. Blum and Mr. Dahl, Mr. Dahl "lunged at Plaintiff, elbows out, face-to-face, and spit on Plaintiff has [sic] he screamed" R. 2 at ¶ 10. The complaint asserted that Mr. Dahl's conduct amounted to assault and battery. R. 3–4. Alleging that "Plaintiff suffered undue fear and terror during the incident," the complaint sought \$100,000 in compensatory damages and \$100,000 in punitive damages, among other relief. R. 4–5.

Mr. Dahl filed his answer on October 26, 2007, putting Ms. Blum on notice of his intent to seek his reasonable attorney fees and costs in defending against the lawsuit, which he averred was frivolous and filed in bad faith. R. 10–13. After discovery was completed, Mr. Dahl filed a motion for summary judgment, which was granted in part (certain damages) and denied in part (other damages and underlying claim). R. 76–151 and 247–250.

Prior to trial, Mr. Dahl reminded opposing counsel and the trial court of his intent to seek his attorney fees and costs pursuant to Utah Code section 78B-5-825. Counsel also inquired of the court whether the issue of fees should be submitted to the jury or remain only with the Court. After discussion with counsel, the court determined that it would be best not to submit the issue to the jury in order to avoid any unfair prejudice. The court further determined that any evidence pertaining only to the issue of bad faith, if any, could be submitted to the court as appropriate following the jury verdict. *See* R. 775 at 5:7–15, 16:5–17:8 and 58:24–59:10–13.

III. Disposition in the Trial Court.

The case was tried to a jury on October 21 and 22, 2010. R. 471–73. At the conclusion of Ms. Blum’s case, Mr. Dahl moved for a directed verdict on Ms. Blum’s claim, which the trial court treated as two causes of action, one for assault and one for battery. The court granted the motion with respect to the battery claim but submitted the assault claim to the jury. R. 473. After deliberating, the jury returned a special verdict form rejecting Ms. Blum’s assault claim. R. 505-08.

IV. Post-trial Proceedings.

Following the jury verdict, Mr. Dahl moved for an award of attorney fees and costs pursuant to the statute. R. 775 at 58:8–10. Before ruling, the trial court allowed the parties time to submit memoranda and additional affidavits pertaining solely to the issue of attorney fees, consistent with the court’s pretrial ruling that, if necessary, additional evidence could be submitted on the issue of bad faith after trial. R. 775 at 58:13–59:3. Following briefing, the court entered an order granting Mr. Dahl’s motion and, after resolving various additional objections and issues, entered judgment in favor of Mr. Dahl. R. 622–25, 753–61.

V. Statement of Facts Relevant to the Issue Presented.

The trial court relied on the following facts in its final Judgment awarding Mr. Dahl his reasonable attorney fees and costs (R. 754-59):

1. Ms. Blum filed her Complaint against Mr. Dahl more than three years ago, on October 4, 2007.
2. The Complaint sought \$200,000 in damages from Mr. Dahl resulting from an assault and battery surrounding a spitting incident, which allegedly took place one year earlier, on October 10, 2006.
3. Mr. Dahl answered the Complaint on October 26, 2007 and put Ms. Blum on notice of his intent to seek an award of reasonable attorney fees incurred “in defending against the Complaint which is frivolous as set forth [in] Utah R. Civ. P. 11, and is filed in bad faith . . . pursuant to Utah Code Ann. § 78-27-56.”

4. Mr. Dahl changed legal representation in late September 2009.
5. After reviewing the allegations of the Complaint and conducting a preliminary investigation into the facts of the case, Mr. Dahl's new counsel contacted counsel for Ms. Blum and reiterated the concerns first raised in the Answer about the claim having no merit.
6. Counsel for Mr. Dahl explained that he would have no choice but to pursue an award of fees under the circumstances and that Ms. Blum should consider dismissing her case to avoid either party from incurring further unnecessary and unjustified expense.
7. Counsel for Mr. Dahl further explained that he would never be able to advise his client to pay a "nuisance" settlement, if that were Ms. Blum's objective, in light of the only hope he had to recover the thousands of dollars he had already incurred defending the lawsuit was to prevail at a trial.
8. Ms. Blum's counsel explained that his client would never consider a "walk-away."
9. Seeing no hope to settle, counsel for Mr. Dahl resolved to attempt to do the minimum amount of discovery, get to trial as fast as possible and keep expenses to a minimum.
10. Within a few months thereafter, discovery was completed and the depositions of the parties and Ms. Blum's only percipient witness (her daughter Catherine Cleveland) had been conducted.

11. After the depositions, counsel for Mr. Dahl resolved once again to approach Ms. Blum's counsel with the idea of a walk-away if Mr. Dahl could get the Parc at Gateway Homeowners Association to agree to indemnify him.

12. When counsel attempted to convey this offer to Ms. Blum's counsel, however, he got no further than mentioning a walk-away before Ms. Blum's counsel interrupted him to reiterate that his client had made it clear to him that she would never consider a walk-away.

13. Shortly thereafter, Mr. Dahl's counsel requested that opposing counsel cooperate with him in "proceed[ing] to trial as quickly as possible" by joining him in a stipulated motion to the Court to set a trial date.

14. Ms. Blum's counsel did not respond to Mr. Dahl's counsel [sic] request.

15. Consequently, Mr. Dahl's counsel waited for the final discovery deadlines to pass and then immediately moved for a trial setting on March 24, 2010.

16. After finding out that a trial would not be able to be scheduled until after Mr. Dahl was due to leave the country with his spouse for a service opportunity in China, counsel filed a summary judgment motion in an effort to have the case dismissed without the need for a trial, arguing that the damages asserted by Ms. Blum, even if valid, had no relation to the alleged assault and battery, and that her claims, therefore, failed as a matter of law.

17. After briefing, the Court dismissed the vast majority of Ms. Blum's claimed damages but ruled that questions of fact precluded dismissal of other claimed damages.

18. At trial, Ms. Blum took the same unsupportable positions on issues surrounding her claims that she did in her earlier deposition.

19. For example, Ms. Blum denied under oath that her daughter helped her in any way in writing a legal demand letter to the homeowners association threatening litigation, despite the fact that (1) her daughter, with whom she is very close, is a lawyer; (2) Ms. Blum has no legal training; (3) the letter was phrased in legalese and cited to federal and state statutes; (4) the letter references “*my* medical dog,” and uses the pronoun “we” throughout; and (5) the letter concerns the condominium where her daughter and her daughter’s dog lived and where she was being subjected to the alleged harassment (being cited for rules violations) that was the subject of the letter.

20. Ms. Blum also testified that she did not know what her daughter’s medical condition was that necessitated having a service animal with her at all times,³ despite the fact that (1) Ms. Blum is a nurse; and (2) Catherine was her daughter, with whom she is very close.

21. Ms. Blum also tried to claim she did not approve of her attorney making the unsupported claim for \$100,000 in compensatory damages. Yet, she was forced to admit at

³ Although Ms. Blum alleged in her letter that Ms. Cleveland would be in “medical danger,” if the dog were to be forced to leave the premises, Ms. Blum admitted that the dog spent time away from Ms. Cleveland when it visited Ms. Blum in St. George. Ms. Blum also conceded that, even though she alleged that “there are NO dogs living in Unit #501,” there was a dog in fact living there, but that the dog happened to be in St. George on the day the letter was written.

trial that in her deposition she embraced this figure and even testified that “it is growing daily.”

22. Ms. Blum’s claim for damages, including her request for \$100,000 in punitive damages, far exceeds anything that she could reasonably have expected to recover, even if her claims had merit.

23. Ms. Blum presented no evidence at trial that would support even a fraction of the damages she claimed.

24. Ms. Blum also maintained that she experienced “untold fear and terror” and “extreme emotional distress and anxiety” arising from Mr. Dahl’s attack, wherein he had allegedly “lunged at [Ms. Blum], elbows out, face-to-face, and spit on [her] as he screamed,” even though (1) she sought no medical or mental health help for her “extreme emotional distress;” (2) she never bothered to contact building security about her concerns; and (3) did not contact the police for at least two weeks, and then only after learning that criminal complaints had been filed by Mr. Dahl and others against her daughter.

25. Ms. Blum did not support her claim that she had suffered emotionally.

26. There was no testimony at trial that Mr. Dahl intentionally touched or caused improper contact with Ms. Blum, that he threatened her, or did anything that would cause a reasonable person to have fear for their safety.

27. Rather, every person called as a witness at trial who was in a position to observe to any degree the alleged interactions between Mr. Dahl and Ms. Blum following the

homeowners association meeting contradicted and flatly rejected Ms. Blum's claims that Mr. Dahl acted in a threatening, intimidating or otherwise inappropriate manner toward Ms. Blum. Instead, they testified, that it was Ms. Blum, in fact, who had been the aggressor toward Mr. Dahl, who had remained "surprisingly calm" throughout the incident.

28. Ms. Blum herself conceded in her trial testimony—and even argued—that the reason she brought and maintained the lawsuit against Mr. Dahl was because she believed it would put an end to what she characterized as harassment meted out against her and her daughter by the homeowners association and management company.

29. Ms. Blum testified that she and her daughter had been the victim of unfair complaints and write-ups by the association, and that she hoped filing this lawsuit would bring an end to this harassment.

30. Based upon all the evidence before the Court, there is no way Ms. Blum could have concluded she had a valid claim against Mr. Dahl, but instead she should have known her lawsuit was without merit. Even if the argument between the parties happened just as Ms. Blum, testified, there was simply no justification for this lawsuit.

31. It would appear that Ms. Blum was unhappy with the way she and her daughter were treated by the homeowners' association, but for some reason decided to sue Mr. Dahl instead of the association.

SUMMARY OF THE ARGUMENTS

1. Nothing could evince bad faith more than a plaintiff who sues a defendant for something the plaintiff knew never happened. Ms. Blum sued Mr. Dahl, claiming assault and battery, for allegedly spitting on her. In fact, every witness called at trial, save Ms. Blum only, testified unequivocally that Mr. Dahl never spat on, nor acted in any manner threatening toward, Ms. Blum. Rather, the witnesses each testified that it was Ms. Blum who confronted and acted aggressively toward Mr. Dahl, who remained remarkably calm under the circumstances. Nevertheless, Ms. Blum sued Mr. Dahl because, as she testified, she was unhappy with the way she and her daughter, Catherine Cleveland, were being treated by their homeowners association, of which Mr. Dahl was president at the time. Because our system of justice cannot tolerate plaintiffs fabricating allegations to support a retaliatory lawsuit, and because there is no merit to the other errors alleged by Ms. Blum on appeal, this Court should affirm the trial court's judgment and order.

2. This Court should not consider the merits of Ms. Blum's appeal because she has failed to marshal the evidence supporting the very findings with which she takes issue. First, Ms. Blum has failed to marshal all the evidence confirming the parameters of the trial court's ruling on the presentation of evidence of bad faith, including a written transcript of the ruling itself. Second, Ms. Blum has failed to marshal all the overwhelming evidence demonstrating the untruthfulness of Ms. Blum's factual allegations, which bears not only on the meritless nature of her lawsuit, but also on the lack of good faith in bringing the same.

