

2011

Aiona Butters v. Nathan Gary Herbert : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

AIONA BUTTERS,

Petitioner and Appellee,

v.

NATHAN GARY HERBERT,

Respondent and Appellant.

Appellate No. 20110310

District Court Case No. 100402656

BRIEF OF APPELLANT NATHAN GARY HERBERT

Appeal from a civil stalking injunction granted after a hearing by the Honorable James R. Taylor, Fourth Judicial District Court, Utah County.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT..... 1

STATEMENT OF ISSUES AND STANDARD OF REVIEW 1

STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS..... 8

SUMMARY OF ARGUMENT 17

ARGUMENT 18

 I. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE COURT’S FINDINGS THAT MR. HERBERT ENGAGED IN A COURSE OF CONDUCT DIRECTED AT MS. BUTTERS. 18

 A. The first incident was not directed at Ms. Butters..... 19

 B. There is no independent evidence of the incidents at Gold’s Gym in December of 2004 or January of 2005, Smith’s in April of 2009, or the University Mall in July of 2009, or of Mr. Herbert’s alleged actions at Gold’s Gym on August 4, 2010. 20

 C. Ms. Butters’s testimony throughout the case was not sufficient to meet her burden of proof because it is internally inconsistent, in contradiction to the documents and other witnesses, and not reasonable. 22

 1. Ms. Butters's testimony is internally inconsistent..... 22

 2. Ms. Butters's testimony is contradicted by the documents and other witnesses.....23

 3. Ms. Butters's testimony is not reasonable.....24

 II. MR. HERBERT’S ACTIONS DID NOT CONSTITUTE A CRIMINAL STALKING OFFENSE UNDER 76-5-106.5(2) BECAUSE HIS CONDUCT WOULD NOT CAUSE A REASONABLE PERSON IN MS. BUTTERS’S CIRCUMSTANCES TO SUFFER EMOTIONAL DISTRESS..... 26

 A. The “outrageous and intolerable” standard articulated by Lopez is still the relevant standard to determine whether Mr. Herbert’s actions would have caused a reasonable person in Ms. Butters’s situation to suffer emotional distress. 27

 B. Mr. Herbert’s conduct did not rise to the intolerable and outrageous level necessary to violate the stalking statute, even when considered in the context of the parties’ previous encounters. 29

III. THE COURT SHOULD GRANT MR. HERBERT HIS ATTORNEY FEES INCURRED IN THE TRIAL COURT AND ON APPEAL.	34
CONCLUSION	35
APPELLANT'S ADDENDUM	A-1
Utah Code Annotated § 77-3a-101.	A-1
Utah Code Annotated § 76-5-106.5.	A-3
Exhibit A: Findings and conclusions of the trial court, R. at 285:143-152	A-7

TABLE OF AUTHORITIES

Cases

<i>Allen v. Anger</i> , 2011 UT App 19, 248 P.3d 1001	27, 28, 29, 30, 32
<i>Bennett v. Jones, Waldo, Holbrook & McDonough</i> , 2003 UT 9, 70 P.3d 17	30, 32
<i>Cabaness v. Thomas</i> , 2010 UT 23, 232 P.3d 486	31, 33
<i>Coombs v. Dietrich</i> , 2011 UT App 136, 253 P.3d 1121	34
<i>Ellison v. Stam</i> , 2006 UT App 150, ¶ 17, 136 P.3d 1242	1, 30, 32
<i>Hatch v. Davis</i> , 2006 UT 44, 147 P.3d 383	31, 33
<i>Ostermiller v. Ostermiller</i> , 2010 UT 43, 23 P.3d 489.....	18
<i>ProMax Dev. Corp. v. Mattson</i> , 943 P.2d 247, 255 (Utah Ct. App. 1997).....	1
<i>Retherford v. AT&T Communications</i> , 844 P.2d 949 (Utah 1992).....	33
<i>Russell v. Thomson Newspapers, Inc.</i> , 842 P.2d 896 (Utah 1992)	27, 29
<i>Salt Lake City v. Lopez</i> , 935 P.2d 1259 (Utah Ct. App. 1997)	1, 18, 27, 29
<i>State v. Parduhn</i> , 2011 UT 57, 692 Utah Adv. Rep. 40.....	28
<i>Utah DOT v. Ivers</i> , 2009 UT 56, 218 P.3d 583.....	2
<i>Wallce v. Van Pelt</i> , 969 S.W.2d 380 (Mo. Ct. App. 1998).....	29

Statutes

Utah Code Annotated 76-5-106.5	1, 2, 17, 18, 19, 26, 27, 28, 34
Utah Code Annotated 77-3a-101.....	1, 2, 18, 34, 35
Utah Code Annotated 78A-3-102	1

Other Authorities

National Ctr. for Victims of Crime, <i>The Model Stalking Code Revisited</i> (2007).....	28
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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this matter pursuant to sections 78A-3-102(3)(j) and (4) of the Utah Code Annotated (2009, as amended).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did Ms. Butters prove by a preponderance of the evidence that Mr. Herbert engaged in a course of conduct of two or more acts directed at or toward Ms. Butters as required by section 76-5-106.5 of the Utah Code Annotated? The standard of review for the trial court's findings of fact is one of clear error, and the appellate court will only reverse "where a finding is against the clear weight of the evidence, or if [it] otherwise reach[es] a firm conviction that a mistake has been made." *Ellison v. Stam*, 2006 UT App 150, ¶ 17, 136 P.3d 1242 (quoting *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1997)). This issue was preserved for review in the trial court at 285:115-134.

2. Under sections 77-3a-101(1) and 76-5-106.5 of the Utah Code Annotated and *Salt Lake City v. Lopez*, 935 P.2d 1259 (Utah Ct. App. 1997), were Mr. Herbert's actions outrageous and intolerable to cause a reasonable person to experience emotional distress when he circled Ms. Butters's car in his vehicle and on foot and stared at Ms. Butters at various locations on five occasions over five years when the incidents were separated by three months at the least and over four years at the most? "The proper interpretation and application of a statute is a question of law which [the appellate court] review[s] for correctness, affording no deference to the district court's legal conclusion[s]." *Ellison*, 2006 UT App 150 at ¶ 13. This issue was preserved for review in the trial court at 286:9.

