

2011

## Lori Blum v. Ranier Dahl : Brief of Appellant

Utah Court of Appeals

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### Recommended Citation

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LORI BLUM,

Plaintiff/Appellant,

District Court No. 070914252

Appellate No. 20110116

vs.

RANIER DAHL,

Defendant/Appellee.

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BRIEF OF APPELLANT

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APPEAL FROM A FINAL JUDGMENT AND A FINAL ORDER/MINUTE ENTRY  
OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE  
COUNTY, THE HONORABLE ROBIN W. REESE PRESIDING

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UTAH APPELLATE COURTS

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BRIEF OF APPELLANT

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**JURISDICTION AND NATURE OF PROCEEDINGS**

This is an Appeal from a Final Judgment and a Final Order/Minute Entry of the Third Judicial District Court, in and for Salt Lake County, the honorable Robin W. Reese presiding. Jurisdiction to hear this appeal is conferred upon the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-4-103(2)(j) (1953 as amended) and Rule 3(a), Utah Rules of Appellate Procedure.

**STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW**

**Issue No. 1:** Did the trial court err in awarding attorney's fees to Defendant for Plaintiff's alleged bad faith when it approved a stipulation that the issue of bad faith would be decided by post-trial affidavit, but then disregarded its own order and used trial evidence in making its determination of bad faith?

**Standard of Review:** An appellate court reviews a trial court's legal conclusions, as in whether the court followed the terms of a stipulation, for correctness. *Lloyd v. Lloyd*, 2009 UT App 314, ¶ 6, 221 P.3d 884 (whether or not the trial court followed the terms of a stipulation is a question of law). See *Zions First Nat'l Bank, N.A. v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988) (questions of contract interpretation are matters of law); *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997) (stipulations are construed as contracts). This issue was preserved in the trial court through Plaintiff's objections to the trial court's orders that relied on evidence presented at trial to determine the issue of bad faith. (R. 666, 728, 730, 747).

**Issue No. 2:** Is there legally sufficient evidence in the record to find bad faith where, pursuant to the court-approved stipulation, the only evidence permitted to be considered and which was submitted regarding Plaintiff's subjective state of mind was filed by Plaintiff and described her good faith?

**Standard of Review:** An appellate court reviews factual questions, as in a finding of bad faith, under a clearly erroneous standard. *Still Standing Stable, LLC, v. Allen*, 2005 UT 46, ¶ 8, 122 P.3d 556 (trial court's finding of bad faith a factual question reviewed under a clearly erroneous standard); *In re Sonnenreich*, 2004 UT 3, ¶ 45, 86 P.3d 712 (same). This issue was preserved in the trial court through Plaintiff's objections to the trial court's orders challenging the sufficiency of the trial court's finding of bad faith because it relied on evidence presented at trial to determine the issue of bad faith when, pursuant to the court-approved stipulation, it was to consider only post-trial affidavits and memoranda. (R. 666, 728, 730, 747). Also, because this issue on appeal is an appeal of

the factual sufficiency of the trial court's finding of bad faith, which is a question of fact, this issue presented on appeal was preserved via timely filing of the Notice of Appeal. (R. 764).

**Issue No.3:** Even if the court-approved stipulation does not bar consideration of other evidence in the record for determining bad faith, does the record contain legally sufficient evidence to support the trial court's finding of bad faith?

**Standard of Review:** An appellate court reviews factual questions, as in the finding of bad faith, under a clearly erroneous standard. *Still Standing Stable, LLC*, 2005 UT 46, ¶ 8 (trial court's finding of bad faith a factual question reviewed under a clearly erroneous standard); *In re Sonnenreich*, 2004 UT 3, ¶ 45, 86 P.3d 712 (same). This issue was preserved in the trial court through Plaintiff's objections to the trial court's orders challenging the sufficiency of the trial court's finding of bad faith. (R. 666, 728, 730, 747). Also, because this issue on appeal is an appeal of the factual sufficiency of the trial court's finding of bad faith, which is a question of fact, this issue presented on appeal was preserved via timely filing of the Notice of Appeal. (R. 764).

### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

The following Constitutional provisions, Statutes and Rules are relevant to this Appeal.

#### Statutes:

1. Utah Code Annotated § 78B-5-825(1) (1953 as amended).

(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. Utah Code Annotated § 78A-4-103(2)(j)

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(j) cases transferred to the Court of Appeals from the Supreme Court.

Rules:

1. Utah Rule of Appellate Procedure 3(a)

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district or juvenile court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule

4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

2. Utah Rule of Appellate Procedure 24(a)(9)

(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.

### 3. Utah Rule of Civil Procedure 52(a)

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

### STATEMENT OF THE CASE

This is an appeal from an award of attorney's fees against Ms. Blum in an action for assault and battery brought by Ms. Lori Blum, appellant, against Mr. Ranier Dahl, appellee. Mr. Dahl prevailed at trial. After the trial, the court found that Ms. Blum's claim was meritless and was brought in bad faith and it thus awarded attorney's fees to Mr. Dahl against Ms. Blum.

### STATEMENT OF FACTS

1. Ms. Blum is a small, 5 foot 1 inch tall, 119 pound, 76 year old nurse who specializes in pediatrics, and who likes to babysit her grandchildren and tutor her down-syndrome granddaughter in speaking, reading, and writing. (R. 162; R. 774:85).

2. Ms. Blum co-owns a condominium at the Park at Gateway, 5 South 500 West, Salt Lake City, Utah. (R. 774:103).

3. After a meeting of the Condominium Association at the Park at Gateway on October 10<sup>th</sup>, 2006, Mr. Dahl, who was president of the Association at the time, made vulgar and insulting comments to Ms. Blum's daughter. (R. 774:92-93; R. 2, ¶¶ 7-8; R. 310, ¶¶ 7-8).

4. After her daughter told her about the insulting comments, Ms. Blum approached Mr. Dahl to ask him not to talk to Ms. Blum's daughter that way. (R. 774:93-94; R. 2, ¶ 9; R. 310, ¶ 9).

5. As she attempted to speak with him, Ms. Blum maintained that Mr. Dahl lunged at her, shouted at her, and spit on her. (R. 774:94-95; R. 582, ¶ 5, Exhibit A; R. 2-3, ¶¶ 10-16; R. 310-311, ¶¶ 10-17).

6. As a result of the incident, one of the witnesses in the case who viewed the incident, Mr. Falcone, advised Mr. Dahl to file a police report against Ms. Cleveland regarding what he viewed to be an assault by Ms. Cleveland against Mr. Dahl that occurred during the same incident between Ms. Blum and Mr. Dahl. (R. 183, Exhibit A; R. 774:191).

7. After the incident, Ms. Blum was allegedly the target of harassment, discrimination, and hostility from numerous persons including the homeowner's association and the management company for the condominium building. (R. 543–545, Exhibit E; R. 774:114–116, 118, 121–124; R. 185–186, 190–192, Exhibit A; R. 276–279, ¶¶ 5–29, Exhibit A; R. 283, ¶¶ 21–25, Exhibit B).