ARGUMENT

The trial court correctly awarded Mr. Dahl his attorney fees because there was significant evidence supporting the trial court's finding that Ms. Blum brought her frivolous lawsuit against Mr. Dahl in bad faith. Utah Code section 78B-5-825 provides: "In civil actions, the court *shall* award reasonable attorney fees to a prevailing party if the court determines that the action . . . was without merit and not brought . . . in good faith" UTAH CODE ANN. 78B-5-825 (emphasis added). The trial court's finding regarding bad faith should not be disturbed on appeal unless it is "clearly erroneous." *Still Standing Stable*, 2005 UT 46, ¶ 8. As set forth below, far from clearly erring, the trial court properly awarded Mr. Dahl his attorney fees and costs in light of the overwhelming evidence showing bad faith on Ms. Blum's part. Regardless, there is no need for the Court of Appeals to even reach the merits of this issue, as Ms. Blum as failed to marshal critical evidence supporting the trial court's findings in this regard.

I. THE TRIAL COURT CORRECTLY FOUND THAT MS. BLUM BROUGHT HER LAWSUIT IN BAD FAITH.

The evidence in this case fully supports the trial court's finding that Ms. Blum brought her lawsuit in bad faith. The Utah Supreme Court has held that a "party acts in bad faith" whenever he brings an action where he "(1) lacks an honest belief in the propriety of the activities in question, (2) intends to take unconscionable advantage of others, *or* (3) intends to or has knowledge of the fact that his actions will hinder, delay, or defraud others." *Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 29, 61 P.3d 1009 (emphasis

added) (citing *Cady v. Johnson*, 671 P.2d at 151). The Utah Court of Appeals has further held that bad faith is also properly found where a party testifies untruthfully. See *Gallegos*, 2008 UT App 40, ¶ 17. The evidence in this case supports the trial court's finding of bad faith under both the *Wardley* and the *Gallegos* decisions.

A. Ms. Blum lacked an honest belief in the propriety of her lawsuit.

Wardley establishes that a plaintiff may not bring a claim he or she knows has no basis in fact. In *Wardley*, a real estate brokerage agency sued another brokerage agency to recover real estate commissions. The defendant prevailed at trial in light of clearly established law showing that the plaintiff's claims had no merit. *Id.* at ¶ 29. Nevertheless, the trial court denied the defendant's motion for fees, finding it would be "inequitable" to award fees. *Id.* at ¶ 31. The Utah Supreme Court reversed, finding that *Wardley* "lacked an honest belief in the propriety of bringing a suit to collect a commission" because it "kn[ew] that it did not have a legal right to a commission." *Id.* at ¶ 29. The Court further ruled that, because *Wardley* knew the facts of the case did not support its claims, it was "deemed to have known that its unjustified action against [the defendant] would hinder, delay, or defraud by causing [the defendant] to spend resources in [its] defense." *Id.*; see also *Boyer v. Boyer*, 2008 UT App 138, ¶ 24, 183 P.3d 1068 (holding an action is in good faith "*as long as there is an honest belief that it is appropriate and as long as there is no intent to hinder, delay, defraud, or take advantage of the other party.*") (emphasis added).

Like *Wardley*, the evidence in this case establishes that Ms. Blum could not have had an honest belief in the propriety of her lawsuit because she herself knew the alleged conduct forming the basis of her claims never occurred. As the trial court found,

every person called as a witness at trial who was in a position to observe to any degree the alleged interactions between Mr. Dahl and Ms. Blum following the homeowners association meeting contradicted and flatly rejected Ms. Blum's claims that Mr. Dahl acted in a threatening, intimidating or otherwise inappropriate manner toward Ms. Blum. Instead, they testified, that it was Ms. Blum, in fact, who had been the aggressor toward Mr. Dahl, who had remained "surprisingly calm" throughout the incident.

R. 758 at ¶ 27. The evidence in this case amply supports these findings.

The following are brief excerpts from the testimony of the six witnesses referenced by the court. The first was Nick Falcone Sr., a retired school teacher and the father of one of the homeowners association's board members. R. 774 at 158:11–159:6. Mr. Falcone Sr. testified as follows:

Q. Okay. Did you ever observed Mr. Dahl jumping at or leaping at Ms. Blum?

A. Never once.

Q. Did you ever observe Mr. Dahl waving his arms in a threatening manner towards Ms. Blum?

A. Never. Never at all.

Q. Did you observe Mr. Dahl spitting on Ms. Blum?

A. I was within inches. If he had done that, I would have seen it. He did not spit ever.

Q. Okay. Did you observe Mr. Dahl screaming or yelling at Ms. Blum?

A. Very calm. No. He did not ever say anything above just a plain normal talk.

R. 774 at 162:1–12.⁴

The second witness was Nola Falcone, also a retired school teacher and Mr. Falcone Sr.'s wife. R. 774 at 171:4–11, 17–23. Mrs. Falcone testified as follows:

Q. Okay. Did you ever observe Mr. Dahl lunge at either woman during the course of this conversation that you were watching?

A. Never.

Q. Did you observe him leap at either of these women during this conversation?

A. Never.

Q. Did you observe him waving his arms?

A. Never.

Q. Did you observe him spit on either of these women?

A. Absolutely not.

Q. Did you—how would you describe Mr.—I'll call him Ranier, as you know him. How would you describe Ranier's demeanor during the course of this conversation with these two women?

A. I thought very patient. I thought very, very patient because I don't know if I could have stood there and taken the abuse that I saw him taking.

R. 774 at 177:10–178:2.

⁴ All trial transcript excerpts directly quoted in this brief are included in the Supplemental Addendum attached hereto.

The third witness was Nick Falcone Jr., a criminal defense attorney with the Salt Lake Legal Defender's office and one of the members of the board. R. 774 at 183:11–24. Mr. Falcone Jr. testified as follows:

Q. Okay. Do you recall during the course of these events following the meeting any time where Ranier Dahl lunged at either Catherine or Lori?

A. No. As a matter of fact—

R. 774 at 188:6–9.

Q. Did you observe Mr. Dahl at any time wave his arms in a threatening manner toward either Catherine or Lori?

A. No, just the opposite. He was—Catherine assaulted Ranier by poking him in the face with her finger. He was controlling himself—

MR. ASCIONE: Again, objection, your Honor. I don't think that that's what the question was.

THE COURT: Yeah, That's probably not responsive, Counsel.

R. 774 at 188:16–24.

Q. Did you see Mr. Dahl at any time spit at either Catherine or Lori?

A. Absolutely not.

Q. Okay. As I—did you see him do any kind of action, engage in any sort of conduct that was threatening in nature?

A. He was frozen there. He would make—he would say—she would make an accusation, he'd state, "No, that's not right. That's not what I said," and then she would start screaming at him again, but at no time did I ever see him do more than respond like that.

Q. Okay. How would you—you've kind of answered this already, but just to be clear, how would you describe Mr. Dahl's demeanor during this conversation he was having with Catherine and Lori?

A. Well, surprisingly calm and collected.

R. 774 at 190:12–191:1.

The fourth witness was Becky Wheeler, one of the two owners of the homeowners association's former management company. R. 774 at 215:1–13. Mrs. Wheeler testified as follows:

Q. Okay. Let me ask you as you observed this conversation between Mr. Blum—Ms. Blum and Mr. Dahl, did you notice Mr. Dahl acting in a threatening manner toward Ms. Blum at any point in time?

A. No, not at all, not threatening at all.

Q. Ms. Blum has alleged that Mr. Dahl, quote, “lunged at her, elbows out, face to face, and spit on her as she screamed—as he screamed.” Did you observe any of that behavior?

A. No, not at all. As a matter of fact, that's why I probably couldn't—I didn't really hear the conversation. He was very soft in his voice.

Q. Did you see—was he flailing his arms or—

A. Very calm. Very calm.

Q. Did you ever see him lunge at Ms. Blum?

A. No.

R. 774 at 218:16–219:5.

The fifth witness was Jeff Wheeler, Mrs. Wheeler's husband and the other co-owner of the association's former management company. R. 774 at 232:8–15. Mr. Wheeler testified as follows:

Q. Okay. Did you notice anything during this time in the hallway that—did you notice Mr. Dahl acting contrary to the professionalism and the good nature that you had observed prior to that time?

A. You know, actually not. It was a very tense meeting that night, and I thought he had, you know, fairly good composure considering how heated that meeting was at times.

Q. Okay. Again, directing your attention after the meeting and in this hallway, did you ever notice Mr. Dahl leap at or lunge at Ms. Blum in any way?

A. I didn't see that personally, no.

Q. Okay. Did you ever see him intentionally spit on her to strike her or do anything threatening toward her?

A. No, I did not.

R. 774 at 234:2–15.

The sixth and final percipient witness called was Sam Bell, the homeowners association's former attorney. R. 774 at 243:9–17. Mr. Bell testified as follows:

Q. Okay. Were you continuing to observe this conversation as it was occurring?

A. Yes.

Q. How would you describe Ms. Blum's demeanor during this conversation?

A. Well, Ms. Blum was upset that Ranier would call her daughter a name.

Q. How would you describe Mr. Dahl's demeanor?

A. I was surprised by how calm he was. I mean it had been a fairly tense night. He was being accused of saying something that he said he didn't say. I was quite—I was impressed by how calm he was.

Q. Did you ever see—well, let me just say, Ms. Blum has alleged that Mr. Dahl, quote, “lunged at her, elbows out, face to face and spit on Ms. Blum as he screamed.” Did you observe any of that kind of conduct?

A. Not that I recall, no.

Q. Did you ever see—and I just want to break it down for you. Did you ever see Mr. Dahl lunge or leap at Ms. Blum?

A. No.

Q. Let's just include Ms. Cleveland in that, just so we're covered. Did you see him lunge or leap at any person that night?

A. No. No, if I remember, his back was to a wall or to a window in the hallway, and I don't—

Q. Did you ever see him extend his elbows or move his arms in a threatening manner toward Ms. Blum?

A. No, nothing that I noted.

Q. Did you ever see him spit on Ms. Blum?

A. Like intentionally spit on her?

Q. Intentionally spit on her.

A. No.

Q. Did you ever see him, for lack of a better term, accidentally spit on her? You know how sometimes people—you know, saliva sometimes comes out of someone's mouth when they're speaking. Did you ever see that?

A. No.

Q. Did you observe at any point whether Mr. Dahl got in Ms. Blum's face so to speak?

A. No. No, they were fairly close, but like I said, his back was to the wall.

Q. Did you observe whether or not—I mean how did they get close together? Was—did Ms. Blum approach him or did Mr. Dahl approach Ms. Blum?