However, even if the issue of whether Mr. Herbert's actions were outrageous and intolerable was not properly preserved in the trial court, Mr. Herbert asserts that this Court should review it because it would be plain error to grant a stalking injunction for conduct that is not outrageous and intolerable as required by *Lopez*. *Utah DOT v. Ivers*, 2009 UT 56, ¶ 29, 218 P.3d 583.

3. Pursuant to section 77-3a-101(16) of the Utah Code, should this Court grant Mr. Herbert his attorney fees incurred in the trial court and on appeal?

STATUTORY PROVISIONS

The statutes from the Utah Code Annotated that are of central importance to the appeal are sections 77-3a-101 and 76-5-106.5 (2008, as amended). The pertinent parts of the statutes are somewhat lengthy, so they are set forth in the addendum attached hereto.

STATEMENT OF THE CASE

Procedural History

Ms. Butters sought an ex parte civil stalking injunction against Mr. Herbert on August 5, 2010 (R. at 15), and it was granted on August 10, 2010 (R. at 17). Mr. Herbert requested a hearing (R. at 24), which was held on November 12 and 17, 2010 (R. at 284-285). After receiving testimony from multiple witnesses, the court found that Ms. Butters's testimony was generally credible and reasonable "with some discount for inaccurate measurements in time and distance and emotional reactions," while Mr. Herbert's testimony was not credible and not convincing. (R. at 285:144, 147-148.)

The court found that there were five incidents in which "Mr. Herbert approached, monitored, observed or confronted Mrs. Butters directly, specifically addressed at her,"

including incidents at the Riverwoods in December 2004, Gold's Gym in December of 2004 or January of 2005, Smith's in April of 2009, University Mall parking lot in July of 2009, and Gold's Gym on August 4, 2010. (R. at 285:150.) Based on those findings, the court concluded that Mr. Herbert knew or should have known that his conduct would cause a reasonable person in Ms. Butters's circumstances to suffer emotional distress and granted the stalking injunction. (R. at 285:150-51.)

Factual History

A. Ms. Akana and the Prior Stalking Injunction

Toward the end of 2004, Mr. Herbert went on several dates with Talei Weingarten Akana ("Ms. Akana"), the sister of Ms. Butters, while Ms. Akana was home from her LDS mission for some period of time for medical reasons. The first time Ms. Butters saw Mr. Herbert was at the Riverwoods mall in December of 2004 when Mr. Herbert approached Ms. Akana and spoke to her briefly. The next encounter Ms. Butters had with Mr. Herbert was in Gold's Gym in December of 2004 or January of 2005 when an unidentified third party allegedly told Ms. Butters that Mr. Herbert was watching her exercise and "touching himself," implying that Mr. Herbert was masturbating; however, Ms. Butters admitted that she was not aware of any such conduct taking place.

In July of 2005, Ms. Akana sought a stalking injunction against Mr. Herbert based on an allegation that he had choked her outside of the Smith Field House at Brigham Young University ("BYU"). While the ex parte civil stalking injunction was in place that restricted Mr. Herbert from going to BYU, Mr. Herbert attended an event at the Harris Fine Arts Center at BYU in August of 2005. Ms. Akana testified that Mr. Herbert ran

after her and those with her, but Robert Weingarten, Ms. Akana's and Ms. Butter's father testified that Mr. Herbert ran out of the building but that he did not approach Ms. Akana and the others with her. A permanent stalking injunction was entered on March 22, 2006 pursuant to a stipulation of the parties. The injunction restrained Mr. Herbert from contacting Ms. Butters.

B. Incidents during the Stalking Injunction

Ms. Butters testified that she saw Mr. Herbert at the Gold's Gym in Orem on 800 East several times while the injunction was in place. On direct examination, Ms. Butters explicitly testified that the times she saw Mr. Herbert at the gym while the injunction was in place, she never saw him staring at her or doing anything that made her uncomfortable. On cross examination, in response to a question about whether Mr. Herbert made any gestures, waved or approached her, Ms. Butters responded that Mr. Herbert stared at her when she saw him on those occasions. No other witnesses testified concerning these incidents.

C. The Smith's Incident

After the injunction expired in March 2009, Ms. Butters testified she next saw Mr. Herbert at the Smith's in Orem in April of 2009 when he sped toward her in his car and then circled her car multiple times as she stood in the store and watched. Ms. Butters testified that she called her sister, her father, and then the police at that time. On direct examination, Ms. Butters testified that she called the police while she was at Smith's but Mr. Herbert left before the police arrived. On cross examination, Ms. Butters stated that she called the police, that the police did not come to Smith's, that the police called her

later when she was already home, and that she was still crying and shaking at that point while giving the report over the phone. There was no police report of the incident, nor did Ms. Akana, Mr. Weingarten, or any other witness other than Mr. Herbert testify regarding this event.

D. The University Mall Incident

Ms. Butters testified that she next saw Mr. Herbert in July of 2009 when he approached her car in the parking lot of the University Mall and stood one to three feet away from her for 40-60 seconds before she looked up and noticed that it was him because she was talking to her husband Spencer Butters (“Mr. Butters”) on the phone. Ms. Butters testified that after she told her husband on the phone that Mr. Herbert was standing there staring at her, Mr. Herbert went and stood behind a pillar next to the entrance to watch her as she was putting her stroller away and driving away. Ms. Butters testified that she later called the University Mall security to report that Mr. Herbert was at the mall and should not be. Ms. Butters did not report Mr. Herbert’s actions in the parking lot, nor did she call the police. Again, there was no report of the incident, nor did Mr. Butters or any other witness other than Mr. Herbert testify regarding this event.