8. In part, Mr. Dahl, through his position as president of the board of directors of the homeowners' association and his influence with the management company, harassed her by enforcing alleged rule violations against her and her daughter while ignoring the same violations by her neighbors, as well as alleging rule violations when none existed, such as charging her late fees on her rent when she had paid on time. (R. 774:98–99; R. 775:25–29; R. 311–314, ¶¶ 18, 24–34, 42; R. 282–283, ¶¶ 13–25, Exhibit B; R. 276–279, ¶¶ 5–29, Exhibit A).

9. He also spoke badly of her to others in the complex and on the board of directors of the Homeowners Association. (R. 775:98–99; R. 312, ¶¶ 24, 30–32; R. 282–283, ¶¶ 13–25, Exhibit B; R. 278, ¶¶ 16–19, Exhibit A).

10. After the initial confrontation with Mr. Dahl, where he shouted and lunged at her, Ms. Blum suffered fear and severe emotional distress. (R. 774:98–99; R. 584, ¶¶ 18–22, Exhibit A; R. 311, 313–314, ¶¶ 19–21, 41, 48; R. 161–162, ¶¶ 11–12).

11. Because of the incident and her resulting fear and distress, Ms. Blum attempted to sell her condominium. Although she was ultimately unsuccessful in doing so, she incurred costs of \$3,300 to list and stage the condominium. (R. 774:98–99, 149–150; R. 584, ¶ 19, Exhibit A).

12. She also restricted her visits to her condominium to about once per month because she feared meeting Mr. Dahl again. (R. 584, ¶¶ 20–21, Exhibit A; R. 311, ¶¶ 20–22; R. 279, ¶¶ 24–26, Exhibit A).

13. This continued until Ms. Blum learned that Mr. Dahl had moved from the premises, whereupon Ms. Blum resumed her former habit of spending about half of each week at her condominium. (R. 774:86; R. 584, ¶ 22, Exhibit A; R. 311, ¶ 23; R. 279, ¶¶ 24, 27–28).

14. During the course of the events, Ms. Blum sought legal advice to discover if she had a case against Mr. Dahl for his actions. (R. 583, ¶¶ 6–9, Exhibit A)

15. The first lawyer she spoke with advised her to find a civil attorney and file a case against Mr. Dahl. (R. 583, ¶ 6, Exhibit A).

16. Further, the civil lawyer she hired advised her that her case had merit and that she should proceed with an action against Mr. Dahl. (R. 583, ¶ 9, Exhibit A; R. 587, Exhibit 1).

17. Based upon this advice, Ms. Blum sued Mr. Dahl for \$200,000 for assault and battery based upon the shouting and spitting incident. (R. 583, ¶¶ 9–10, Exhibit A; R. 3–4, ¶¶ 18–26; R. 313–314, ¶¶ 35–44).

18. After she initiated the lawsuit, Ms. Blum received an offer of settlement from counsel for Mr. Dahl. She did not accept the offer. However, the offer reinforced her belief in the strength of her case, as did a later deposition of Mr. Dahl. (R. 583, ¶¶ 11–14, Exhibit A; R. 563; R. 589, Exhibit 2).

19. Subsequently, during a deposition, Mr. Dahl admitted that he was upset while speaking with Ms. Blum, and admitted that it was possible that he spit on her some time during their interaction. (R. 583, ¶ 14, Exhibit A).

20. Ms. Blum’s original complaint plead damages for harassment and discrimination that Ms. Blum allegedly suffered from Mr. Dahl’s use of his position of authority at the head of the homeowner’s association “to exert undue pressure and influence upon” Ms. Blum and her daughter. (R. 4, ¶ 25).

21. The trial court correctly dismissed these claims for damages because Ms. Blum’s original counsel, Mr. Brown pled them poorly. (R. 1–5; 248–249).

22. Ms. Blum was unaware of the deficiencies in her pleadings until Mr. Dahl filed the motion for summary judgment which led to the dismissal of her damages claims for harassment and discrimination. (R. 566; R. 248–249).

23. After the ruling, Ms. Blum first became aware that the pleading that had been filed on her behalf only included facts regarding the incident in which Mr. Dahl had shouted at her. (R. 566).

24. After the ruling, Ms. Blum retained new counsel to handle the case. (R. 252A–253).

25. Immediately upon retaining new counsel, Ms. Blum motioned to postpone the trial and amend her pleadings to include the subsequent events, and add other causes of action for intentional infliction of emotional distress, defamation, and false light, to address the harassment and discrimination she allegedly suffered. However, because of the late date, the court denied her motion to amend. (R. 253, 263; R. 314-316, ¶¶ 45-63; R. 430)

26. At the beginning of the trial, Ms. Blum and Mr. Dahl agreed that if Mr. Dahl decided to pursue the matter of bad faith and attorney's fees, the trial court judge would determine it based on post-trial affidavits and memoranda submitted by both parties, and the court so ordered. (R. 774:5–6, 15–18).

27. The stipulation was agreed upon and ordered because the trial court was initially concerned that addressing the issue of bad faith at trial could distract the jury “from the real issues” and confuse their minds. (R. 774:6, 16–17).

28. The trial court did not want the issue of bad faith even “on the table” because “just the power of suggestion” could lead the jury to punish Ms. Blum for her disputed position in bringing the lawsuit. (R. 774:17).

29. The trial court concluded that it was best to leave the entirety of the issue of bad faith until the end of the trial, to be decided by post-trial affidavits. (R. 774:6, 16–17).

30. Both parties understood that evidence of bad faith was not permitted during trial, and that the trial court would leave the entirety of the issue of bad faith and attorney's fees until the end of the trial, to be decided by affidavits. (R. 774:6, 16–17)

31. Mr. Dahl's counsel referred to the stipulation as creating "essentially a bifurcated trial." (R. 774:17).

32. Following the trial, the trial court relied heavily upon testimony presented at trial, instead of relying solely on post-trial affidavits, which trial evidence he believed justified a finding that Ms. Blum brought the case in bad faith. (R. 756–759, ¶¶ 18–31).

33. At trial, the court issued a summary judgment against Ms. Blum on the issue of battery, and the jury found against her on the issue of assault. (R. 775:4, 56).

34. In obeying the court-approved stipulation, Ms. Blum refrained from presenting evidence at trial showing her good faith, and from cross-examining Mr. Dahl's witnesses regarding her motive in bringing the case. (R. 774:5–6, 8, 15–18, 80).

35. After the trial, Mr. Dahl motioned for an award of attorney's fees based upon Utah Code Ann. § 78-27-56 [Renumbered as § 78B-5-825]. "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..." Utah Code Ann. § 78B-5-825. (R. 775:58; R. 510).

36. Ms. Blum submitted an affidavit to the trial court regarding her good faith in pursuing the action. (R. 582, Exhibit A).

37. Mr. Dahl declined to submit any such memorandum or affidavit, nor did he request an evidentiary hearing, nor attempt to cross-examine Ms. Blum on the facts she submitted in her affidavit.

38. In the final judgment, the trial court found that the lawsuit of the non-prevailing party, Ms. Blum, was meritless, and therefore concluded that it had been filed in bad faith. (R. 758–759, ¶ 30; R. 750–751).