A. Ms. Blum approached him.

Q. Okay. Just finally, did you see Mr. Dahl act in a threatening manner in any fashion toward Ms. Blum or her daughter while in the hallway that evening?

A. No. Like I said, he was I thought surprisingly calm under the circumstances.

R. 774 at 246:13–248:11.

Just like these witnesses, Ms. Blum herself, being a participant in this encounter, would have known that there was no truth to her allegations. As the trial court found, Ms. Blum all but conceded this fact when she testified that the reason she brought her lawsuit was not to right a wrong allegedly perpetrated by Mr. Dahl, but to put an end to what she considered to be harassment on the part of the homeowners association and its management company. R. 758 at ¶¶ 28–29.

Like the trial court's other findings, there was ample evidence establishing this ulterior, and retaliatory, motive. For example, Ms. Blum's testimony included the following:

Q. Okay. Whey [sic] did you file a complaint in this case?

A. Well, when did I file the complaint?

Q. Why?

A. Why? I just wanted them to leave us alone. I just wanted them to shut up and leave us alone and quit persecuting us.

R. 774 at 99:16–21.

Q. BY MR. HOOLE: Do you recall a time—you do recall a time, don't you, Ms. Blum, when the homeowner's association's attorney wrote you a letter and stated—and demanded that because of a number of different rules violations in which your daughter was engaged that you needed to evict her as a tenant?

A. I don't think it was a number of violations.

Q. Do you recall that they wanted you to evict her?

A. I recall that I got that letter, yes.

R. 774 at 105:4–11.

Q. BY MR. HOOLE: Now Mr. Dahl was the president of the management—of the homeowner's association when this eviction demand was sent out, correct?

A. Correct.

Q. All right [sic]. You obviously weren't very happy to receive a demand from the homeowner's association telling you you needed to evict your daughter, correct?

A. The demand came from the attorney.

Q. Who represented the homeowner's association, correct?

A. Yes.

Q. That didn't make you very happy, did it?

A. Of course not.

Q. Of course not. You perceived in your own mind, at least, didn't you that Mr. Dahl had some role in requesting the attorney to demand that you evict your daughter?

A. I don't know what I thought at that time.

Q. Well, didn't you previously testify at your deposition that Mr. Dahl—that you thought Mr. Dahl had some sort of role in what you perceived to be harassment and discrimination being meted out against you and your daughter?

A. I thought Mr. Dahl had a very powerful position and that his influence permeated through the building.

R. 774 at 107:19–108:15.

Q. All right [sic]. The letter goes on to address the charges that were brought against your daughter for public intoxication at the meeting October 10, 2006, correct?

A. Yes.

Q. That would be in the paragraph 2 there. This was the same night that the alleged assault occurred, correct?

A. Yes.

Q. All right [sic]. This was just one of four charges that Salt Lake City brought against your daughter for her conduct on that night?

A. Yes.

Q. You felt that Mr. Dahl was singling out your daughter for prosecution, correct?

A. Yes, because wine was served generally at the meeting.

R. 774 at 121:25–122:13.

Q. All right [sic]. Now even after you sent this letter the management company didn't stop enforcing the condominium rules with respect to your daughter, did they?

A. I think we continued to be harassed.

Q. When you say you continued to be harassed, what you mean by that is you continued to receive rules violation notices from the homeowner's association's management company; isn't that correct?

A. Well, for instance, one time we –

Q. Ms. Blum, Ms. Blum, again, I'm just asking yes or no questions. If there's something that needs to be expanded upon your attorney is here to protect your interest and he will make sure you have that opportunity. My question is you -- when you say harassment you're talking about letters that you received from the management company regarding rules violations, correct?

A. Alleged rules violations.

R. 774 at 123:22–124:12.

Q. All right [sic]. So when the homeowner's association—pardon me. When the management company wouldn't stop sending notices with respect to various rules violations—

A. Alleged.

Q. Alleged rules violations against your daughter, you felt that you had no choice but to file a lawsuit, correct?

A. I just wanted them to leave me alone.

Q. You thought that if you filed a lawsuit the discrim—what you considered to be harassment would stop?

A. That was my hope.

R. 774 at 124:24–125:8.

A. So I didn't file the lawsuit because he was running for the board. *I filed the lawsuit to try to get them to stop harassing me.*

Q. Okay.

R. 774 at 152:5–8 (emphasis added). Thus, this evidence strongly supports the trial court's finding that "[i]t would appear that Ms. Blum was unhappy with the way she and her daughter were treated by the homeowners' association, but for some reason decided to sue Mr. Dahl instead of the association."⁵ R. 759 at ¶ 31.

In short, this evidence, coupled with the overwhelming evidence showing there was no truth to Ms. Blum's allegation that Mr. Dahl "lunged at [her], elbows out, face-to-face, and spit on [her] has [sic] he screamed," R. 2 at ¶ 10, fully supports the trial court's finding that Ms. Blum could not have had an "honest belief in the propriety" of her lawsuit. *Wardley*, 2002 UT 99 at ¶ 29. Similarly, because Ms. Blum knew her lawsuit had no merit,

⁵ For this same reason there is no basis to Ms. Blum's argument that "[t]he only evidence in the record regarding Ms. Blum's subjective belief in her claim was Ms. Blum's post-trial affidavit." Brief of Appellant at 35. Nothing could establish subjective bad faith more convincingly than evidence that Ms. Blum knew there was no truth to her allegations but chose to sue Mr. Dahl anyway. *See, e.g., West v. Thomson Newspapers*, 835 P.2d 179, 187 (Utah Ct. App. 1992) (noting a party's subjective state of mind "may be proved by inference" in addition to the party's own testimony concerning the matter); *State v. Bissegger*, 2003 UT App 256, ¶ 7, 76 P.3d 178 (noting subjective state of mind "may be inferred from words spoken, acts done, and other objective facts.").

she, like the plaintiff in *Wardley*, is “deemed to have known that [her] unjustified action against [Mr. Dahl] would hinder, delay, or defraud by causing [Mr. Dahl] to spend resources in [his] defense.” *Wardley*, 2002 UT 99 at ¶ 29.

B. Ms. Blum Testified Untruthfully.

The trial court’s finding of bad faith is further supported by the fact that Ms. Blum testified untruthfully at trial. In *Gallegos v. Lloyd*, cited above, the trial court found that the defendant acted in bad faith because the defendant “‘came to court and testified in [its] opinion, totally without credibility.’” *Gallegos*, 2008 UT App 40, ¶ 17. On appeal, the Utah Court of Appeals held: “We agree that the trial court’s belief that [the defendant] testified untruthfully is sufficient to support [a finding of bad faith] and we will not disturb it on appeal.” *Id.*

Here, the trial court found that Ms. Blum testified untruthfully on a number of different substantive issues, including her allegations that (1) she suffered “untold fear and terror” and “extreme emotional distress and anxiety” as a result of Mr. Dahl’s actions, (2) the amount of damages she incurred as a result of the alleged assault and battery and (3) her daughter’s involvement in the actual circumstances leading up to the lawsuit (*i.e.*, violations of homeowners’ rules, particularly by her adult daughter, whom the association was demanding she evict). R. 756 at ¶¶ 18–24; 774 at 105:4–11, 25–106:3. Ms. Blum argues that “[a]t most these facts can support only a finding regarding Ms. Blum’s credibility.” Brief of Appellant at 38. However, a lack of credibility, when established by untruthful

testimony, is precisely what the Utah Court of Appeals has held is sufficient to support a finding of bad faith. *Id.*

C. The Trial Court Properly Relied on Trial Evidence as Well as Post-trial Affidavits in Deciding the Issue of Bad Faith.

Ms. Blum argues that the trial court should not have considered any of the evidence introduced at trial in deciding the issue of bad faith because of a supposed stipulation and order limiting the evidence to be considered on this issue *only* to post-trial affidavits. The trial court never constrained itself in this way. Rather, the court simply ordered that the question of bad faith should be decided by the court instead of the jury. Consistent with this order, the trial court excluded from trial any evidence that was relevant *only* to the issue of bad faith, as it would be irrelevant to the merits and might potentially prejudice the jury unfairly. The court instructed the parties that such evidence could be submitted, if necessary, after trial. However, the trial court *never* entered any order, nor was a stipulation ever proposed, that would have precluded the court from considering evidence admitted on the merits at trial that also happened to shed light on the issue of bad faith, as merits evidence often does. Although the actual order has not been marshaled by the Appellant, the following exchanges among the court and counsel confirm the general parameters of the court's order.

First, the trial court confirmed with counsel that the jury would not be asked to decide the issue of bad faith:

THE COURT: Sure. Now when we talked yesterday, the way we left that issue is that *rather than have the jury decide it and instruct the jury on*

those sorts of issues, that it would probably be better for all concerned, and maybe even better for the plaintiff if we just left that to the end, and if the defendant prevails then address that issue to the Court. Is that correct? Is that where we kind of left off?

MR. HOOLE: Yes, your Honor, and in fact—

MR. ASCIONE: Yes, your Honor.

R. 774 at 5:7–15 (emphasis added).

Next, the trial court explained the basis of excluding evidence from trial that it considered relevant only to the issue of bad faith and elaborated on how such evidence could be introduced after trial, if it became necessary after the jury's decision on the merits:

THE COURT: I apologize for that. The thing that I want to stay away from, too, I understand that at some point depending on the outcome, of course, the—whether this lawsuit was filed in bad faith or not will become critical. But again, I would like to stay away from that during the trial.

I'm thinking of evidence, because I'm concerned about confusion. *If we bring in a lot of evidence during the trial about why Ms. Blum brought the lawsuit, had she been persecuted of friends of Mr. Dahl that lived in the complex and so forth, I think we're going to start getting into—or confusing the jury with issues that aren't critical to their determination.* Maybe what we'd have to do, if the defense prevails, and if they choose the [sic] argue that the lawsuit was brought in bad faith, would then be allow the parties to proffer by affidavit—you know, in other words, allow Ms. Blum to say, "Here's what happened to me, here's what these people were telling me. I felt obligated to protect myself to bring the lawsuit."

Maybe that's what we're going to have to do, but I don't want to clutter the lawsuit with that, either, just because again, it may distract the jury and may lead them to think about things that wouldn't be helpful and even helpful to the plaintiff, because I'm afraid if we start suggesting to the jury during the trial that there may have been bad faith—if we let that issue—if we put it out on the table, I'm concerned that the jury may just the power of suggestion may start—lead them to start thinking that, and if they start thinking that they may

punish Ms. Blum for her position for brining [sic] the lawsuit. So that's a long way of—I just kind of hope we stay away from that stuff. If it becomes relevant later on, I'll let you do it with an affidavit.