E. The Orem Library Incident

Ms. Butters testified that she next saw Mr. Herbert in January of 2010 at the Orem Library when he was standing either five feet or one to three feet behind her in line and then chased her out of the building after she dropped her book and sprinted out of the building. There was an Orem Police report of the incident in which Ms. Butters told the officer that Mr. Herbert was standing one foot behind her in line and that he followed her

out of the building. The report also noted that Ms. Butters told the officer she did not want him to contact Mr. Herbert and that she just wanted the incident documented. Again, no other witnesses other than Mr. Herbert testified regarding this event.

F. Gold's Gym Incident on August 4

The next time Ms. Butters saw Mr. Herbert was on August 4, 2010 at the Gold's Gym in Orem on 800 East at which time he was walking out of the front doors when she was arriving. Ms. Butters testified that she asked Mr. Herbert to leave her alone when she saw him, and he immediately circled her car 5-10 times after she walked in. Ms. Butters stated that Mr. Herbert reentered the gym, stood twenty feet from her, paced back and forth as he stared at her, and then stared at her from several different locations within the gym. Ms. Butters also testified that she was very upset and emotional at this time and that she talked to at least three different people while she stared back at Mr. Herbert. Only one witness other than Mr. Herbert testified regarding this event, Tyler Phillips ("Mr. Phillips"), and Mr. Phillips testified that the only behavior of Mr. Herbert's that he observed was when Mr. Herbert looked at Ms. Butters while he was on a weight bench and then an elliptical. After several minutes of Ms. Butters, Mr. Phillips, and others staring at Mr. Herbert and talking, Mr. Herbert left the gym. Ms. Butters then called the police department, who advised her to go in and fill out a request for a civil stalking injunction. None of the witnesses that testified regarding this event other than Ms. Butters saw Mr. Herbert circling Ms. Butters's car or pacing back and forth while staring at her.

G. Orem Police Department on August 4

Ms. Butters testified that after the Gold's Gym incident, she waited at the gym for some period of time and then went to the Orem Police Department. After she obtained the paperwork, Ms. Butters drove to the Fourth District Court in Provo to submit the paperwork and then went back to the Orem Police Department. When she returned to the police department, she was informed that Mr. Herbert was there and immediately became emotional. Ms. Butters never saw Mr. Herbert at the police station while she was there that day. Ms. Butters testified that she received the stalking injunction the following day on August 5. The record shows that the ex parte injunction was signed and filed on August 10, 2010.

H. Gold's Gym Incident on August 11

Ms. Butters testified that she waited at least a week to return to Gold's Gym and took the stalking injunction with her when she went to provide it to the staff. Ms. Butters testified that she arrived at 9:40, scanned her card, and began working out. She testified that she generally works out for an hour and arrives at about the same time every day. Ms. Butters specifically testified that she remembered going to the gym on August 11 and having her card scanned. When she was about to leave after her workout, an unidentified person or employee told Ms. Butters that Mr. Herbert was there and that he had been there the whole time she was working out. Ms. Butters testified that she immediately began crying when someone told her Mr. Herbert was there. Ms. Butters testified that she saw Mr. Herbert walk out of the management office and that Mr. Herbert did not look at her as he walked out of the gym, but that he turned around and stared at her after he

walked out. She also testified that she was staring back at him as he stared at her because she was “looking at the situation.”

Gold’s Gym records show that Ms. Butters’s card was not scanned at any time on August 11, which was the date confirmed by Jess Anderson, Josh Workman (“Trooper Workman”), and Nathan Herbert as the date that Mr. Herbert met with the Gold’s Gym management at the gym on 800 East in Orem. Trooper Workman testified Mr. Herbert arrived at the gym at 11:00 and that the meeting with Gold’s Gym management lasted approximately 45 to 60 minutes. Trooper Workman testified that he saw Ms. Butters as he was escorting Mr. Herbert out of the gym and that Ms. Butters was not crying at that time that he recalled.

STATEMENT OF FACTS

1. Ms. Akana and Mr. Herbert went on at least six dates in 2004. (R. at 284:19-20, 285:23-25).
2. Ms. Akana and Ms. Butters are sisters. (R. at 284:4.)
3. Mr. Herbert and Ms. Butters have never dated or had a conversation. (R. at 284:24-25.)
4. The last date that Ms. Akana and Mr. Herbert went on was to Temple Square in Salt Lake City in the latter part of 2004. (R. at 284:27-28.)
5. Sometime in December of 2004, Ms. Akana was in a store in the Riverwoods with her mother Meraia Weingarten, Ms. Butters and her husband, and Ms. Akana’s friend when Ms. Akana saw Mr. Herbert and hid in the back of the store with some of the

others until Mr. Herbert approached and asked if they were hiding from him. (R. at 284:28-30, 284:45.)

6. Ms. Butters saw Mr. Herbert for the first time when he came into the store in the Riverwoods, and Ms. Butters admitted that Mr. Herbert was not at the store in the Riverwoods to see or talk to her. (R. at 284:29, 45, 65.)

7. In approximately December of 2004 or January of 2005, Ms. Butters was exercising at Gold's Gym on 900 East in Provo when an unidentified female told Ms. Butters that someone was standing behind her "inappropriately touching himself." (R. at 284:46.)

8. Ms. Butters turned around and saw Mr. Herbert with his hand on his genitals, which he stopped as soon as he saw her. (R. at 284:48). Ms. Butters admitted that she simply saw Mr. Herbert's hands down toward his "crotch" and that she was not aware of any masturbation actually taking place. (R. at 284:65-66.) Ms. Butters also admitted that it was very possible that Mr. Herbert was simply making an adjustment or trying to get comfortable when she saw him with his hands by his genitals. (R. at 284:66.)

9. In July of 2005, Ms. Akana requested a civil stalking injunction against Mr. Herbert based on an allegation that Mr. Herbert choked her outside the Smith Field House at BYU. (R. at 284:8-10.)

10. Ms. Butters was not present at the alleged choking incident (R. at 284:22), but she was listed on the stipulation and the resulting civil stalking injunction between Ms. Akana and Mr. Herbert as an individual that Mr. Herbert was not to contact. (R. at 208: Ex. 1 and 2; 284:10, 49.)