39. The trial court based its conclusion of bad faith on evidence presented at trial, despite the fact that, pursuant to the stipulation, the issue of bad faith and attorney's fees was to be decided by post-trial affidavits and memoranda. (R. 756–759, ¶¶ 18–31; R. 750–751; R. 774:5–6, 15–18).

40. This case was decided at the trial court level for Mr. Dahl. Ms. Blum appeals.

### **ARGUMENT SUMMARY**

The trial court erred in awarding attorney's fees against Ms. Blum. A court may award attorney's fees against the non-prevailing party only if the court finds separately that: (1) the non-prevailing parties case lacked merit; and (2) the non-prevailing party brought the action in bad faith. (Utah Code Ann. § 78B-5-825(1)).

First, both parties stipulated, and the trial court ordered, that the trial court would decide the issue of bad faith based on the parties' affidavits submitted after the trial was over. The parties specifically stipulated, and the trial court ordered, that the entirety of the issue of bad faith would be determined based on affidavits and memoranda presented to the court post-trial, so neither party was to raise the issue nor present evidence of bad

faith during the trial. (R. 774:5–6, 8, 15–18, 80; R. 775:58–61). Nor would the trial court consider testimony from the trial to determine the issue of bad faith. (R. 774:5–6, 15–18). After the trial, and pursuant to the court-approved stipulation, Ms. Blum submitted an affidavit describing her good faith in bringing the lawsuit. (R. 582–585, Exhibit A). After Ms. Blum filed her affidavit, 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. (R. 756–758). Doing so was legally improper and is reversible error under Utah law. *Lloyd v. Lloyd*, 2009 UT App 314, ¶¶ 7, 11, 221 P.3d 884 (citation omitted).

Second, there is no legally sufficient evidence in the record to support the trial court’s finding of bad faith. To find bad faith, there must be evidence that the non-prevailing party brought the suit lacking of an honest belief in the propriety of her actions, intending to take unconscionable advantage of others, or intending to or knowing that her actions would hinder, delay, or defraud another. E.g., *Chipman v. Miller*, 934 P.2d 1158, 1163 (Utah Ct.App.1997); *Still Standing Stable, LLC, v. Allen*, 2005 UT 46, ¶ 11, 122 P.3d 556. The record does not affirmatively establish that Ms. Blum was lacking at least one of the good faith factors because, pursuant to the court-approved stipulation, the only evidence permitted to be submitted and which was submitted regarding bad faith was Ms. Blum’s post-trial affidavit that described her good faith. Additionally, even if this Court disregards the trial court’s stipulation and considers the evidence in the record besides just Ms. Blum’s post-trial affidavit, the record still does not affirmatively establish that Ms. Blum was lacking at least one of the three good faith factors at the time of bringing the lawsuit. More specifically, even after marshaling all evidence that could

support the trial court's finding of bad faith, there is a fatal flaw in the evidence such that it is legally insufficient to support the trial court's finding of bad faith because the evidence instead supports a finding of lack of merit and credibility, or cannot properly be considered to find bad faith against Ms. Blum because such use is an abuse of discretion.

Therefore, this Court should reverse the trial court's award of attorney's fees against Ms. Blum because the trial court disregarded the stipulation by using trial testimony in determining that Ms. Blum brought her action in bad faith. Additionally, the record does not contain legally sufficient facts to support the trial court's finding of bad faith. More specifically, there is legally insufficient evidence to affirmatively establish that Ms. Blum lacked an honest belief in the propriety of her actions, intended to take unconscionable advantage of another, or intended or knew that she would be hindering, delaying, or defrauding another. *Chipman*, 934 P.2d at 1163.

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES TO DEFENDANT WHEN IT APPROVED A STIPULATION BY ORDER THAT THE ISSUE OF BAD FAITH WOULD BE DECIDED BY POST-TRIAL AFFIDAVITS, BUT THEN DISREGARDED ITS OWN ORDER AND USED TRIAL EVIDENCE IN DETERMINING THAT MS. BLUM BROUGHT THIS LAWSUIT IN BAD FAITH.**

A court is bound by a stipulation when it has approved the stipulation by order. *Lloyd v. Lloyd*, 2009 UT App 314, ¶ 7, 221 P.3d 884 (citing *First of Denver Mortgage Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521, 527 (Utah 1979)). Failure of the court to abide by a binding stipulation that it had approved by order is reversible error. *Lloyd*, 2009 UT App 314, ¶ 11. An appellate court reviews a trial court's legal conclusions, as in

whether the trial court followed the terms of a stipulation, for correctness. *Id.* at ¶ 6 (whether or not the trial court followed the terms of a stipulation is a question of law). See *Zions First Nat'l Bank, N.A. v. National Am. Title Ins. Co.*, 749 P.2d 651, 653 (Utah 1988) (questions of contract interpretation are matters of law); *Coalville City v. Lundgren*, 930 P.2d 1206, 1209 (Utah Ct. App. 1997) (stipulations are construed as contracts).

A trial court is bound by a stipulation that it approves by order, and failure of the trial court to abide by a binding stipulation that it had approved by order is reversible error. For example, in *Lloyd*, two parties stipulated that they would make an attempt, for a period of six months, to sell certain real property for no less than a specific price. 2009 UT App 314, ¶ 2. This stipulation was subsequently issued as an order accepting the stipulation. *Id.* at ¶ 3. Several months after the stipulated timeframe had expired, the plaintiffs moved to extend the period for an additional six months and to change other details of the stipulation, without the consent of the defendant. *Id.* at ¶¶ 4-5. The trial court entered an order in the plaintiff's favor, and the defendants appealed. *Id.* at ¶ 5. The appellate court reversed the trial court, *Id.* at ¶ 11, and ruled that, "[a]fter having approved a stipulation by an order, a court is bound by such stipulation," *Id.* at ¶ 7, and that the trial court had erred in disregarding the original stipulation. *Id.* at ¶¶ 7, 11; see also *First of Denver Mortgage Investors*, 600 P.2d at 527 (stating that, ordinarily, parties and the court are bound by stipulations agreed to between the parties).

In the present case, the parties agreed to a court-suggested stipulation, which the trial court subsequently ordered, that the court would determine the issue of bad faith and

attorney's fees based solely on the parties' post-trial memoranda and affidavits. (R. 774:15–18; R. 775:58–61). The stipulation was agreed upon and ordered because the trial court was initially concerned that addressing the issue of bad faith at trial could distract the jury “from the real issues” and confuse their minds. (R. 774:6, 16–17). In fact, the trial court did not want the issue even “on the table” because “just the power of suggestion” could lead the jury to punish Ms. Blum for her disputed position in bringing the lawsuit. (R. 774:17). Thus, the trial court concluded that it was best to leave the entirety of the issue of bad faith until the end of the trial, to be decided by affidavits. (R. 774:6, 16–17; R. 775:58–61). Both parties understood that evidence of bad faith was not permitted during trial, and that the trial court would leave the entirety of the issue of bad faith and attorney's fees until the end of the trial, to be decided by affidavits. (R. 774:6, 16–17); (R. 774:17) (opposing counsel describing the stipulation as “essentially a bifurcated trial”). However, following the trial, the trial court relied heavily upon testimony presented at trial, instead of relying solely on post-trial affidavits, which trial evidence he believed justified a finding that Ms. Blum brought the case in bad faith. (R. 756–759).