R. 774 at 16:5–17:8 (emphasis added).

Thus, the court's order was not meant to exclude any evidence from consideration by the judge; only to exclude irrelevant and potentially unfairly prejudicial evidence from consideration by the jury. The court allowed for the latter, if any, to be submitted to the court by way of affidavit after trial. The court and the parties understood that any evidence thus submitted would be “additional” to that evidence admitted at trial that had relevance both to the merits and to the issue of bad faith. This is evident by the following exchange that occurred after counsel for Ms. Blum objected to the suggestion that the issue of bad faith be argued immediately after the jury had been dismissed. The exchange concludes with the court ordering the issue to be briefed and submitted with affidavits containing additional evidence, “if any”:

MR. ASCIONE: Your Honor, frankly, I had thought that we would be doing it the way that the Court suggested originally, which is to simply hand in affidavits to that effect.

THE COURT: If there were *additional* affidavits that you wanted to submit?

MR. ASCIONE: Yes, presumably from my client with regards to her intentions and so forth.

MR. HOOLE: If there's *additional* evidence that wasn't elicited in trial because of those (inaudible) that's fine. I hate to draw this out and incur even more expense and that sort of thing, but —

THE COURT: Yeah. We did talk about that at the beginning that there would be certain evidence that we wouldn't bring into the trial for fear of prejudice to the jury, but Counsel could bring that up later.

I'm wondering—I sure hate to have you come back and spend that much money, too. Why don't—would it make sense to just have you each given a short period of time to produce whatever affidavit that you'd like to, *if any*, and just a short written memorandum as to what your position would be, and then I could make my decision without having you come back to court?

R. 775 at 58:24–59:19 (emphasis added).

Therefore, the record refutes Ms. Blum's assertion that the trial court artificially constrained itself from considering anything but all of the evidence relevant to the issue of bad faith, whether admitted at trial or in a post-trial affidavit. Rather, the record confirms that the trial court properly relied on all the relevant evidence admitted at trial, in addition to post-trial affidavits, in deciding the issue of bad faith, just as is done in all other cases where bad faith is at issue. *See, e.g., Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998); *Wardley*, 2002 UT 99 at ¶ 29; *Gallegos*, 2008 UT App 40 at ¶ 17.

D. The Trial Court Did Not Base its Finding of Bad Faith on its Finding of Lack of Merit.

Ms. Blum also contends that “bad faith cannot be inferred because the party knew or should have known the claim was frivolous.” Brief of Appellant at 34 (citing *Cady*, 671 P.2d at 151–52; *Still Standing Stable*, 2005 UT 46, ¶¶ 12, 15). This is incorrect. While it is true that frivolousness does not automatically equate to bad faith, the case law, including the cases cited by Ms. Blum, does not support the assertion that bad faith can not be inferred where the plaintiff *knew* her claim was frivolous. *See In re Sonnenreich*, 2004 UT 3, ¶ 49

(“the mere fact that an action is meritless does not *necessarily* mean that the action is also brought in bad faith.”) (emphasis added) (citations omitted). Indeed, bringing a lawsuit one knows to be meritless is one of the very definitions of bad faith. *E.g.*, *Wardley*, 2002 UT 99, ¶ 29 (holding bad faith is found where the plaintiff “lacks an honest belief in the propriety of the activities in question”); *see also Cady*, 671 P.2d at 151 (same); *Mi Vida Enterprises v. Steen-Adams*, 2005 UT App 400, ¶ 17, 122 P.3d 144 (same); *Valcarce v. Fitzgerald*, 961 P.2d at 316 (same). Rather, the case law draws a distinction between inferring bad faith from a meritless case the plaintiff mistakenly yet honestly believes to have merit and a meritless case the plaintiff knows is meritless but pursues anyway.

For example, in *Cady v. Johnson*, the Utah Supreme Court held that, even though better legal research would have revealed the meritless nature of plaintiff’s claim, the plaintiff’s legal ignorance did not constitute bad faith because there was no evidence showing that plaintiff (1) lacked an honest belief in the propriety of the claims, (2) intended to take unconscionable advantage of others, or (3) intended to or had knowledge of the fact that his actions would hinder, delay, or defraud the defendant. *See Cady*, 671 P.2d at 152; *see also Still Standing Stable*, 2005 UT 46, ¶13 (rejecting finding of bad faith premised on plaintiff’s failure to conduct adequate legal research and investigation before filing claim).

Similarly, in *In re Sonnenreich*, the Utah Supreme Court rejected a trial court’s finding of bad faith premised on the plaintiff’s misinterpretation of precedent:

simply because the OPC was, according to the district court, incorrect in its interpretation of *Crandall* and *Schwenke* is inadequate to demonstrate bad

faith. The record shows the OPC was consistent, and ultimately correct, in its assertions that *Crandall* neither prohibited the Bar from administratively suspending attorneys for failure to pay annual licensing fees, nor prevented the OPC from premising a disciplinary action upon the practice of law while administratively suspended. Furthermore, the OPC's failure to present any evidence that Sonnenreich had actual notice must be viewed in light of the OPC's continued adherence to the argument that no actual notice was required—a determination that, until this opinion, was debatable given the notice requirement in RLDD 8(b).

In re Sonnenreich, 2004 UT 3, ¶ 50.

In contrast to these cases dealing with plaintiffs who pursued their cases based on an honest misunderstanding of the law, Ms. Blum pursued her case knowing there was no truth to the allegations. The trial court made the following specific findings bearing on this issue:

28. Ms. Blum herself conceded in her trial testimony—and even argued—that the reason she brought and maintained the lawsuit against Mr. Dahl was because she believed it would put an end to what she characterized as harassment meted out against her and her daughter by the homeowners association and management company.

29. Ms. Blum testified that she and her daughter had been the victim of unfair complaints and write-ups by the association, and that she hoped filing this lawsuit would bring an end to this harassment.

30. *Based upon all the evidence before the Court, there is no way Ms. Blum could have concluded she had a valid claim against Mr. Dahl, but instead she should have known her lawsuit was without merit.* Even if the argument between the parties happened just as Ms. Blum, testified, there was simply no justification for this lawsuit.

31. It would appear that Ms. Blum was unhappy with the way she and her daughter were treated by the homeowners' association, *but for some reason decided to sue Mr. Dahl instead of the association.*

R. 758–59 at ¶¶ 28–31 (emphasis added). As set forth in detail in subsection I.A. above, each of these findings is fully supported by the evidence introduced at trial, and each of them evinces a lack of honest belief on Ms. Blum’s part in the propriety of her claims.

Ms. Blum argues nonetheless, that this evidence does not support a finding of bad faith because her lawsuit would have included claims for harassment and discrimination had it not been for (1) poor lawyering on behalf of Ms. Blum’s former attorney coupled, and (2) adverse court rulings. Brief of Appellant at 36–37. This argument is nonsensical for at least two reasons. First, even were there factual support to bring claims for harassment and discrimination, this would not have justified suing Mr. Dahl for assault and battery, especially when such claims are based on fabricated allegations. Second, based on Ms. Blum’s own allegations the proper defendant in a harassment and discrimination action would have been the association, not Mr. Dahl.

In sum, because of the overwhelming evidence in this case showing that Ms. Blum did not have an honest belief in the propriety of her lawsuit, coupled with the evidence showing she testified untruthfully, it cannot be said that the trial court’s finding of bad faith was “clearly erroneous.” *See Gallegos*, 2008 UT App 40 at ¶ 6. Indeed, like the *Wardley* case, “it would [have been] inequitable *not* to award attorney fees” to Mr. Dahl under the circumstances of this case. *Wardley*, 2002 UT 99, ¶ 31 (emphasis in original); *see also In re Sonnenreich*, 2004 UT 3, ¶ 50 (“[T]he wide variety of circumstances that could support

a court's finding of subjective bad faith," 'requires that [appellate courts] give a [district] court relatively broad discretion in concluding that bad faith has been shown.'").

II. MS. BLUM FAILED TO MARSHAL KEY EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS.

Ms. Blum failed in her duty to marshal all the evidence that supports the trial court's findings. The Utah Rules of Appellate Procedure state that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." UTAH R. APP. P. 24(a)(9). The Utah Court of Appeals has elaborated on this requirement:

Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. *In order to properly discharge the [marshaling] duty . . . , the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.*" Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Oneida/SLIC v. Oneida Cold Storage & Warehouse, Inc., 872 P.2d 1051, 1052–53 (Utah Ct. App. 1994) (emphasis added) (citations omitted); *see also Chipman v. Miller*, 934 P.2d 1158, 1162 (Utah 1997) (noting appellant's requirement to marshal all the evidence and then show that "the evidence, viewed in a light most favorable to the trial court, is legally insufficient to support the contested finding").

In this case, Ms. Blum failed to meet this requirement in at least two critical respects. First, Ms. Blum failed to marshal all the evidence regarding the trial court's ruling regarding how evidence was to be presented related to the issue of bad faith. Second, Ms. Blum failed to marshal all the evidence in support of the trial court's finding that Ms. Blum could not have had an honest belief in the propriety of her claims.

A. Ms. Blum Failed to Marshal All the Evidence Regarding the Trial Court's Ruling on the Presentation of the Evidence.

Ms. Blum assigns error to the trial court's finding of bad faith because the court allegedly acted contrary to a pretrial stipulation and order that she asserts prevented the trial court from considering any evidence related to the issue of bad faith except for that contained in post-trial affidavits. As set forth above, the recorded exchanges regarding this order among the trial court and counsel do not support, and in fact, undermine this argument. Aside from this, however, Ms. Blum has failed to marshal the best evidence of the stipulation and order—the stipulation and order itself.

As indicated in the record cited above, the trial court entered the order at issue during a pretrial conference with counsel wherein Mr. Dahl's counsel sought direction from the court on whether or not the issue of bad faith should be included on the special verdict form submitted to the jury. R. 774 at 5:7–15. Mr. Dahl is unaware of whether or not this pretrial conference was put on the record. Regardless, Ms. Blum bears the burden of marshaling all the evidence that supports the findings she resists on appeal, including ensuring that all

evidence related to those findings is in the record in the first place. *See Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1359 (Utah Ct. App. 1991).

In *Olson*, the Court of Appeals refused to consider an issue presented by affidavit on appeal that was allegedly addressed with the trial court “in chambers and without a court reporter.” *Id.* The Court of Appeals reasoned, “[t]he affidavit presents but one account of an unrecorded conversation in which critical issues were allegedly addressed.” *Id.* The court elaborated:

The district courts of this state are courts of record, and a record of all its official proceedings should be made. This precept “applies to conferences in chambers as well as courtroom proceedings.” “The burden is on the parties to make certain that the record they compile will adequately preserve their arguments for review” The role of the appellate court is to sift the parties’ arguments in light of “the facts found by the trial court and square them with the law.” We may, however, weigh only those facts and legal arguments preserved for us in the trial court record. *Counsel’s recollection of the course of proceedings is no substitute for a record of those proceedings.*

Id. (internal citations omitted) (emphasis added).