11. Ms. Butters testified that she told Ms. Akana about the incident at the 900 East Gold's Gym prior to the time that Ms. Akana obtained her stalking injunction. (R. at 284:49.) Ms. Akana testified that Ms. Butters told her about the incident and that Ms. Butters was added to Ms. Akana's stalking injunction as a result of the incident at Gold's Gym. (R. at 284:26-27).

12. Ms. Butters testified that she also told her husband and her parents about the incident at the 900 East Gold's Gym. (R. at 284:49.) Ms. Butters's parents and her husband did not testify regarding the event. (R. at 284:31-44, 285:86-88.)

13. After the incident at the 900 East Gold's Gym and during the time Ms. Akana's stalking injunction was in place, the next time Ms. Butters saw Mr. Herbert was at Gold's Gym a couple of times, and she left the gym when she saw him. (R. at 284:49-50.) Regarding these encounters, Ms. Butters testified on direct examination that she never noticed Mr. Herbert staring at her or doing anything that made her uncomfortable (R. at 284:50), but on cross examination, she testified that Mr. Herbert stared at her. (R. at 284:67.)

14. The stalking injunction obtained by Ms. Akana expired on March 22, 2009. (R. at 284:49.)

15. The next time Ms. Butters encountered Mr. Herbert was at the Smith's grocery store in Orem in April of 2009 when she noticed a car coming toward her very fast and realized that it was Mr. Herbert. (R. at 284:51-52.) Ms. Butters testified that after she walked into Smith's, she watched Mr. Herbert circle her car in his car for "several minutes" and "at least five minutes." (R. 284:52, 73-74.)

16. Ms. Butters testified that she parked her car in the Smith's parking lot "[a]t the very, very, very end toward the road [where] it's just one row of cars and mine was at the very, very end of that particular parking stall and there was not a car parked right next to me but one on the other side of that." (R. at 284:72.) She further testified that her car was parked facing Center Street and that there were no other rows of parking between the row her car was parked on and Center Street. (R. at 284:73; 280: Ex. 4.) However, Ms. Butters later testified based on an aerial map of the Smith's parking lot (R. at 280: Ex. 9) that she was parked on the second row in from Center Street on a row with two rows of cars, although there was not a parking space directly in front of where her car was parked. (R. at 285:89.)

17. On direct examination, Ms. Butters testified that she called the police to report it after she called Ms. Akana and her father, but that Mr. Herbert left before the police got there. (R. at 284:53.) On cross examination, Ms. Butters testified that the police did not come to Smith's and that they called her and told her not to go directly home, but she was already home when they called. (R. at 284:76.) Ms. Butters testified that when she reported the incident over the phone when the police called her back, she was crying and shaking at that point, but that "it wasn't that dramatic." (R. at 284:76.)

18. Ms. Butters testified that, prior to requesting her civil stalking injunction, she went to the Orem Police Department, requested all of the reports that dealt with her and Mr. Herbert and attached all of them to her request for a civil stalking injunction. (R. at 284:67-68.) Ms. Butters's request for a civil stalking injunction contains three police reports, none of which document the incident at Smith's in April 2009. (R. at 1-11.) One

police report from August 2008 reports an incident from August 2008 in which Mr. Herbert allegedly followed Ms. Butters while they were both in vehicles, but Ms. Butters testified that she did not recall the incident. (R. at 1-3; 284:83.)

19. Neither Ms. Akana nor Mr. Weingarten testified regarding the incident at Smith's. (R. at 284:3-37.)

20. The next time Ms. Butters encountered Mr. Herbert was in the parking lot of the University Mall in July of 2009, at which time Mr. Herbert came and stood next to Ms. Butters as Ms. Butters was trying to get her stroller put together while talking to her husband on the phone. (R. at 284:54-55.) Ms. Butters testified on direct examination that Mr. Herbert stood one foot or one and a half feet away from her and then left when Ms. Butters told her husband on the phone that Mr. Herbert was staring at her, at which point Mr. Herbert went and stood behind a pillar at the entrance of the mall and continued to watch Ms. Butters as she got in her car and drove away. (R. at 284:55-56.)

21. On cross examination, Ms. Butters stated that Mr. Herbert stood one and a half to two or three feet away from her for forty to sixty seconds before she looked up to see who it was and told her husband that Mr. Herbert was staring at her. (R. at 284:78-81.) Ms. Butters testified that after she left, she called the University Mall security to alert them that Mr. Herbert was at the mall and was not allowed to be there. (R. at 284:82.) However, she did not report Mr. Herbert's conduct in the parking lot, nor did she call the police. (R. at 284:82-83.)

22. Mr. Butters did not testify regarding this incident. (R. at 285:86-88.)

23. Ms. Butters next saw Mr. Herbert at the Orem Library in January 2010. (R. at 284:57-58.) Ms. Butters testified on direct examination that she was standing in line when she turned around to see Mr. Herbert standing five feet behind her in line and dropped her book and ran to her car as Mr. Herbert chased her. (R. at 284:57-58.)

24. On cross examination, Ms. Butters testified that Mr. Herbert was three feet behind her in line and that she ran out to her car with Mr. Herbert in hot pursuit. (R. at 284:85-86.) When Ms. Butters reported the incident to the Orem Police, she reported that Mr. Herbert stood one foot behind her in line and that he followed her out. (R. at 6; 284:85.) The Orem Police report also states that Ms. Butters did not want the officer to make contact with Mr. Herbert and that she just wanted the incident to be documented. (R. at 6; 284:86.) Ms. Butters testified that she did not want the officer to make contact because she did not want to have to go near Mr. Herbert (R. at 284:86), but she also testified that she thought calling the police “would handle things” and did so “in the hopes that that would be resolved at this point.” (R. at 284:88.)

25. No other witnesses testified regarding the Orem Library incident (R. at 284, 285) other than Mr. Herbert denying that he ever chased Ms. Butters or anyone out of the library (R. at 285:42-43.)