Therefore, this Court should reverse the award of attorney's fees because the trial court disregarded the stipulation by relying on trial testimony in holding that Ms. Blum brought this lawsuit in bad faith. Because this disregard for the court-approved stipulation, without more, is reversible error under Utah law, the trial court's award of attorney's fees should be reversed.

## II. ADDITIONALLY, THE RECORD DOES NOT CONTAIN LEGALLY SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF BAD FAITH.

Before a court may award attorney's fees, it must make separate findings that the non-prevailing party's case was without merit, and that the non-prevailing party brought the action in bad faith. (Utah Code Ann. § 78B-5-825). The court must either make specific findings of both lack of merit and bad faith, or must make specific findings that indicate it has separately found both lack of merit and bad faith. *Still Standing Stable, LLC, v. Allen*, 2005 UT 46, ¶¶ 7, 11-13, 122 P.3d 556; *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983); *Chipman v. Miller*, 934 P.2d 1158, 1161, 1163 (Utah Ct.App.1997); *In re Sonnenreich*, 2004 UT 3, ¶¶ 46, 51-52, 86 P.3d 712; *Valcarce v. Fitzgerald*, 961 P.2d 305, 315-316 (Utah 1998). Ms. Blum does not challenge the trial court's finding that the lawsuit lacked merit. However, Ms. Blum does challenge the trial court's finding that the lawsuit was brought in bad faith.

Whether "a claim was brought in 'bad faith' is a 'question of fact [that] [the court] review[s] . . . under a clearly erroneous standard.'" *Still Standing Stable, LLC*, 2005 UT 46, ¶ 8. When challenging a trial court's factual finding, the challenging party "must first marshal all record evidence that supports the challenged finding." Utah R. App. P. 24(a)(9). Marshaling requires that the challenging party "identify which particular findings are challenged as lacking adequate evidentiary support and then show the court why that is so. This can only logically be done by summarizing, or 'marshaling,' whatever evidence there is that *supports* each challenged finding." *Kimball v. Kimball*, 2009 UT App 233, ¶¶ 21, 56, fn. 5. "If there is no supportive evidence, counsel need only

say so and the challenge will be well-taken – counsel is not expected to marshal the nonexistent.” *Id.* “If there is some supportive evidence, once that evidence is marshaled it is the challenger’s burden to show the ‘fatal flaw’ in that supportive evidence and explain why the evidence is legally insufficient to support the finding.” *Id.* (citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)).

**A. THE RECORD CONTAINS NO SUPPORTIVE EVIDENCE THAT CAN BE MARSHALED TO SUPPORT THE TRIAL COURT’S FINDING OF BAD FAITH BECAUSE, PER THE COURT-APPROVED STIPULATION, THE ISSUE OF BAD FAITH IS TO BE DECIDED SOLELY BASED ON POST-TRIAL AFFIDAVITS.**

Since the court approved a stipulation that the issue of bad faith would be decided based solely on post-trial affidavits and memoranda, (R. 774:5–6, 15–18; R. 775:58–61), any evidence in any deposition or trial testimony that could be used to determine Ms. Blum’s subjective intent in bringing this lawsuit was prohibited from being considered for purposes of determining bad faith. Despite the stipulation, the trial court relied extensively on Ms. Blum’s trial testimony in finding bad faith. (R. 756–759, ¶¶ 18–31). In fact, each justification for the trial court’s conclusion came from trial, even though the stipulation it ordered prevented the presentation of evidence regarding the issue of bad faith at trial and prevented its consideration for the post-trial determination of bad faith. (R. 756–759, ¶¶ 18–31; R. 774:5–6, 15–18).

Removing the depositions and trial testimony from consideration in making a finding of bad faith, the facts in the trial record are legally insufficient to make a finding of bad faith. Pursuant to the court-approved stipulation, the only evidence in the record

that can be considered to make a determination of bad faith was Ms. Blum's post-trial affidavit, which described how she sued in good faith. (R. 582). Ms. Blum described how, during the course of the events, she sought legal advice to discover if she had a case against Mr. Dahl for his actions. (R. 583, ¶¶ 6–9, Exhibit A). The first attorney she spoke with advised her to find a civil attorney and file a case against Ms. Dahl. (R. 583, ¶ 6, Exhibit A). Furthermore, the civil attorney she hired advised her that her case had merit and that she should proceed with an action against Mr. Dahl. (R. 583, ¶ 9, Exhibit A). Based upon this advice, Ms. Blum sued Mr. Dahl for assault and battery based upon the shouting incident. (R. 583, ¶¶ 9–10, Exhibit A). Two years later, Ms. Blum's attorney sent her a letter from Mr. Dahl's attorney, offering to settle the case. (R. 583, ¶¶ 11–12, Exhibit A; R. 589, Exhibit 2). The settlement offer strengthened Ms. Blum's belief in her case. (R. 583, ¶ 13, Exhibit A). Subsequently, during a deposition, Mr. Dahl admitted that he was upset while speaking with Ms. Blum, and admitted that it was possible that he spit on her some time during their interaction. (R. 583, ¶ 14, Exhibit A). This again, strengthened Ms. Blum's belief in her case. (R. 583, ¶ 14, Exhibit A).

Mr. Dahl presented no affidavit. Although he could have requested a post-trial evidentiary hearing, or an opportunity to cross-examine Ms. Blum on the statements she submitted in her affidavit, he did not do so. In fact, the only evidence he submitted to the court was a memorandum in support of his motion for an award of attorney's fees in which he simply restated testimony produced in trial. (R. 510–520; R. 774:15–18). Therefore, per the court-approved stipulation, the record contains insufficient evidence to make a determination of bad faith because the only evidence in the record permitted to be

used for such determination is Ms. Blum's post-trial affidavit which described her good faith.

**B. EVEN IF THIS COURT DISREGARDS THE TRIAL COURT'S STIPULATION AND CONSIDERS THE EVIDENCE IN THE RECORD BESIDES JUST MS. BLUM'S POST-TRIAL AFFIDAVIT, THE RECORD STILL DOES NOT AFFIRMATIVELY ESTABLISH THAT MS. BLUM WAS LACKING AT LEAST ONE OF THE THREE GOOD FAITH FACTORS IN BRINGING THE LAWSUIT.**

Even after marshaling the entire record, the evidence from the record is legally insufficient to support a finding of bad faith. Bad faith turns on the subjective intent of the party, and to find bad faith, the party asserting the claim must prove that the opposing party (1) "lacked an honest belief in the propriety of the activities in question," (2) "intended to take unconscionable advantage of others," or (3) "intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others." *Valcarce*, 961 P.2d at 316; *Chipman*, 934 P.2d at 1162–1163; *Cady*, 671 P.2d at 151–152; *In re Sonnenreich*, 2004 UT 3, ¶ 49; *Still Standing Stables, LLC*, 2005 UT 46, ¶¶ 12, 16.