Here, Ms. Blum alleges that “the trial court disregarded the stipulation of the parties and its own order by relying on testimony from trial to decide the issue of bad faith.” Brief of Appellant at 19. Yet, Ms. Blum fails to marshal either the actual stipulation or the actual order in support of her argument. Because “[c]ounsel’s recollection of the course of proceedings is no substitute for a record of those proceedings,” especially, where, as here, such recollection is seriously flawed, this Court should not consider Ms. Blum’s argument regarding an evidentiary limitation that never existed. *Id.*

B. Ms. Blum Failed to Marshal All the Evidence Regarding the Trial Court's Finding of Bad Faith.

Ms. Blum also assigns error to the trial's finding that Ms. Blum could not have had an honest belief in the propriety of her claims. To be sure, there is plenty of evidence in that part of the record that was marshaled to support the trial court's finding. However, Ms. Blum failed to marshal additional and substantial record evidence supporting this finding. For example, Ms. Blum, even as she was purportedly marshaling the evidence in her brief, asserts that there were "only two witnesses" who observed the incident and testified that Mr. Dahl did not "act in an intimidating and threatening manner." Brief of Appellant at 27. In fact, as set forth in detail above in subsection I.A., there were six witnesses called at trial, all of whom flatly rejected Ms. Blum's story that Mr. Dahl assaulted and battered her. R. 774 at 162:1–12; 177:10–178:2; 188:6–9; 188:16–24; 90:12–191:1; 218:16–219:5; 234:2–15; and 246:13–248:11.

Additionally, Ms. Blum says not a word in her brief of Mr. Dahl's deposition testimony, which was admitted into evidence at trial. R. 775 at 18:8–19:18.⁶ Instead, Ms. Blum cites as fact her own contested, unsubstantiated and mostly irrelevant version of events, which was roundly rejected by every witness called at trial, the jury and the judge. Thus, far from "present[ing], in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists," *Olson*,

⁶ Mr. Dahl was fulfilling a service opportunity with his wife in China at the time of trial and was unavailable to appear in person to testify. R. 756 at ¶ 16.

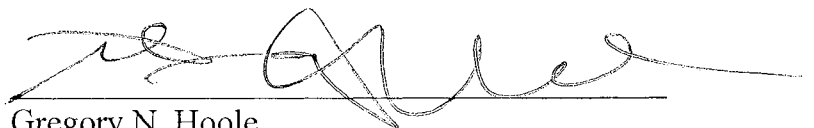
815 P.2d at 1359, Ms. Blum has failed to marshal a substantial amount of significant record evidence related to the fundamental issue on appeal—whether sufficient evidence exists to support the trial court’s finding that Ms. Blum acted in bad faith when she sued Mr. Dahl for an assault and battery that never occurred.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s findings, judgment and order, and require Ms. Blum to reimburse Mr. Dahl for the reasonable attorney fees and costs he has incurred in defending himself against her frivolous lawsuit.

RESPECTFULLY SUBMITTED this 30 day August, 2011.

HOOLE & KING, L.C.

A handwritten signature in dark ink, appearing to read 'Gregory N. Hoole', written over a horizontal line.

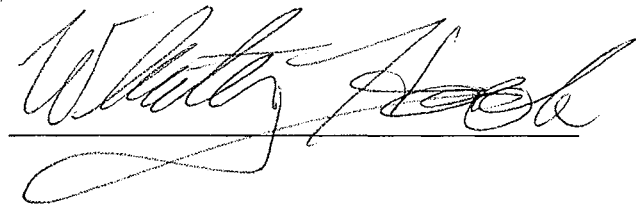
Gregory N. Hoole
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2011, I caused two true and correct copies of the foregoing to be placed in the United States Mail, postage pre-paid and addressed to the following:

Patrick J. Ascione
Tyna-Minet Anderson
ASCIONE & ASSOCIATES, LLC
4692 North 300 West, Suite 220
Provo, Utah 84604

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight
☐ Facsimile

A handwritten signature in cursive script, appearing to read "Whitney Hook", is written over a horizontal line.

SUPPLEMENTAL ADDENDUM

Trial Transcript Excerpts (September 21, 2010)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

_____)	
LORI BLUM,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 101401343 FS
)	
RANIER DAHL,)	(Volume I)
)	
Defendant.)	
_____)	

Jury Trial
Electronically Recorded on
October 21, 2010

BEFORE: THE HONORABLE ROBIN W. REESE
Third District Court Judge

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1 MR. ASCIONE: Your Honor, maybe we can resolve this
2 right now, actually. The reason that we're bringing in that
3 particular testimony is because as you know, in our informal
4 discussion yesterday, Mr. Hoole mentioned the fact that he
5 thought that this action may have been continued or begun in bad
6 faith, and this goes directly to that particular point.

7 THE COURT: Sure. Now when we talked yesterday, the way
8 we left that issue is that rather than have the jury decide it
9 and instruct the jury on those sorts of issues, that it would
10 probably be better for all concerned, and maybe even better for
11 the plaintiff if we just left that to the end, and if the
12 defendant prevails then address that issue to the Court. Is that
13 correct? Is that where we kind of left off?

14 MR. HOOLE: Yes, your Honor, and in fact --

15 MR. ASCIONE: Yes, your Honor.

16 MR. HOOLE: -- it might be -- last night when I was
17 looking at your rule again -- and the reason I was a little back
18 and forth on the phone with you regarding that issue is the case
19 law talks about it being a question of fact, but trial courts --
20 the case law also shows that the trial courts are the one making
21 the decision. When I reread the language of the rule it says the
22 trial court shall, so I think as I read the rule it's clearly the
23 providence of the trial court to make the determination, even
24 though technically it's a question of fact.

25 THE COURT: Uh-huh.

1 THE COURT: I guess the point --

2 MR. ASCIONE: -- that's my concern.

3 THE COURT: I'm sorry to interrupt you, Counsel.

4 MR. ASCIONE: Sorry.

5 THE COURT: I apologize for that. The thing that I want
6 to stay away from, too, I understand that at some point depending
7 on the outcome, of course, the -- whether this lawsuit was filed
8 in bad faith or not will become critical. But again, I would
9 like to stay away from that during the trial.

10 I'm thinking of evidence, because I'm concerned about
11 confusion. If we bring in a lot of evidence during the trial
12 about why Ms. Blum brought the lawsuit, had she been persecuted
13 of friends of Mr. Dahl that lived in the complex and so forth, I
14 think we're going to start getting into -- or confusing the jury
15 with issues that aren't critical to their determination.

16 Maybe what we'd have to do, if the defense prevails, and
17 if they choose the argue that the lawsuit was brought in bad
18 faith, would then be allow the parties to proffer by affidavit --
19 you know, in other words, allow Ms. Blum to say, "Here's what
20 happened to me, here's what these people were telling me. I felt
21 obligated to protect myself to bring the lawsuit." Maybe that's
22 what we're going to have to do, but I don't want to clutter the
23 lawsuit with that, either, just because again, it may distract
24 the jury and may lead them to think about things that wouldn't be
25 helpful and even helpful to the plaintiff, because I'm afraid if

1 we start suggesting to the jury during the trial that there may
2 have been bad faith -- if we let that issue -- if we put it out
3 on the table, I'm concerned that the jury may -- just the power
4 of suggestion may start -- lead them to start thinking that, and
5 if they start thinking that they may punish Ms. Blum for her
6 position for brining the lawsuit. So that's a long way of -- I
7 just kind of hope we stay away from that stuff. If it becomes
8 relevant later on, I'll let you do it with an affidavit.

9 MR. HOOLE: I think --

10 MR. ASCIONE: I like the Court's way of thinking on
11 that, your Honor.

12 MR. HOOLE: I think it's very wise. It's essentially a
13 bifurcated trial, which was what I was going to suggest. And
14 I -- bifurcate, I don't envision a big long presentation of
15 evidence on the second phase of trial. It's something that we
16 could just wrap up very careful -- quickly. If it were a few
17 items that Mr. Ascione or I thought were relevant with respect to
18 the bad faith issue, they could be presented quickly, I would
19 hope, after a verdict.

20 THE COURT: I'm thinking even affidavit maybe.

21 MR. HOOLE: Perhaps. I mean maybe perhaps we can
22 just -- I'll judge it by time. That said, I think to a certain
23 extent it is relevant in this case to show motive, but I won't
24 couch it in terms of bad faith. I won't -- and I certainly won't
25 belabor things, but we do think that -- answering the question

1 condo, it's beautiful, but we felt like we couldn't even walk in
2 the hallway because people would have something to complain about
3 or yell at us about, and so -- in the parking garage, when I
4 pulled in the parking garage, his cars were parked right over
5 here, and I'd sit there for a few minutes and watch to see if he
6 was going to be there because I thought he might have somebody
7 trying to hit me or beat me up or something -- get after me
8 because he really hated me at that point, and I could tell by
9 the -- all the hostility that was coming our direction.

10 The other people weren't being fined and getting
11 complaint letters about the same things that we were getting
12 complaint letters about, so there was surely discrimination and
13 hostility toward us, and I was afraid for my safety, even being
14 in the building, or being on the elevator with anybody that might
15 have anything to do with them.

16 Q. Okay. Why did you file a complaint in this case?

17 A. Well, when did I file the complaint?

18 Q. Why?

19 A. Why? I just wanted them to leave us alone. I just
20 wanted them to shut up and leave us alone and quit persecuting
21 us.

22 MR. ASCIONE: Okay. I don't think I have anything more
23 at this time, your Honor.

24 THE COURT: All right. We'll allow the defense, then,
25 to cross examine Ms. Blum -- or Ms. Blum, excuse me.

1 THE COURT: Why don't you ask it --

2 MR. HOOLE: I'll break it down, your Honor.

3 THE COURT: Make it (inaudible).

4 Q. BY MR. HOOLE: Do you recall a time -- you do recall a
5 time, don't you, Ms. Blum, when the homeowner's association's
6 attorney wrote you a letter and stated -- and demanded that
7 because of a number of different rules violations in which your
8 daughter was engaged that you needed to evict her as a tenant?

9 A. I don't think it was a number of violations.

10 Q. Do you recall that they wanted you to evict her?

11 A. I recall that I got that letter, yes.

12 Q. You recall that they wanted you to evict her because of
13 rules violations?

14 A. One rule violation.

15 Q. That's your --

16 MR. ASCIONE: Objection, your Honor. I'm going to
17 renew my objection with regards to relevancy, your Honor. I just
18 don't -- I'm not seeing it at this point.

19 THE COURT: Well, I kind of think I can tell where it's
20 going, and at this point I'll find it is relevant, overrule the
21 objection.

22 MR. ASCIONE: Okay. Thank you, your Honor.

23 THE COURT: Given the nature of the direct examination,
24 I think it would be relevant.

25 Q. BY MR. HOOLE: In fact, one of the reasons you were

1 impeaching her testimony.