26. The trial court specifically found that Ms. Butters had established only that she saw Mr. Herbert at the library and that he smiled at her, but not that Mr. Herbert chased her out to her car. (R. at 285:149.)

27. Ms. Butters next encountered Mr. Herbert on August 4, 2011 at the Gold’s Gym on 800 North in Orem. (R. at 284:58-59.) Ms. Butters was walking into the gym as Mr.

Herbert was walking out of the gym. (R. at 284:59.) Ms. Butters asked Mr. Herbert to please leave her alone, and then she watched from inside as Mr. Herbert circled her car “[a]t least five times.” (R. at 284:59.) Ms. Butters testified that Mr. Herbert reentered the gym, stood a distance from her while pacing and staring, then moved to different locations around the gym while he stared at her. (R. at 284:60-61, 92-98.)

28. Ms. Butters testified that she stood next to several different people during the incident (R. at 284:94-98) and stared back at Mr. Herbert “the whole time” (R. at 284:99) until Mr. Herbert left after several minutes of Ms. Butters and three or four other people standing in a group and looking at Mr. Herbert. (R. at 284:100-102).

29. The only other witness to testify regarding this incident other than Mr. Herbert was Tyler Phillips (“Mr. Phillips”), who testified that Ms. Butters was upset and that he saw Mr. Herbert “looking back over at” Ms. Butters from a weight bench and “looking at her” from an elliptical. (R. at 284:149-150.) Mr. Phillips testified that he did not see Mr. Herbert circling Ms. Butters’s car or pacing back and forth and staring at her. (R. at 284:149-150.)

30. Ms. Butters testified that she called the police after Mr. Herbert left and that they advised her to go to the police station and file for a civil stalking injunction. (R. at 284:61). Ms. Butters testified that at one point while she was at the police station, an employee told her that Mr. Herbert was there at the police station, but she never saw him because she waited in a back room until they escorted her out. (R. at 284:62-63).

31. After Ms. Butters obtained the ex parte stalking injunction, she returned to the gym a week later. (R. at 284:63.) Ms. Butters testified that she recalled going to the gym

on August 11, that she arrived around 10:00, and that she scanned her card prior to working out. (R. at 284:224-225.) Ms. Butters testified that she generally works out for an hour. (R. at 284:104.) When Ms. Butters was done with her workout, someone approached her and told her that Mr. Herbert was at the gym and that he had been there the entire time she had been working out. (R. at 284:64.) Ms. Butters testified that she then saw Mr. Herbert walk out of the manager's office, that he did not look at her while she was in the gym, and that he turned around and stared at her after her left the building. (R. at 284:64.)

32. Ms. Butters testified that she did not know why Mr. Herbert would have been meeting with the management and that he "could have a little bit of decency or respect to say, I'll just come back and meet with them later. I know that there's obviously an issue and you know, I would hope that—to me, it's just not normal." (R. at 284:109-110.)

33. Gold's Gym records show that Ms. Butters did not scan her card at any time on August 11. (R. at 208: Ex. 5.)

34. Trooper Workman accompanied Mr. Herbert to his meeting with the management of Gold's Gym on August 11. (R. at 284:214.) Trooper Workman testified that he arrived at the gym at about 10:15, that the meeting was scheduled for 11:00, and that Mr. Herbert arrived at 11:00. (R. at 284:214-215.) Trooper Workman also testified that the meeting took approximately 45 to 60 minutes, at which time Trooper Workman and Mr. Herbert proceeded directly out to Mr. Herbert's vehicle at the far west end of the parking lot and discussed the meeting for ten to fifteen minutes. (R. at 284:216-217.)

Trooper Workman did not see Mr. Herbert staring at anyone when they were leaving the gym or leering at anyone. (R. at 284:219.)

35. At some point after Ms. Butters saw Mr. Herbert, she or a bystander called the police, but she could not remember who it was. (R. at 284:105.) Ms. Butters testified that while she was waiting for the police to come, she stood at the doors of the gym “looking at the situation” as Mr. Herbert stared at her from his car. (R. at 284:106.) Ms. Butters testified that she was “instantly” crying when she learned that Mr. Herbert was at the gym and that she continued crying when she went out to speak to the police after they arrived. (R. at 284:108.)

36. Trooper Workman testified that Ms. Butters was crying when she came out to speak to the police officers that were talking to him after Mr. Herbert left. (R. at 284:218-219.) However, Trooper Workman testified that he did not recall seeing Ms. Butters crying when Mr. Herbert pointed her out to Trooper Workman as they exited the gym. (R. at 284:219.)

37. There was testimony from two Nordstrom loss prevention officers (R. at 284:155-173) and a University Mall security guard (R. at 284:174-184) regarding an incident in February 2004 in which Mr. Herbert was accused of masturbating for several seconds just outside of Nordstrom while staring at a female employee of Nordstrom and for which he was ultimately charged with and pled to disorderly conduct. (R. at 285:38, 68-69.) However, Ms. Butters never indicated in any of her testimony throughout the case that she had any knowledge of this incident. (R. at 284:44-112, 223-226; 285:89-102.)

38. The court found that Mr. Herbert knowingly and intentionally engaged in a course of conduct in which he “approached, monitored, observed or confronted Mrs. Butters directly, specifically addressed at her” based on “the confrontation at Riverwoods; the Gold’s Gym incident in 2004-2005; the Smith’s incident in April of ’09; the University Mall incident in July of ’09 and the Gold’s Gym incident in August 4, 2010.” (R. at 285:150.) The court also found that “given the history of [Mr. Herbert’s] problems at the Mall [in February of 2004] and the prior orders and confrontations with the family, I think the evidence reasonably establishes that...he knew or should have known the conduct would cause a reasonable person in her place an[d] in those circumstances to suffer emotional distress.” (R. at 285:150-51.)

39. The court allowed counsel for Ms. Butters to make an application for attorney fees since it was authorized by statute (R. at 285:151) and ultimately granted attorney fees and costs in favor of Ms. Butters in the amount of \$9,837.00. (R. at 286:16.)