When examining bad faith, the prevailing American rule is that the inquiry should be limited to conduct relating to the litigation process itself. *See Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1318 (10<sup>th</sup> Cir. 2000) (reasoning "that Utah likely would agree with the weight of federal authority . . . that the court's inherent power to award attorney's fees for bad faith conduct is limited to instances of such bad faith relating to the litigation process itself"). Federal courts "usually require a finding of deliberate falsehood in the filing of claims before awarding attorneys' fees based on bad

faith conduct.” Jay E. Rosenblum, *The Appropriate Standard of Review for Finding Bad Faith*, 60 Geo. Wash. L. Rev. 1546, 1551 (1992) (citing *Sterling Energy, Ltd. v. Friendly Nat. Bank*, 744 F.3d 1433, 1435 (10<sup>th</sup> Cir. 1984)); *cf. Chipman*, 934 P.3d at 1163.

Coupled with this high evidentiary threshold is the notion that the statute “is narrowly drawn and not meant to be applied to all prevailing parties.” *Still Standing Stables, LLC*, 2005 UT 46, ¶ 9 (citations and internal quotations omitted). Indeed, “‘the reason for awarding attorney fees [based on bad faith] is to punish the wrongdoer, and not compensate the victim,’ and . . . fees should therefore be awarded only upon specific evidence of bad faith.” *Id.* at ¶ 16 (quoting Jay E. Rosenblum, *The Appropriate Standard of Review for Finding Bad Faith*, 60 Geo. Wash. L. Rev. 1546, 1551 (1992)) (alterations in original).

## 1. MARSHALING OF EVIDENCE THAT SUPPORTS A FINDING OF BAD FAITH.

Pursuant to Utah law, the record must be first marshaled to summarize all evidence that could support the trial court’s finding of bad faith, much of which was relied upon by the trial court in finding that Ms. Blum brought the lawsuit in bad faith.

First, there is some evidence in the record possibly bearing on Ms. Blum’s subjective belief in the merits of her lawsuit against Mr. Dahl. More specifically, regarding the incident between Ms. Blum and Mr. Dahl on October 10<sup>th</sup>, 2006 during which Mr. Dahl allegedly assaulted and battered Ms. Blum, the only two witnesses that directly observed the incident testified that they did not see Mr. Dahl act in an intimidating and threatening manner. (R. 774:94–95, 218–221, 228, 246–248). In fact,

one of the witnesses referred to Mr. Dahl as “surprisingly calm” during the incident. (R. 774:248). Although Ms. Blum’s lawsuit relies partially on the allegation that Mr. Dahl spat on her during the incident, Ms. Blum never confronted Mr. Dahl about spittle hitting her face. (R. 774:94–95, 134; R. 161, ¶ 11). In fact, following the incident, Ms. Blum sent a letter to the homeowner’s association regarding Mr. Dahl’s alleged assault and battery against her, but in the letter she never once alleged that Mr. Dahl intentionally spat on her during the incident. (R. 774:123; Evidence at p. 3<sup>1</sup>). Ms. Blum herself stated that she did not know whether Mr. Dahl intentionally spat on her or not. (R. 774:135). In Ms. Blum’s declaration, she never alleged that Mr. Dahl intentionally spit on her. (R. 582, ¶5, Exhibit A) Lastly, two weeks following the incident, Ms. Blum filed a police report with the police department regarding the incident, in which report she never alleged that Mr. Dahl intentionally spat on her. (R. 774:135–138; Evidence at pp. 8, 11).

Additionally, despite Ms. Blum’s allegation that she suffered extreme emotional distress and anxiety as a result of the incident with Mr. Dahl, she never sought care from any mental health specialist regarding the alleged assault and battery, and in fact did not seek treatment of any kind. (R. 774:143–144; R. 161–162, ¶¶ 11–12; R. 183, Exhibit A). Even though Ms. Blum described what she experienced as a result of the incident as “undue fear and terror,” she never once approached building security, who she knew was

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<sup>1</sup> As the documents in the Evidence folder were not numbered as part of the record but are part of the record, these documents are referred to in this brief as “Evidence” to indicate the location of the document, and is then followed by a page number to indicate the location of the document within the Evidence folder.

in the condominium building from time to time, and she did not notify the police of the incident that night. (R. 774:144–146; R. 183–185, Exhibit A).

Furthermore, despite the fact that Ms. Blum is seeking damages totaling \$200,000 for this alleged assault and battery against her, (R. 774:141–142), Ms. Blum was unable to give specific reasons why she was entitled to \$200,000 in damages except that she incurred costs putting up her condominium for sale and staging the condominium – costs incurred allegedly because she wanted to move out of the condominium because “the management company and the [homeowner’s association] were doing everything they could to harass us to the point where we would move from our condo”– and her daily increase in attorney fees. (R. 162, ¶ 12; R. 774:146–150; R. 187–189, Exhibit A).

Second, there is some evidence in the record that bears on Ms. Blum’s motives in bringing this lawsuit. More specifically, Ms. Blum iterated numerous times that she was being harassed and discriminated against by various persons including the homeowner’s association and condominium management company. (R. 543–545, Exhibit E; R. 774:98–99, 114–116, 118, 121–124; 775:25–29; R. 185–186, 190–192, Exhibit A; R. 276–279, ¶¶ 5–29, Exhibit A; R. 282–283, ¶¶ 13–25, Exhibit B; R. 311–314, ¶¶ 18, 24–34, 42).

Ms. Blum alleged that as a result of the incident between her and Mr. Dahl, she was the “target of extreme aggression, discrimination, hostility and false gossip throughout the building,” but could not point to any direct act from Mr. Dahl against her that supported this claim, but instead relied on the assertion that Mr. Dahl “has great influence in the building, because he was president” of the homeowner’s association at the time. (R. 185–186, Exhibit A). Ms. Blum also testified that she knew that Mr. Dahl

was up for reelection, and was going to run again to be on the board of the homeowner's association. (R. 774:127). She testified that she was concerned about Mr. Dahl's intention to run for reelection to the homeowner's association, but she clarified that this was not part of the reason she filed the lawsuit against Mr. Dahl. (R. 774:127, 130; R. 190, Exhibit A).

Following the incident, one of the witnesses in the case who viewed the incident, Mr. Falcone, advised Mr. Dahl to file a police report against Ms. Blum's daughter, Ms. Cleveland, regarding what he viewed to be an assault by Ms. Cleveland against Mr. Dahl that occurred during the same incident between Ms. Blum and Mr. Dahl. (R. 183, Exhibit A; R. 774:191). Mr. Dahl did in fact file a police report. (R. 774:191).