2 THE COURT: With respect to whether there was more than
3 one complaint or not?

4 MR. HOOLE: That's correct, your Honor.

5 THE COURT: Can you do that by just referring to the
6 letter in question?

7 MR. HOOLE: Yeah. I don't intend to introduce it as an
8 exhibit. I'm going to just go through the various violation
9 notices and see if it refreshes her memory.

10 THE COURT: I'm going to sustain the objection, Counsel.

11 MR. HOOLE: Okay. So I can't impeach her?

12 THE COURT: I don't know that we want to -- no. I don't
13 know that we want to go back and develop the history of the
14 letters.

15 THE WITNESS: (Inaudible) please.

16 THE COURT: No. I've sustained the objection. Go
17 ahead, Counsel.

18 MR. HOOLE: Thank you, your Honor.

19 Q. BY MR. HOOLE: Now Mr. Dahl was the president of the
20 management -- of the homeowner's association when this eviction
21 demand was sent out, correct?

22 A. Correct.

23 Q. All right. You obviously weren't very happy to receive
24 a demand from the homeowner's association telling you you needed
25 to evict your daughter, correct?

1 A. The demand came from the attorney.

2 Q. Who represented the homeowner's association, correct?

3 A. Yes.

4 Q. That didn't make you very happy, did it?

5 A. Of course not.

6 Q. Of course not. You perceived in your own mind, at
7 least, didn't you that Mr. Dahl had some role in requesting the
8 attorney to demand that you evict your daughter?

9 A. I don't know what I thought at that time.

10 Q. Well, didn't you previously testify at your deposition
11 that Mr. Dahl -- that you thought Mr. Dahl had some sort of role
12 in what you perceived to be harassment and discrimination being
13 meted out against you and your daughter?

14 A. I thought Mr. Dahl had a very powerful position and that
15 his influence permeated through the building.

16 MR. HOOLE: Okay. Let me just turn your attention to
17 Exhibit No. 10. If I could just ask if the bailiff got the
18 screen ready. Deputy, do you by chance have a screen for the
19 exhibits?

20 COURT BAILIFF: It's outside the door.

21 MR. HOOLE: Outside the door. Could we just pause for
22 30 seconds, and if appropriate, I'd like to publish this exhibit
23 to the jury, your Honor.

24 THE COURT: If it's received, you may.

25 MR. HOOLE: Yes. I won't do that beforehand.

1 A. A yes to a negative question, yes.

2 Q. You're not aware of any special training that the dog
3 had, this Chihuahua, to function as a service animal, correct?

4 A. The only thing I know is dogs have a special sensing
5 ability. They just are born with it. Dogs are --

6 MR. ASCIONE: Your Honor, I'd like to object again on
7 the basis of relevancy. I agree that, you know, the dog is in
8 the letter, but to keep on beating this to death, I'm just not
9 seeing where it's going.

10 MR. HOOLE: We have only one more dog question.

11 THE COURT: Okay. I'll -- and then I will ask you to
12 move on, Counsel, because I don't want to turn this into a trial
13 about whether --

14 MR. HOOLE: Sure.

15 THE COURT: -- the daughter needed the dog.

16 MR. HOOLE: Just one. The letter is of good
17 significance in the trial, your Honor, so -- but one more dog
18 question.

19 Q. BY MR. HOOLE: That is when I asked you in your
20 deposition, Ms. Blum, whether or not the dog had any special
21 training that would qualify it to be a actual service animal,
22 your response was, quote, "I think God trains the dogs," end
23 quote. Is that -- do you recall that?

24 A. I recall that.

25 Q. All right. The letter goes on to address the charges

1 that were brought against your daughter for public intoxication
2 at the meeting October 10th, 2006, correct?

3 A. Yes.

4 Q. That would be in the paragraph 2 there. This was the
5 same night that the alleged assault occurred, correct?

6 A. Yes.

7 Q. All right. This was just one of four charges that Salt
8 Lake City brought against your daughter for her conduct on that
9 night?

10 A. Yes.

11 Q. You felt that Mr. Dahl was singling out your daughter
12 for prosecution, correct?

13 A. Yes, because wine was served generally at the meeting.

14 Q. Even though it was Salt Lake City who brought the
15 charges against your daughter?

16 A. Because Nick Falcone worked in the prosecutor's office.

17 Q. That's what you believe is Nick Falcone worked in the
18 prosecutor's office?

19 A. He did work in the prosecutor's office.

20 Q. Okay. Now you also cite in your letter that you
21 received -- you've already covered that. Strike that. Okay.
22 On the next page, if we can go to the next page, Aubrey, under
23 paragraph B, assault (inaudible) battery. You then discuss your
24 allegations that Mr. Dahl assaulted and battered you following
25 the October 10th, 2006 homeowner's association meeting, correct?

1 A. Yes.

2 Q. If you'll just -- if I can just direct your attention to
3 the fourth line down, the line begins with the word, "Invaded my
4 personal" -- the words, "Invaded my personal space."

5 A. Yes.

6 Q. You say, "He invaded my personal space while shouting,
7 spitting and blowing his halitosis breath in my face." Did I
8 read that correctly?

9 A. That's correct.

10 Q. Is that what happened?

11 A. Yes.

12 Q. A couple of lines below that you write -- the line
13 begins with, "He stepped forward in a threatening manner and" --
14 quote -- "continued to shout and spit." Is that what happened?

15 A. Yes.

16 Q. You never in this letter write or allege that Mr. Dahl
17 intentionally spat on you, did you?

18 A. I didn't say that in the letter.

19 Q. Okay. Then you state at the end of the paragraph that
20 this caused you mental and emotional distress?

21 A. Yes.

22 Q. All right. Now even after you sent this letter the
23 management company didn't stop enforcing the condominium rules
24 with respect to your daughter, did they?

25 A. I think we continued to be harassed.

1 Q. When you say you continued to be harassed, what you mean
2 by that is you continued to receive rules violation notices from
3 the homeowner's association's management company; isn't that
4 correct?

5 A. Well, for instance, one time we --

6 Q. Ms. Blum, Ms. Blum, again, I'm just asking yes or no
7 questions. If there's something that needs to be expanded upon
8 your attorney is here to protect your interest and he will make
9 sure you have that opportunity. My question is you -- when you
10 say harassment you're talking about letters that you received
11 from the management company regarding rules violations, correct?

12 A. Alleged rules violations.

13 Q. Okay. Alleged rules violations. You and your daughter
14 continued to raise complaints back to the homeowner's association
15 with respect to what you perceived to be harassment from the
16 management company, correct?

17 A. The only time I wrote to them --

18 Q. Right.

19 A. -- was when they were harassing us.

20 Q. Thank you. This continued for a number of months
21 leading up to the time you finally filed a lawsuit against
22 Mr. Dahl, correct?

23 A. Yes.

24 Q. All right. So when the homeowner's association --
25 pardon me. When the management company wouldn't stop sending

1 notices with respect to various rules violations --

2 A. Alleged.

3 Q. Alleged rules violations against your daughter, you felt
4 that you had no choice but to file a lawsuit, correct?

5 A. I just wanted them to leave me alone.

6 Q. You thought that if you filed a lawsuit the discrim --
7 what you considered to be harassment would stop?

8 A. That was my hope.

9 Q. The other reason you brought the lawsuit was you
10 had heard Mr. Dahl was intending to run for president of the
11 homeowner's association board again, correct?

12 A. No.

13 Q. No?

14 A. I heard that, but that wasn't why I brought the lawsuit.

15 MR. HOOLE: Your Honor, if I may, I have here Ms. Blum's
16 deposition transcript. I'd like to open it and hand her the
17 original copy if --

18 THE COURT: Sure.

19 MR. HOOLE: Thank you.

20 THE COURT: In order to refresh her recollection, is
21 that what you're trying to do, Counsel?

22 MR. HOOLE: Yes, your Honor.

23 THE COURT: Okay. Should we have it marked as an
24 exhibit?

25 MR. ASCIONE: Counsel? The Judge just asked --

1 at that point?

2 A. That I may not have got the lawsuit if I was able to
3 move out of the building and sell my condo, but since 48 condos
4 were on the market, I wasn't able to do that.

5 Q. Okay.

6 A. So I didn't file the lawsuit because he was running for
7 the board. I filed the lawsuit to try to get them to stop
8 harassing me.

9 Q. Okay.

10 A. If I moved out of the building then hopefully the
11 harassment would stop.

12 MR. ASCIONE: Okay. Thank you. I don't have any
13 further at this time, your Honor.

14 THE COURT: Any recross on just that issue, Counsel?

15 MR. HOOLE: Yes, your Honor.

16 MR. ASCIONE: Do you want me to get that?

17 MR. HOOLE: She can keep it. Thanks.

18 RECROSS EXAMINATION

19 BY MR. HOOLE:

20 Q. Ms. Blum, you stated that -- I think -- if I heard you
21 correctly that you incurred \$3,300 of expenses with respect to
22 staging your condominium for sale?

23 A. Yes.

24 Q. Those expenses were incurred in July of 2008?

25 A. They were incurred in March of 2007, and in August of

1 we could move the podium back to where it was? That way I can
2 have a little better (inaudible) of the witness, if that's all
3 right.

4 THE COURT: Sure.

5 MR. ASCIONE: Thank you. I much appreciate it.

6 NICK FALCONE

7 having been first duly sworn,

8 testifies as follows:

9 DIRECT EXAMINATION

10 BY MR. HOOLE:

11 Q. Mr. Falcone, will you please state your name for the
12 record?

13 A. Nick Falcone, F-a-l-c-o-n-e.

14 Q. What is your occupation, Mr. Falcone?

15 A. I'm a retired school teacher.

16 Q. How long did you teach school?

17 A. For 31 years.

18 Q. So 31 years, great. I grabbed the wrong Nick Falcone
19 outline. What did you teach, Mr. Falcone?

20 A. Music education.

21 Q. Okay. Wonderful. Do you know who Mr. Ranier Dahl is
22 that --

23 A. Did I what?

24 Q. Do you know who Mr. Ranier Dahl is?

25 A. Yes.

1 Q. How do you know Mr. Dahl?

2 A. He was on the board with my son. My son was on the
3 board, and I knew Mr. Ranier from that.

4 Q. Did you have any direct friendship or relationship with
5 Mr. Dahl?

6 A. Not very much, just casual.

7 Q. Okay. Could you estimate approximately how many
8 occasions you've even talked to or met with Mr. Dahl?

9 A. Oh, no more than two to three times.

10 Q. Okay. Were you at a homeowner's association's meeting
11 at the Parc at Gateway on October 10th, 2006?

12 A. Yes.

13 Q. Did you have an opportunity to observe Mr. Dahl during
14 that meeting?

15 A. Yes.

16 Q. Was he conducting the meeting?

17 A. Yes.

18 Q. Could you describe for the jury what your observations
19 were with respect to Mr. Dahl's demeanor as he conducted that
20 meeting?

21 A. Well, I observed he was very calm and to the point, and
22 he was very patient with everyone. He acted very professional.