SUMMARY OF ARGUMENT

There was no course of conduct by Mr. Herbert directed at Ms. Butters as required by section 76-5-106.5 of the Utah Code because the evidence supporting the court’s findings that there were five incidents in which Mr. Herbert approached, monitored, observed or confronted Ms. Butters directly was legally insufficient to support the findings. Ms. Butters admitted that the first incident identified by the court was not directed at her. The next three incidents were not corroborated by any evidence other than Ms. Butters’s own testimony, which was, in many instances throughout the case, internally inconsistent and contradicted by the exhibits and the testimony of other

witnesses, excluding the testimony of Mr. Herbert, whom the court found to not be credible or convincing. Similarly, Mr. Herbert's behavior that Ms. Butters found to be disturbing in the fifth incident identified by the court was not corroborated by any other witnesses. Therefore, the evidence supporting the court's findings that Mr. Herbert engaged in a course of conduct directed at Ms. Butters is legally insufficient, even when viewed in the light most favorable to the court's decision, *see Ostermiller v. Ostermiller*, 2010 UT 43, ¶ 20, 23 P.3d 489, and the findings are clearly erroneous.

However, even if all of the five incidents happened exactly as Ms. Butters described and even when viewed in light of the totality of the circumstances between Ms. Butters and her family and Mr. Herbert, Mr. Herbert's conduct would not cause a reasonable person in Ms. Butters's circumstances to suffer emotional distress under the relevant standard because it was not intolerable and outrageous as required by *Salt Lake City v. Lopez*, 935 P.2d 1259, 1264 (Utah Ct. App. 1997). Therefore, the conclusion that Mr. Herbert was guilty of stalking as defined by section 76-5-106.5(2) of the Utah Code was error and should be reversed by this court. Ms. Butters's stalking injunction should be dismissed, and Mr. Herbert should receive his attorney fees and costs incurred at the trial court and on appeal pursuant to section 77-3a-101(16) of the Utah Code.

ARGUMENT

I. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE COURT'S FINDINGS THAT MR. HERBERT ENGAGED IN A COURSE OF CONDUCT DIRECTED AT MS. BUTTERS.

In order to obtain a civil stalking injunction pursuant to section 77-3a-101 of the Utah Code, a petitioner must prove "by a preponderance of the evidence that stalking of

the petitioner by the respondent has occurred.” Utah Code Ann. § 77-3a-101(7) (2008 as amended). The statute provides, “As used in this chapter, ‘stalking’ means the crime of stalking as defined in Section 76-5.106.5....” *Id.* at (1). Section 76-5-106.5(1)(f) of the Utah Code defines stalking as “an offense as described in Subsection (2) or (3).” *Id.* at § 76-5-106.5(1)(f). Subsection (2) states, “A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person: (a) to fear for the person’s own safety or the safety of a third person; or (b) to suffer other emotional distress.” *Id.* at (2).

The court found that Mr. Herbert intentionally and knowingly engaged in a course of conduct directed at Ms. Butters in which he “approached, monitored, observed or confronted Mrs. Butters directly, specifically addressed at her” that consisted of “the confrontation at Riverwoods; the Gold’s Gym incident in 2004-2005; the Smith’s incident in April of ’09; the University Mall incident in July of ’09 and the Gold’s Gym incident in August 4, 2010.” (R. at 285:150.) The court made a finding “that Mr. Herbert’s testimony is not convincing, it was not credible and that Ms. Butters’ [sic] testimony with some discount for inaccurate measurements in time and distance and emotional reactions is more credible.” (R. at 285:147-48.)

A. The first incident was not directed at Ms. Butters.

The first incident identified by the court as part of the course of conduct was the incident at the Riverwoods in December 2004. (R. at 285:150.) Ms. Akana testified that Mr. Herbert saw Ms. Akana, Ms. Butters, their mother, Mr. Butters, and a friend of Ms.

Akana's at a store in the Riverwoods approximately one month after the last date that Ms. Akana and Mr. Herbert had. (R. at 284:28-29.) Ms. Akana stated that she, her friend, and Ms. Butters hid in the back of the store when they saw Mr. Herbert, and Mr. Herbert came back and talked to them. (R. at 284:29.) However, when asked if her sister was there at the time, Ms. Akana stated, "She was in the store." (R. at 284:29). When Ms. Butters was questioned about the incident, she was asked, "[Mr. Herbert] was not there [in the store] to talk to you or see you or do anything with you; is that right?" (R. at 284:65). She responded, "I'm sure not." (R. at 284:65). Based on Ms. Butters's own admission, Mr. Herbert's actions at the store in the Riverwoods in December 2004 were not directed at her. The court's finding that this incident was part of a course of conduct taken by Mr. Herbert directed at Ms. Butters is therefore not supported by the evidence.

B. There is no independent evidence of the incidents at Gold's Gym in December of 2004 or January of 2005, Smith's in April of 2009, or the University Mall in July of 2009, or of Mr. Herbert's alleged actions at Gold's Gym on August 4, 2010.

The remaining incidents identified by the court as comprising the course of conduct were the incidents at Gold's Gym in December of 2004 or January of 2005, Smith's in April of 2009, the University Mall in July of 2009, and Gold's Gym on August 4, 2010. (R. at 285:150.) Ms. Butters testified that after the incident at the Riverwoods, she next encountered Mr. Herbert at Gold's Gym in December of 2004 or January of 2005 (R. at 284:65) when an unidentified female told her that someone was standing behind Ms. Butters "inappropriately touching himself." (R. at 284:46.) Although Ms. Butters testified about this incident (R. at 284:46-49, 65-67) and Ms. Akana testified that

Ms. Butters told her about this incident prior to Ms. Akana obtaining her civil stalking injunction (R. at 284:26), neither Ms. Butters nor Ms. Akana ever filed a report regarding the incident. (R. at 284:30.) Additionally, Ms. Butters testified that she told her sister, her husband, and her parents about this incident. (R. at 284:49.) Neither Meraia Weingarten (R. at 284:38-44), Robert Weingarten (R. at 284:31-37), nor Mr. Butters (R. at 285:86-88) testified regarding this event.