Two weeks after the incident, Ms. Blum filed a police report with the police department regarding the alleged assault and battery against her by Mr. Dahl. (R. 774:135, 138–139; Evidence at pp. 8, 11; R. 184, Exhibit A). The police report indicates that Ms. Blum “didn’t report [the alleged assault and battery] until now because she just learned that the suspect, meaning Mr. Dahl, filed a report against her and her daughter, Cleveland, and the suspect is attempting to evict Cleveland from the condominium complex.” (R. 774:139; Evidence at p. 8). Ms. Blum later reiterated that, despite her alleged untold fear from the alleged assault and battery, she did not file the police report regarding the attack until at least two weeks after the incident, when she learned of Mr. Dahl’s filed police report. (R. 774:146).

Additionally, before filing this lawsuit, Ms. Blum received a letter from the homeowner’s association’s attorney demanding that Ms. Blum evict her daughter, Ms.

Cleveland, because of a number of alleged rules violations. (R. 774:104–105). When Ms. Blum received the eviction demand, Mr. Dahl was the president of the homeowner’s association. (R. 774:107). Ms. Blum indicated that the eviction demand of course did not make her very happy. (R. 774:108). When asked whether Ms. Blum perceived that Mr. Dahl had some role in requesting the eviction demand, Ms. Blum responded that she believed that “Mr. Dahl had a very powerful position and that his influence permeated through the building.” (R. 774:108).

Furthermore, following the incident between Ms. Blum and Mr. Dahl, Ms. Blum composed a letter on February 3<sup>rd</sup>, 2007, complaining to the homeowner’s association regarding alleged discrimination and harassment. (R. 774:114; R. 543–545, Exhibit E). In the letter, Ms. Blum threatened the homeowner’s association with a lawsuit if the alleged discrimination and harassment did not stop. (R. 774:114; R. 543–545, Exhibit E; R. 190, Exhibit A). Ms. Blum indicated that even though she threatened the lawsuit against the homeowner’s association, it was not her intention to go through with it but she thought such a threat would “help the situation.” (R. 190, 192, Exhibit A). She also indicated that if the alleged harassment had stopped, or had she received an apology regarding the alleged assault and battery incident, she probably would not have filed this lawsuit. (R. 192, Exhibit A). The first allegation of discrimination that Ms. Blum addressed in her letter to the homeowner’s association was with regards to a Chihuahua dog that usually stayed at Ms. Blum’s condominium. (R. 774:114–116; R. 543, Exhibit E). Essentially, the homeowner’s association was forcing Ms. Blum and her daughter to remove the Chihuahua dog from the premises. (R. 774:118; R. 543, Exhibit E). Ms. Blum testified

that the dog was a service animal and that she would hold the homeowner's association liable for all injuries or complications which might result from the removal of the dog from the premises. (R. 774:114, 118; R. 543, Exhibit E). The second allegation of harassment is that Ms. Cleveland, Ms. Blum's daughter, was charged with public intoxication in conjunction with the October 10<sup>th</sup>, 2006 homeowner's association meeting and Ms. Blum felt that Mr. Dahl was singling out her daughter for public intoxication charges because wine was served generally at the homeowner's association meeting. (R. 774:121–122; R. 543, Exhibit E; R. 190, Exhibit A). Furthermore, Ms. Blum has been very clear that she is very protective of her daughter. (R. 774:133).

Moreover, Ms. Blum testified that after she sent the letter to the homeowner's association regarding alleged harassment and discrimination, she was still the target of such harassment and discrimination from the condominium building's management company, which took the form of numerous notices received by Ms. Blum regarding various alleged rule violations. (R. 774:123–124). This alleged harassment continued for a number of months before she decided to file a lawsuit against Mr. Dahl. (R. 774:124). When Ms. Blum realized that the management company would not stop sending notices regarding alleged rules violations, she thought that if she filed a lawsuit the alleged harassment would stop. (R. 774:124–125, 129, 152, 155–156).

Lastly, Ms. Blum testified that she filed the complaint in this case because she “just wanted [the homeowner's association and everyone involved with those who were allegedly persecuting her and her daughter] to leave us alone.” (R. 774:99). Ms. Blum

quickly reiterated her point, expressing that she “just wanted them to shut up and leave us alone and quit persecuting us.” (R. 774:99).

2. THERE IS A FATAL FLAW IN THE SUPPORTIVE EVIDENCE SUCH THAT THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE TRIAL COURT’S FINDING OF BAD FAITH.

Now that all supportive evidence in the record has been marshaled, the next step under Utah law is for the challenger to show that there is a “fatal flaw” in [the] supportive evidence and explain why the evidence is legally insufficient to support the [trial court’s] finding.” *Kimball*, 2009 UT App 233, ¶¶ 21, 56, fn. 5 (citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991)). “[T]he legal sufficiency of the evidence is determined under civil procedure rule 52(a), which provides: ‘Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.’” *Doelle v. Bradley*, 784 P.2d 1176, 1178 (Utah 1989) (quoting Utah R. Civ. P. 52(a)). “A trial court’s factual finding is deemed ‘clearly erroneous’ only if it is against the clear weight of the evidence.” *Doelle*, 784 P.2d at 1178 (citations omitted).

i. MUCH OF THE MARSHALED EVIDENCE SUPPORTS THE TRIAL COURT’S FINDING THAT MS. BLUM’S LAWSUIT LACKED MERIT, BUT THIS IS NOT SUFFICIENT TO SUPPORT A FINDING THAT MS. BLUM BROUGHT THIS LAWSUIT IN BAD FAITH.

First, regarding the supportive evidence that may possibly bear on Ms. Blum’s subjective belief in the merits of her lawsuit, all of that evidence regards whether or not

Ms. Blum's claim lacked merit, not whether or not she lacked an honest belief in her claim. More specifically, testimony regarding Mr. Dahl's manner during the incident; whether or not Mr. Dahl intentionally spit on Ms. Blum; Ms. Blum's lack of seeking treatment for her alleged suffering; and lack of ability to prove \$200,000 in damages, all support a finding that Ms. Blum's assault and battery claims lacked merit in that she could not prove the elements necessary to collect damages on her claims. (R. 774:94–95, 123, 134–138, 141–150, 218–221, 228, 246–248; R. 161–162, ¶¶ 11–12; R. 183–185, 187–189, Exhibit A; Evidence at pp. 3, 8, 11; R. 582, ¶ 5, Exhibit A). None of this evidence bears on whether Ms. Blum lacked an honest belief in her claim, brought this lawsuit to take unconscionable advantage of Mr. Dahl, or wanted to hinder, delay, or defraud Mr. Dahl.

Pursuant to Utah law, just because all of this evidence may support a finding that Ms. Blum's case lacked merit, that alone cannot support a finding of bad faith. More specifically, “the mere fact that an action is meritless does not necessarily mean that the action is also brought in bad faith.” *Still Standing Stable, LLC*, 2005 UT 46, ¶ 9 (citations and quotations omitted). “[T]he ‘bad faith’ determination must be made independently of the ‘without merit’ determination.” *Id.* at ¶ 12. Moreover, bad faith cannot be inferred because the party knew or should have known the claim was frivolous. *Cady*, 671 P.2d at 151–52; *Still Standing Stables, LLC*, 2005 UT 46, ¶¶ 12, 15. Thus, this evidence that supports a finding of lack of merit is legally insufficient to support a finding that Ms. Blum brought this lawsuit in bad faith.