23 Q. Was the meeting -- how would you describe the tone of
24 the meeting?

25 A. Well, the tone of the meeting was contentious at best.

1 Q. Okay. Did you ever observed Mr. Dahl jumping at or
2 leaping at Ms. Blum?

3 A. Never once.

4 Q. Did you ever observed Mr. Dahl waving his arms in a
5 threatening manner towards Ms. Blum?

6 A. Never. Never at all.

7 Q. Did you observe Mr. Dahl spitting on Ms. Blum?

8 A. I was within inches. If he had done that, I would have
9 seen it. He did not spit ever.

10 Q. Okay. Did you observe Mr. Dahl screaming or yelling at
11 Ms. Blum?

12 A. Very calm. No. He did not ever say anything above just
13 a plain normal talk.

14 Q. Now I know it's been a number -- it's been four years,
15 hasn't it?

16 A. Uh-huh.

17 Q. Do you recall how that -- we'll call it a
18 conversation -- concluded?

19 A. Well, they didn't conclude very well. They -- she kept
20 staying there, and I think they --

21 MR. ASCIONE: Objection, your Honor. We're not sure at
22 this point of who she is.

23 THE COURT: When you tell us she, it would be easier if
24 you just identified the person by name. So who kept staying
25 there?

1 Q. Feel free to relax. Everyone here is nice. The Judge
2 isn't going to -- can you please state your name for the record,
3 please?

4 A. My name is Nola Falcone, F-a-l-c-o-n-e.

5 Q. Okay. What is your occupation?

6 A. I'm a retired school teacher.

7 Q. How long were you a school teacher for?

8 A. For 36 years.

9 Q. Great. Do you know who Ranier Dahl is?

10 A. I know who he is. I didn't know him well, but I knew
11 him a little bit.

12 Q. Okay. Do you recall going to the homeowner's
13 association meeting at the Parc at Gateway on October 10th, 2006?

14 A. Very well.

15 Q. Okay. Do you -- what do you recall very well from that
16 meeting?

17 A. Well, it was the first meeting I had been to. My son
18 had been asked to be on the board. Well, he had -- he was on
19 the board, and he did work with Ranier, so that's how I was
20 introduced to Ranier. He came -- my son came and picked me up
21 that night to take me up to the meeting. He thought it might be
22 interesting for me, and my husband was going to pick us up there,
23 and that's how I happened to be there.

24 Q. Okay. How would you describe the overall tenor of the
25 homeowner's association meeting?

1 recorded.

2 A. Okay.

3 Q. So you had only met them the one time?

4 A. Yeah, I just met them the one time, yeah.

5 Q. Okay. So I think in light of that, I think I have
6 a question that will simplify this. You observed two women
7 conversing with Mr. Dahl after the meeting?

8 A. And there might have been a few other people there, but
9 I don't remember.

10 Q. Okay. Did you ever observe Mr. Dahl lunge at either
11 woman during the course of this conversation that you were
12 watching?

13 A. Never.

14 Q. Did you observe him leap at either of these women during
15 this conversation?

16 A. Never.

17 Q. Did you observe him waving his arms?

18 A. Never.

19 Q. Did you observe him spit on either of these women?

20 A. Absolutely not.

21 Q. Did you -- how would you describe Mr. -- I'll call him
22 Ranier, as you know him. How would you describe Ranier's
23 demeanor during the course of this conversation with these two
24 women?

25 A. I thought very patient. I thought very, very patient

1 because I don't know if I could have stood there and taken the
2 abuse that I saw him taking.

3 MR. HOOLE: Okay. That's all the questions I have.
4 Thank you very much.

5 THE WITNESS: Thank you.

6 MR. HOOLE: You just need to stay there just for a
7 minute. I'm sorry.

8 THE WITNESS: Okay.

9 RECROSS EXAMINATION

10 BY MR. ASCIONE:

11 Q. Mrs. Falcone, you said that you remember the night well;
12 is that correct?

13 A. I remember that part very well. Well, I remember most
14 of it quite well.

15 Q. Okay. You remember most of it quite well. You
16 mentioned that -- do you recognize Ms. Blum?

17 A. To tell you the truth, no. In fact, I was in the
18 restroom and I didn't even notice who she was.

19 Q. Okay.

20 A. But I do remember she is blonde now, and she had dark
21 hair then.

22 Q. Okay.

23 A. That's the only thing that I could tell you about them.

24 Q. Okay. Can you tell me where you were standing
25 approximately when you were observing all of this?

1 case now pending before the Court will be the truth, the whole
2 truth, and nothing but the truth, so help you God?

3 THE WITNESS: I do.

4 THE COURT: Go ahead, Counsel.

5 MR. HOOLE: Thank you.

6 NICK FALCONE

7 having been first duly sworn,

8 testifies as follows:

9 DIRECT EXAMINATION

10 BY MR. HOOLE:

11 Q. Could you please state your name for the record?

12 A. Yes. My name is Nick Falcone, N-i-c-k, F-a-l-c-o-n-e.

13 Q. May I call you Nick?

14 A. Yes.

15 Q. Nick, what's your profession?

16 A. I'm a lawyer and I'm a criminal defense attorney.

17 Q. Where do you work?

18 A. I work for Salt Lake Legal Defender's.

19 Q. Okay. What's your relationship -- do you know Ranier
20 Dahl?

21 A. I do.

22 Q. How do you know Ranier?

23 A. I know Ranier, I served with him on a board of directors
24 for three years at the Gateway Condo Association.

25 Q. Okay. Were you at attendance of the meeting -- excuse

1 Q. Lori, Catherine's mother, is standing there at this
2 time?

3 A. That's right. I was there the whole time that Lori and
4 Catherine were there until Catherine was taken out by the
5 apartment -- the condo manager. I was there the entire time.

6 Q. Okay. Do you recall during the course of these events
7 following the meeting any time where Ranier Dahl lunged at either
8 Catherine or Lori?

9 A. No. As a matter of fact --

10 THE COURT: Well, you answered the question.

11 THE WITNESS: Oh. No.

12 Q. BY MR. HOOLE: What else did you observe?

13 A. Well --

14 Q. Let me ask you another question. I'm sorry.

15 A. Okay.

16 Q. Did you observe Mr. Dahl at any time wave his arms in a
17 threatening manner toward either Catherine or Lori?

18 A. No, just the opposite. He was -- Catherine assaulted
19 Ranier by poking him in the face with her finger. He was
20 controlling himself --

21 MR. ASCIONE: Again, objection, your Honor. I don't
22 think that that's what the question was.

23 THE COURT: Yeah, That's probably not responsive,
24 Counsel.

25 MR. HOOLE: Well --

1 her. The apartment manager came over and kind of said, "Okay,
2 come on," you know, broke -- kind of trying to break it up,
3 moving Catherine out, but Ranier stood there and took that.
4 Now I don't think a lot of people would --

5 Q. BY MR. HOOLE: Okay. That's good enough, Nick. Thanks.
6 Did you ever observe during this entire time -- and I just want
7 to be clear. You're with Mr. Dahl during this entire time?

8 A. Right.

9 Q. You saw from the beginning of the conversation with Lori
10 and Catherine to the end?

11 A. I did.

12 Q. Did you see Mr. Dahl at any time spit at either
13 Catherine or Lori?

14 A. Absolutely not.

15 Q. Okay. As I -- did you see him do any kind of action,
16 engage in any sort of conduct that was threatening in nature?

17 A. He was frozen there. He would make -- he would say --
18 she would make an accusation, he'd state, "No, that's not right.
19 That's not what I said," and then she would start screaming at
20 him again, but at no time did I ever see him do more than respond
21 like that.

22 Q. Okay. How would you -- you've kind of answered this
23 already, but just to be clear, how would you describe Mr. Dahl's
24 demeanor during this conversation he was having with Catherine
25 and Lori?

1 A. Well, surprisingly calm and collected.

2 Q. Okay. I wanted to ask you also, did there come a time
3 following the night of October 10th, 2006 -- that night that
4 you've just been talking about -- when you advised Mr. Dahl to
5 file a police report against Ms. Blum's daughter, Ms. Cleveland?

6 A. Yeah. It was either -- we talked about it maybe a
7 little bit that night, but mostly it was about a day after or so.
8 He didn't want to do anything about it, but I felt that it was
9 serious enough that he needed to talk to somebody because -- so
10 it was after -- we talked a little bit about it briefly after the
11 meeting, he said he didn't want to do anything about it because
12 he was -- he just wanted it all to kind of go away as far as, you
13 know, he was scared and stuff.

14 Q. He wasn't worried about pressing charges for having
15 Catherine poking him in his face?

16 A. Not at first. I told him to call the police department
17 and report it, and he did.

18 Q. Was there anything subsequent to the poking that
19 motivated you to advise Ranier to report this to the police?

20 A. Well, that night about 2 o'clock in the morning --

21 MR. ASCIONE: Objection, your Honor, this is not
22 relevant for purposes of this, and it might be --

23 THE COURT: Well, let me have Counsel approach the
24 bench, can we?

25 MR. ASCIONE: Yes, your Honor.

1 A. Rebecca Wheeler.

2 Q. Do you go by Becky?

3 A. Yes, I do.

4 Q. May I call you Becky?

5 A. Please.

6 Q. What do you do for a living, Becky?

7 A. I own Community Solutions and Sales, an HOA management
8 company.

9 Q. All right. Were the management company for the Parc at
10 Gateway Condominiums --

11 A. We were.

12 Q. -- on October 10th, 2006?

13 A. We were.

14 Q. Okay. Do you know Ranier Dahl?

15 A. I do.

16 Q. Who is Ranier Dahl?

17 A. He was the president of the board.

18 Q. Were you in attendance at the homeowner's association
19 meeting on October 10th, 2006?

20 A. I was.

21 Q. Okay. I want to just skip over the actual meeting, and
22 we're going to kind of try to cut this to the chase. I want to
23 ask you a couple of questions about what happened after the
24 meeting. Were you with Mr. Dahl following the meeting?

25 A. We were. We were standing in the hallway.

1 Q. Okay. Was your husband with you in the hallway?

2 A. Back and forth. We had talked. We had talked back and
3 forth.

4 Q. Back and forth. He wasn't there the whole time?

5 A. Correct.

6 Q. Can you -- did you recognize anyone else who was in
7 the hallway at the particular time when you were observing this
8 conversation between Mr. Dahl and Ms. Blum?

9 A. I don't remember who was in the hallway, but I do
10 remember seeing people.

11 Q. Okay. Do you recall whether or not you saw the
12 association's attorney Sam Bell in the hallway?

13 A. I did see Sam Bell.

14 Q. Okay. Did you see Nick Falcone in the hallway?

15 A. At different times.

16 Q. Okay. Let me ask you as you observed this conversation
17 between Mr. Blum -- Ms. Blum and Mr. Dahl, did you notice
18 Mr. Dahl acting in a threatening manner toward Ms. Blum at any
19 point in time?