Regarding the incident in the Smith's parking lot in Orem in April of 2009, Ms. Butters testified that she called Ms. Akana, her father Robert Weingarten, and the police. (R. at 284:75). Neither Ms. Akana (R. at 284:3-31) nor Robert Weingarten (R. at 284:31-37) testified regarding this incident. In addition, there was no police report of this incident (R. at 1-15), and Ms. Butters specifically testified that prior to filing her request for a civil stalking injunction in August of 2010, she requested all of the police reports dealing with her and Mr. Herbert from the Orem Police Department and attached them to her request for a stalking injunction. (R. at 284:67-71.) Similarly, Ms. Butters testified that she was on the phone with her husband Mr. Butters at the time of the incident in the University Mall parking lot in July 2009 and that she called the University Mall security. Mr. Butters did not testify regarding this incident (R. at 285:86-88), and there was no report submitted of this incident. (R. at 284:82-82.)

Regarding the incident at Gold's Gym on August 4, 2010, Ms. Butters testified that Mr. Herbert circled her car five to ten times, that he paced and stared at her for a minute when he reentered the gym, and that he stared at her from various locations in the gym. (R. at 284:59-61, 92-98.) However, Mr. Phillips, the only other witness to testify

regarding this incident other than Mr. Herbert, testified that Ms. Butters was upset and that he saw Mr. Herbert “looking back over at” Ms. Butters from a weight bench and “looking at her” from an elliptical. (R. at 284:149-150.) Mr. Phillips did not testify that Mr. Herbert was “staring at” Ms. Butters. Additionally, Mr. Phillips testified that he did not see Mr. Herbert circling Ms. Butters’s car or pacing back and forth and staring at her. (R. at 284:149-150.)

C. Ms. Butters’s testimony throughout the case was not sufficient to meet her burden of proof because it is internally inconsistent, in contradiction to the documents and other witnesses, and not reasonable.

In addition to being unsupported by other testimony or documents, Ms. Butters’s testimony throughout the hearing was not sufficient to meet her burden of proof because it is internally inconsistent, contradicted by the documents and testimony of other witnesses, and not reasonable.

1. Ms. Butters’s testimony is internally inconsistent

Ms. Butters did not meet her burden to prove by a preponderance of the evidence that Mr. Herbert engaged in a course of conduct directed at her because her testimony is internally inconsistent. Regarding the Smith’s incident in April 2009, Ms. Butters testified on direct that she called the police, but that Mr. Herbert left before the police arrived. (R. at 284:53.) However, on cross examination, Ms. Butters testified that the police did not come to Smith’s, but that they called her after she had left Smith’s and was already home. Similarly, Ms. Butters testified initially that she was parked on the “very, very, very end” row closest to Center Street that was only one row of cars (R. at 284:72),

but she later testified that she was actually on the second row in from Center Street that has two rows of cars although there was not a parking stall across from her car. (R. at 285:89.) On direct examination, Ms. Butters testified that she called her sister and the police (R. at 284:53), and on cross examination, she testified that she called her sister, her father, and the police. (R. at 284:75.)

Ms. Butters's testimony regarding the Orem Library incident is likewise inconsistent. On direct examination, she testified that Mr. Herbert was standing five feet behind her in line (R. at 284:57-58), while on cross examination she testified that he was three feet behind her (R. at 284:85-86), and in the police report, she told the officer he was one foot behind her (R. at 11). Even with a discount for an inability to gauge distances accurately, Ms. Butters should be able to state the same distance each time she is questioned about it. Similarly inconsistent is Ms. Butters's testimony that Mr. Herbert chased her out of the library when she saw him (R. at 284:57-58, 85-86) compared to her statement in the report that Mr. Herbert simply followed her out of the library. (R. at 11.)

2. Ms. Butters's testimony is contradicted by the documents and other witnesses

Additionally, Ms. Butters's testimony is contradicted by the documents and other witnesses. Ms. Butters testified that she reported the Smith's incident in April of 2009 and that she requested all reports from the Orem Police Department regarding her and Mr. Herbert prior to requesting the stalking injunction and attached them to her request. (R. at 284:67-68.) However, Ms. Butters's request for a civil stalking injunction contains three police reports, none of which document the incident at Smith's, and one regarding

an event that allegedly occurred in August of 2008 that Ms. Butters did not recall. (R. at 1-11; 284:83.) In Ms. Butters's report of the Orem Library incident, she told the officer that Mr. Herbert was one foot behind her in the line and that he followed her out. (R. at 11.) In contrast, she testified that he was five feet (R. at 284:57-58) or three feet (R. at 284:85-86) behind her in line and that he chased her out of the library with both of them sprinting. (R. at 285:102.)

Similarly, Ms. Butters's testimony regarding the parties' encounter at Gold's Gym on August 11 is contradicted by the record from Gold's Gym, which shows that Ms. Butters did not scan her card at any time on August 11. (R. at 208:Ex 5.) Her testimony that she was crying "instantly" when she learned that Mr. Herbert was in the gym (R. at 284:108) is also contradicted by the testimony of Trooper Workman, who testified that he did not recall seeing Ms. Butters crying as he and Mr. Herbert left the gym. (R. at 284:219.)

3. Ms. Butters's testimony is not reasonable

Ms. Butters's testimony is also not reasonable based on a person who was allegedly experiencing emotional distress because of her encounters with Mr. Herbert. Ms. Butters testified regarding the Smith's incident in April 2009 that she was still crying and shaking when the police called her back, but that they did not have to tell her calm down because "it wasn't that dramatic." (R. at 284:76.) She also testified that she did not look up to see who the person was standing one foot to three feet away from her in the University Mall parking lot for forty to sixty seconds as she was trying to set up her stroller and on the phone with her husband only three months after her last encounter

with Mr. Herbert. (R. at 284:78-81.) Failing to look up to see what someone is doing when they are standing no more than three feet away for forty to sixty seconds is not reasonable behavior. Furthermore, Ms. Butters testified that when she called to report the incident to the University Mall security, she did not report Mr. Herbert's conduct in the parking lot; rather, she simply told them Mr. Herbert was at the mall and she thought he was not allowed to be there. (R. at 284:82.) Again, this is not reasonable behavior if Mr. Herbert's conduct caused Ms. Butters to experience emotional distress.