The only evidence in the record regarding Ms. Blum's subjective belief in her claim was Ms. Blum's post-trial affidavit, which described how she sued in good faith. (R. 582, Exhibit A). Ms. Blum described how, during the course of the events, she sought legal advice to discover if she had a case against Mr. Dahl for his actions. (R. 583, ¶¶ 6–9, Exhibit A). The first attorney she spoke with advised her to find a civil attorney and file a case against Ms. Dahl. (R. 583, ¶ 6, Exhibit A). Furthermore, the civil attorney she hired advised her that her case had merit and that she should proceed with an action against Mr. Dahl. (R. 583, ¶ 9, Exhibit A). Based upon this advice, Ms. Blum sued Mr. Dahl for assault and battery based upon the shouting incident. (R. 583, ¶¶ 9–10, Exhibit A). Two years later, Ms. Blum's attorney sent her a letter from Mr. Dahl's attorney, offering to settle the case. (R. 583, ¶¶ 11–12, Exhibit A). The settlement offer strengthened Ms. Blum's belief in her case. (R. 583, ¶ 13, Exhibit A). Subsequently, during a deposition, Mr. Dahl admitted that he was upset while speaking with Ms. Blum, and admitted that it was possible that he spit on her some time during their interaction. (R. 583, ¶ 14, Exhibit A). This again, strengthened Ms. Blum's belief in her case. (R. 583, ¶ 14, Exhibit A).

ii. ALL OF THE EVIDENCE REGARDING MS. BLUM'S  
MOTIVES IN BRINGING THE LAWSUIT IS NOT  
LEGALLY SUFFICIENT TO SUPPORT A FINDING OF  
BAD FAITH.

Second, regarding the supportive evidence that bears on Ms. Blum's motives for bringing this lawsuit, Ms. Blum has indicated at many places in the record that part of the reason she brought the lawsuit was because she wanted to end the harassment and

discrimination that Ms. Blum and her daughter were allegedly experiencing at the hands of various persons including the homeowner's association and the management company. (R. 774:99, 104–105, 107–108, 114–116, 118, 121–125, 129, 135, 138–139, 146, 152, 155–156; Evidence at pp. 8, 11; R. 184–186, 190, 192, Exhibit A; R. 543–545, Exhibit E). The trial court used this evidence against Ms. Blum, essentially concluding that Ms. Blum sued the wrong person, Mr. Dahl, for the wrong reasons; in other words, that Ms. Blum sued Mr. Dahl for assault and battery when she should have sued the homeowner's association for claims regarding harassment and discrimination. (R. 758–759, ¶¶ 28–31).

However, this evidence cannot be properly relied on to establish that Ms. Blum brought this lawsuit in bad faith. When Ms. Blum's complaint was filed, it contained claims for damages under the heading for assault and battery for the "undue pressure and influence" that Mr. Dahl allegedly exerted against Ms. Blum and her daughter through his position in the homeowner's association. (R. 4, ¶¶ 24–25). Because the complaint did not properly plead the claims for the harassment and discrimination, the trial court properly dismissed those claims. (R. 248–249). This deficiency in the complaint was the result of poor pleading by Ms. Blum's original counsel in this matter, Mr. Brown. (R. 1). Once Ms. Blum retained current counsel, current counsel moved quickly to amend Ms. Blum's complaint to cure its deficiencies by filing a Notice of Appearance of Counsel while simultaneously filing a Motion to Postpone Trial and a Motion to Amend Complaint. (R. 252A, 255, 263). Each filing was a good faith attempt to cure Ms. Blum's complaint of Mr. Brown's deficient pleadings and thus to properly plead claims regarding the harassment and discrimination Ms. Blum allegedly suffered. Despite the late change

in counsel and Ms. Blum's good faith attempt to cure the deficiencies of her complaint, the trial court denied Ms. Blum's Motion to Postpone Trial and Ms. Blum's Motion to Amend Complaint. (R. 430).

As indicated above, Ms. Blum's uncontroverted testimony is that her motives in bringing this lawsuit were to protect herself and her daughter from Mr. Dahl's alleged exertions of undue pressure. The trial court dismissed the claims involving harassment and discrimination that support Ms. Blum's stated motives in bringing this lawsuit. If the trial court had allowed Ms. Blum to include such claims, based on Mr. Dahl's alleged exertion of influence over the condominium's organizations, her motives in bringing this lawsuit never would have been brought into question. Thus, the clear weight of the evidence shows that Ms. Blum's motives in bringing this lawsuit were proper. The absence of claims involving harassment and discrimination from this lawsuit suit is due entirely to the trial court's prior rulings. Ms. Blum did the best she could with the counsel that she had. It is improper to compensate the Defendant for Mr. Brown's poor pleadings.

iii. OTHER EVIDENCE RELIED ON BY THE TRIAL COURT IS LEGALLY INSUFFICIENT TO SUPPORT ITS FINDING OF BAD FAITH.

Third, the trial court relied on other evidence that in no way lends support to a finding of Ms. Blum's alleged bad faith in bringing this lawsuit. More specifically, the trial court relied on the fact that "Ms. Blum denied under oath that her daughter helped her in any way in writing the legal demand letter to the homeowner's 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.” (R. 756–757, ¶ 19; R. 774:114–118).

Additionally, the trial court relied on the fact that Ms. Blum “testified that she did not know what her daughter’s medical condition was that necessitated having a service animal with her at all times, despite the fact that (1) Ms. Blum is a nurse; and (2) Catherine was her daughter, with whom she is very close.” (R. 757, ¶ 20; R. 774:118–120). Furthermore, the trial court found that trial testimony showed that Ms. Blum acted aggressively against Mr. Dahl. (R. 758, ¶ 27).

The facts above relied on by the trial court are legally insufficient to support a finding of bad faith. More specifically, whether Ms. Blum received help from her legally trained daughter in writing a demand letter, whether Ms. Blum knew of her daughter’s medical condition that allegedly necessitated having a service dog, and whether Ms. Blum acted aggressively towards Mr. Dahl, each have absolutely no bearing on Ms. Blum’s honest belief in the propriety of her claim and her motivation in bringing a lawsuit. (R. 756–757, ¶¶ 19–20; R. 774:114–120; R. 758, ¶ 27). At most these facts can support only a finding regarding Ms. Blum’s credibility.

In summary, no evidence in the record is legally sufficient to establish that Ms. Blum lacked an honest belief in her claim, that Ms. Blum intended to take

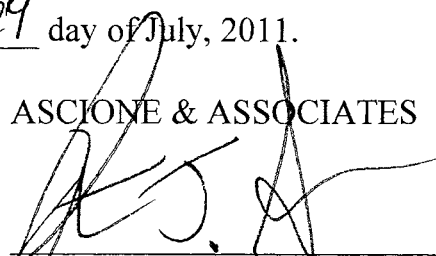
unconscionable advantage of Mr. Dahl, or intended or knew that her claim would hinder, delay, or defraud Mr. Dahl. It was therefore clear error for the trial court to find bad faith and a finding of bad faith is unsupportable by legally sufficient evidence.