20 A. No, not at all, not threatening at all.

21 Q. Ms. Blum has alleged that Mr. Dahl, quote, "lunged at
22 her, elbows out, face to face, and spit on her as she screamed --
23 as he screamed." Did you observe any of that behavior?

24 A. No, not at all. As a matter of fact, that's why I
25 probably couldn't -- I didn't really hear the conversation. He

1 was very soft in his voice.

2 Q. Did you see -- was he flailing his arms or --

3 A. Very calm. Very calm.

4 Q. Did you ever see him lunge at Ms. Blum?

5 A. No.

6 Q. Did there come a point in time when Catherine Cleveland
7 joined -- do you know who Catherine Cleveland is?

8 A. Yes.

9 Q. It's Ms. Blum's daughter?

10 A. Yes.

11 Q. Did there come a point in time when she joined the
12 conversation?

13 A. Yes.

14 Q. Did you see Mr. Dahl act in a threatening manner at all
15 after Ms. Cleveland joined the conversation?

16 A. No. Ms. Cleveland was aggressive towards Mr. Dahl, but
17 Mr. Dahl was not aggressive.

18 Q. Okay. When you say she was aggressive toward Mr. Dahl,
19 what do you mean by that?

20 A. She was doing this. I saw this action, and then --

21 THE COURT: For the record, you're taking your right
22 index finger and pointing it forward?

23 THE WITNESS: Yes, towards his face. When I saw that
24 I -- reaction, I jumped in front of her. Ranier was behind me,
25 she was in front of me. I put my hands out and I said, "Please

JEFF WHEELER

having been first duly sworn,

testifies as follows:

DIRECT EXAMINATION

BY MR. HOOLE:

Q. Good afternoon. Would you state your name for the record?

A. Yes, it's Jeff Wheeler.

Q. May I call you Jeff?

A. Sure.

Q. Jeff, what is your occupation?

A. I own an association management company, Community Solutions and Sales.

Q. Are you a co-owner with your wife, Becky?

A. Yes.

Q. All right. Do you know who Ranier Dahl is?

A. Yes, I do.

Q. How do you know Ranier?

A. He was the president of a homeowner's association that we managed, the Parc at Gateway.

Q. Parc at Gateway. Do you recall a homeowner's association meeting at the Parc at Gateway on October 10th, 2006?

A. Yes, I do.

Q. We're going to jump -- just fast forward through the meeting and talk about post meeting activities.

1 serves on a board of directors, actually.

2 Q. Okay. Did you notice anything during this time in the
3 hallway that -- did you notice Mr. Dahl acting contrary to the
4 professionalism and the good nature that you had observed prior
5 to that time?

6 A. You know, actually not. It was a very tense meeting
7 that night, and I thought he had, you know, fairly good composure
8 considering how heated that meeting was at times.

9 Q. Okay. Again, directing your attention after the meeting
10 and in this hallway, did you ever notice Mr. Dahl leap at or
11 lunge at Ms. Blum in any way?

12 A. I didn't see that personally, no.

13 Q. Okay. Did you ever see him intentionally spit on her to
14 strike her or so anything threatening toward her?

15 A. No, I did not.

16 MR. HOOLE: All right. That is all the questions I
17 have. Thank you.

18 THE WITNESS: Okay.

19 CROSS EXAMINATION

20 BY MR. ASCIONE:

21 Q. Mr. Wheeler, did you have the opportunity to watch the
22 entire conversation between Lori Blum and Ranier Dahl?

23 A. No, I did not, sir.

24 Q. Okay. Do you know which part you got to watch?

25 A. You know, it was like the meeting had been held, the

1 COURT CLERK: Sit up here, please.

2 THE COURT: Go ahead, Counsel.

3 MR. HOOLE: Thank you.

4 SAM BELL

5 having been first duly sworn,

6 testifies as follows:

7 DIRECT EXAMINATION

8 BY MR. HOOLE:

9 Q. Will you please state your name for the record?

10 A. Sam Bell.

11 Q. Sam, what's your occupation?

12 A. I'm an attorney.

13 Q. Were you the attorney for the Parc at Gateway
14 homeowner's association on October 10th, 2006?

15 A. Yes.

16 Q. Are you their attorney right now?

17 A. No.

18 Q. Do you even work for the law firm that had that
19 retain -- that engagement?

20 A. No.

21 Q. Okay. So you have no ongoing relationship with the
22 homeowner's association?

23 A. Currently, no.

24 Q. Okay. Let me ask you, do you know Ranier Dahl?

25 A. Vaguely. I met him at the meeting.

1 feet.

2 Q. Okay. The Judge has indicated he estimated this at 10
3 feet, and I wasn't so sure, but --

4 A. There you go.

5 Q. Did you -- did there come a point in time where -- do
6 you know who Ms. Blum's daughter is?

7 A. I mean I saw her there at that meeting.

8 Q. Did there come a point in time while you're observing
9 the conversation between Mr. Blum and Ms. Dahl (sic) following
10 the meeting in the hallway where Ms. Blum's daughter came and
11 joined the conversation?

12 A. Yeah. Yeah, she joined the conversation at some point.

13 Q. Okay. Were you continuing to observe this conversation
14 as it was occurring?

15 A. Yes.

16 Q. How would you describe Ms. Blum's demeanor during this
17 conversation?

18 A. Well, Ms. Blum was upset that Ranier would call her
19 daughter a name.

20 Q. How would you describe Mr. Dahl's demeanor?

21 A. I was surprised by how calm he was. I mean it had been
22 a fairly tense night. He was being accused of saying something
23 that he said he didn't say. I was quite -- I was impressed by
24 how calm he was.

25 Q. Did you ever see -- well, let me just say, Ms. Blum has

1 alleged that Mr. Dahl, quote, "lunged at her, elbows out, face to
2 face and spit on Ms. Blum as he screamed." Did you observe any
3 of that kind of conduct?

4 A. Not that I recall, no.

5 Q. Did you ever see -- and I just want to break it down for
6 you. Did you ever see Mr. Dahl lunge or leap at Ms. Blum?

7 A. No.

8 Q. Let's just include Ms. Cleveland in that, just so we're
9 covered. Did you see him lunge or leap at any person that night?

10 A. No. No, if I remember, his back was to a wall or to a
11 window in the hallway, and I don't --

12 Q. Did you ever see him extend his elbows or move his arms
13 in a threatening manner toward Ms. Blum?

14 A. No, nothing that I noted.

15 Q. Did you ever see him spit on Ms. Blum?

16 A. Like intentionally spit on her?

17 Q. Intentionally spit on her.

18 A. No.

19 Q. Did you ever see him, for lack of a better term,
20 accidentally spit on her? You know how sometimes people -- you
21 know, saliva sometimes comes out of someone's mouth when they're
22 speaking. Did you ever see that?

23 A. No.

24 Q. Did you observe at any point whether Mr. Dahl got in Ms.
25 Blum's face so to speak?

1 A. No. No, they were fairly close, but like I said, his
2 back was to the wall.

3 Q. Did you observe whether or not -- I mean how did they
4 get close together? Was -- did Ms. Blum approach him or did
5 Mr. Dahl approach Ms. Blum?

6 A. Ms. Blum approached him.

7 Q. Okay. Just finally, did you see Mr. Dahl act in a
8 threatening manner in any fashion toward Ms. Blum or her daughter
9 while in the hallway that evening?

10 A. No. Like I said, he was I thought surprisingly calm
11 under the circumstances.

12 MR. HOOLE: Thank you very much.

13 THE COURT: Counsel, cross examination.

14 MR. ASCIONE: Yes, your Honor.

15 CROSS EXAMINATION

16 BY MS. ANDERSON:

17 Q. Did Mr. Dahl appear upset at any time during the
18 conversation?

19 A. Not that I recall. He seemed pretty calm the whole
20 time.

21 Q. Do you remember what else you were doing when the
22 conversation occurred?

23 A. Yeah. Right before the conversation occurred I was with
24 the Falcones -- Nick and his parents. We were discussing --
25 well, we were just talking about history. His mom taught some of

Trial Transcript Excerpts (September 22, 2010)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

_____)	
LORI BLUM,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 101401343 FS
)	
RANIER DAHL,)	(Volume II)
)	
Defendant.)	
_____)	

Jury Trial
Electronically Recorded on
October 22, 2010

BEFORE: THE HONORABLE ROBIN W. REESE
Third District Court Judge

APPEARANCES

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1 conduct them back, then.

2 COURT BAILIFF: Please rise.

3 (Jury excused)

4 THE COURT: All right. Counsel, you can be seated. I
5 don't know that there's anything else to do other than Counsel
6 for the defendant, would it be appropriate for you to prepare a
7 written judgment consistent with the verdict of the jury?

8 MR. HOOLE: I'd be happy to, your Honor. There is one
9 additional matter, and that is our motion for attorney's fees
10 pursuant to statute.

11 THE COURT: Oh, that's right. That's right. How would
12 you like us to approach that?

13 MR. HOOLE: I'm happy to make my argument to the Court
14 at this point. I don't think there's additional evidence that I
15 would introduce other than what's already been introduced. I
16 think it's a pretty straightforward issue. Your Honor may want
17 to take it under advisement, but that's completely up to you,
18 obviously, and I'm happy to handle it however you would like to,
19 your Honor, but I think it would be nice if we could just --
20 we're all here today, we might as well move forward on it.

21 THE COURT: Sure. I understand why you wouldn't want to
22 expend any other time or resources to come back later on, so I'm
23 happy to proceed that way. Counsel, how do you want to proceed?

24 MR. ASCIONE: Your Honor, frankly, I had thought that we
25 would be doing it the way that the Court suggested originally,

1 which is to simply hand in affidavits to that effect.

2 THE COURT: If there were additional affidavits that you
3 wanted to submit?

4 MR. ASCIONE: Yes, presumably from my client with
5 regards to her intentions and so forth.

6 MR. HOOLE: If there's additional evidence that wasn't
7 elicited in trial because of those (inaudible) that's fine. I
8 hate to draw this out and incur even more expense and that sort
9 of thing, but --

10 THE COURT: Yeah. We did talk about that at the
11 beginning that there would be certain evidence that we wouldn't
12 bring into the trial for fear of prejudice to the jury, but
13 Counsel could bring that up later.

14 I'm wondering -- I sure hate to have you come back
15 and spend that much money, too. Why don't -- would it make sense
16 to just have you each given a short period of time to produce
17 whatever affidavit that you'd like to, if any, and just a short
18 written memorandum as to what your position would be, and then I
19 could make my decision without having you come back to court?

20 MR. HOOLE: That's fine. Maybe we can even do things a
21 little bit backwards and just entertain five minutes, ten minutes
22 of oral argument and then we can supplement with --

23 THE COURT: I'd be willing to do that, too.

24 MR. HOOLE: -- a brief -- I don't intend to -- I'll just
25 forewarn you, and it really isn't a warning, there won't be a