### CONCLUSION

For the aforementioned reasons, Ms. Blum respectfully asks this court to overturn the award of attorney's fees against her by the lower court.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of July, 2011.

ASCIONE & ASSOCIATES



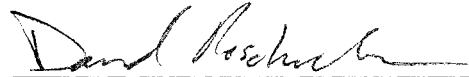
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PATRICK J. ASCIONE  
Attorney for Appellant

## MAILING CERTIFICATE

I hereby certify that on this 29<sup>th</sup> day of July, 2011, I caused a true and accurate copy of the foregoing **Brief of Appellant** to be served by First Class Mail postage pre-paid to Gregory N. Hoole, attorney for Defendant/Appellee, at the following address:

Gregory N. Hoole  
Hoole & King, L.C.  
4276 South Highland Drive  
Salt Lake City, Utah 84124

  
\_\_\_\_\_  
Legal assistant to Patrick J. Ascione

# Addendum

FILED DISTRICT COURT  
Third Judicial District

JAN - 3 2011

SALT LAKE COUNTY

By \_\_\_\_\_  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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LORI BLUM,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 070914252
vs.	:	
RAINER DAHL,	:	
Defendant.	:	

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The Court has considered again the Revised Proposed Judgment submitted by the defendant, the plaintiff's Objection to that document, and the defendant's Response to that Objection, and does hereby overrule the plaintiff's Objection.

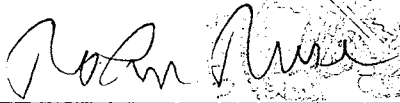
The plaintiff explicitly agreed that the issues of the plaintiff's purported bad faith in the bringing of this lawsuit, and the relative merit of the same, would not be presented to the jury. It was agreed by the plaintiff that to allow the jury to consider bad faith and merit might inappropriately influence them and have an unfair impact on their decision. Because the plaintiff agreed that the jury should not consider these issues, she cannot now complain about that decision.

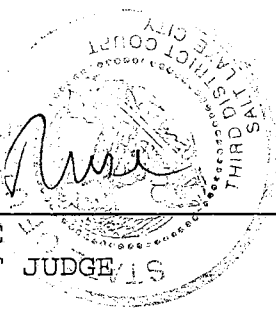
However, the fact that the jury was not presented with these issues for their decision does not mean the Court can<sup>1</sup> base a decision regarding the merit of the lawsuit and/or the bad faith in bringing it on testimony heard at trial. I reiterate those conclusions expressed in that Order,

dated November 19, 2010, that the plaintiff should have known that this lawsuit was frivolous, and the fact that she filed it anyway is certainly evidence of bad faith. That fact, coupled with the admission by the plaintiff at trial that she sued Mr. Dahl personally in order to bring about an end to unfair activity by the homeowners' association, warrants a conclusion that this suit was brought in bad faith and the defendant should be awarded his attorney's fees expended in defending it.

The fees requested by the defendant seem reasonable, and the Court has signed the revised Judgment.

Dated this 3 day of January, 2011.

  
\_\_\_\_\_  
ROBIN W. REESE  
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this \_\_\_\_\_ day of January, 2011:

Patrick J. Ascione  
Tyna-Minet Anderson  
Attorneys for Plaintiff  
4692 North 300 West, Suite 220  
Provo, Utah 84604

Gregory N. Hoole  
Attorney for Defendant  
4276 S. Highland Drive  
Salt Lake City, Utah 84124

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Telephone: 801-272-7556  
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[gregh@hooleking.com](mailto:gregh@hooleking.com)

Attorneys for Rainer Dahl

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

---

LORI BLUM,

Plaintiff,

vs.

RAINER DAHL,

Defendant.

**JUDGMENT**

Civil No. 070914252

Judge Reese

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A jury trial was held before the Court, commencing on October 21, 2010 and concluding on October 22, 2010. Plaintiff Lori Blum was represented by Patrick Ascione and Tyna-Minet Anderson. Defendant Rainer Dahl was represented by Gregory N. Hoole. A jury of eight persons was impaneled. The parties offered testimony and other evidence with respect to Ms. Blum's claims and Mr. Dahl's defenses. At the conclusion of Ms. Blum's case, the Court dismissed Ms. Blum's claim for battery based on Mr. Dahl's motion. At the conclusion of trial, the jury rendered a verdict dismissing Ms. Blum's remaining claim for assault. Following the conclusion of trial, the parties

submitted memoranda regarding Mr. Dahl's motion for attorney fees pursuant to Utah Code section 78B-5-825, and the Court subsequently entered an order on November 19, 2010 granting Mr. Dahl's motion.

In support of the Court's ruling on the motion for attorneys fees, the Court specifically finds as follow:

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."<sup>1</sup>
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.

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<sup>1</sup> Utah Code section 78-27-56 is the predecessor statute to 78B-5-825.  
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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 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 other claimed damages. *(dismissal of (RV))*

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,<sup>2</sup> 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 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

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<sup>2</sup> 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.

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.

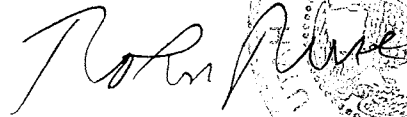
31. It would appear that Ms. Blum was unhappy with the way she and her daughter were treated by the homeowners' association, but for some reason decided to sue Mr. Dahl instead of the association.

Based upon the jury verdict, the evidence presented at trial, Mr. Dahl's motions for a directed verdict and for an award of attorney fees, the Court's prior orders concerning these motions, the findings and conclusions made herein, and the affidavits submitted to support an award of attorney fees, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Mr. Dahl is not liable to Ms. Blum for battery, and Ms. Blum's claim for battery is DISMISSED with prejudice.
2. Mr. Dahl is not liable to Ms. Blum for assault, and Ms. Blum's claim for assault is DISMISSED with prejudice.
3. Ms. Blum's claims for assault and battery were without merit.
4. Ms. Blum's claims for assault and battery were not brought in good faith.
5. Pursuant to Rule 54(d) of the Utah Rules of Civil Procedure and Utah Code section 78B-5-825, Mr. Dahl is entitled to the costs and reasonable attorney fees he incurred defending the claims on which he prevailed at trial in the amount of \$47,566.45.
6. This Judgment shall be augmented in the amount of the costs and reasonable attorney fees, if any, incurred in collecting this Judgment, as shall be established by affidavit.

DATED this 30 day of December, 2010.

BY THE COURT:



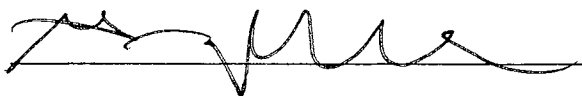
Hon. Robin W. Reese  
District Court Judge



### CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of December, 2010, a true and correct copy of the foregoing was served upon the following via email pursuant to stipulation at the email addresses listed below:

Patrick J. Ascione  
Tyna-Minet Anderson  
Ascione & Associates, LLC  
patrick@ana-law.com  
tanderson@ana-law.com

A handwritten signature in black ink, appearing to be "Patrick J. Ascione", written over a horizontal line.