Regarding the Orem Library incident, the police report of the incident states that Ms. Butters did not want the officer to make contact with Mr. Herbert and that she just wanted the incident to be documented. (R. at 6.) However, Ms. Butters testified that she thought calling the police "would handle things" and that she did so "in the hopes that that would be resolved at this point." (R. at 284:88.) In light of Ms. Butters's testimony that Mr. Herbert chased her out of the library (R. at 284:57-58) and that she was scared, experienced overwhelming fear, and thought that Mr. Herbert could possibly kill her (R. at 284:88), it is not reasonable that she would then tell the officer to not contact such a person. Moreover, regarding the Gold's Gym encounters in August of 2010, Ms. Butters testified that she stared back at Mr. Herbert the entire time he was in the gym on August 4 (R. at 284:99) and that she stood in the doorway "looking at the situation" after Mr. Herbert had left the building on August 11 and was allegedly standing in the parking lot staring back at her. Again, staring back at someone for several minutes at a time is not reasonable behavior when the person initiating the staring allegedly causes one to experience emotional distress to the point of crying and shaking.

Because Ms. Butters's testimony of the Mr. Herbert's actions was internally inconsistent, contradicted by the documents and other testimony, not reasonable, and not supported by any independent evidence, Ms. Butters did not meet her burden to prove by a preponderance of the evidence that Mr. Herbert engaged in a course of conduct directed at her. The evidence supporting the court's findings that Mr. Herbert engaged in a course of conduct directed at Ms. Butters is therefore legally insufficient, and the findings should be reversed.

II. MR. HERBERT'S ACTIONS DID NOT CONSTITUTE A CRIMINAL STALKING OFFENSE UNDER 76-5-106.5(2) BECAUSE HIS CONDUCT WOULD NOT CAUSE A REASONABLE PERSON IN MS. BUTTERS'S CIRCUMSTANCES TO SUFFER EMOTIONAL DISTRESS.

Subsection (2) of section 76-5-106.5 of the Utah Code states, "A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person: (a) to fear for the person's own safety or the safety of a third person; or (b) to suffer other emotional distress." Utah Code Ann. § 76-5-106.5(2) (2008 as amended). "Reasonable person" is defined as a "a reasonable person in the victim's circumstances." *Id.* at (1)(e). "Emotional distress" is defined as "significant mental or psychological suffering, whether or not medical or other professional treatment or counseling is required." *Id.* at (1)(d). The court specifically based the issuance of the stalking injunction on the finding that a reasonable person in Ms. Butters's circumstances would have experienced emotional distress. (R. at 285:151.)

In *Allen v. Anger*, 2011 UT App 19, ¶ 16 n.4, 248 P.3d 1001, this Court noted that the 2008 amendment to the stalking statute (“the 2008 stalking statute”) added the definition for emotional distress as set forth in section 76-5-106.5(1)(d); whereas, the prior version of the statute as amended in 2003 (“the 2003 stalking statute”) did not define emotional distress. The case law “interpreted the emotional distress element of the 2003 stalking statute to be synonymous with the level of emotional distress necessary to establish the tort of intentional infliction of emotional distress (IIED).” *Id.* at ¶ 16 (citing *Lopez*, 935 P.2d at 1264). This Court then noted, “Whether this definition is intended to overrule the outrageousness requirement imposed by *Salt Lake City v. Lopez*, 935 P.2d 125 (Utah Ct. App. 1997), and whether it would be effective in doing so, are questions beyond the scope of today’s decision.” *Id.* at ¶ 16 n.4. Mr. Herbert asserts that the intolerable and outrageous standard from *Lopez* is still the relevant standard and that his conduct as described by Ms. Butters could not have caused the requisite emotional distress because it was not “outrageous and intolerable in that it offends the generally accepted standards of decency and morality.” *Lopez*, 935 P.2d at 1264 (quoting *Russell v. Thomson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992)).

A. The “outrageous and intolerable” standard articulated by Lopez is still the relevant standard to determine whether Mr. Herbert’s actions would have caused a reasonable person in Ms. Butters’s situation to suffer emotional distress.

Mr. Herbert argues that the “outrageous and intolerable” standard imposed by *Lopez* is still the relevant standard notwithstanding the inclusion of the definition for emotional distress in the 2008 stalking statute. Nothing in the plain language of the

definition of “emotional distress” conflicts with this Court’s holding in *Lopez*. See *State v. Parduhn*, 2011 UT 57, ¶¶ 20-22, 692 Utah Adv. Rep. 40 (concluding that amendments to act did not overrule or supersede holding in prior case). The plain language of the definition requiring “*significant* mental or psychological suffering...” U.C.A. § 76-5-106.5(1)(d) echoes the requirement set forth in *Lopez* and articulated by this Court in *Allen* that “the degree of emotional distress that will support a stalking offense must be much greater than mere ‘anxiety or annoyance.’” *Allen*, 2011 UT App 19 at ¶ 16 (citing *Lopez*, 935 P.2d at 1264). It seems that the only practical difference the definition makes is to clarify that the victim is not required to seek medical treatment, other professional treatment, or counseling in order for the significant mental or psychological suffering to qualify as emotional distress.

Furthermore, in *Allen*, this Court noted that the amendments that resulted in the 2008 stalking statute were based on the recommendations of the 2007 model anti-stalking code (“the 2007 Model Code”) and also noted that “the model code commentaries may provide useful guidance in interpreting Utah’s statutes based on the model codes.” 2011 UT App 19 at ¶ 14 n.3 (citations omitted). In the commentary to the definition of “emotional distress” in the 2007 Model Code, the Model Stalking Code Advisory Board stated, “Relevant case law supports the use of this definition,” and then cited to a Missouri case in which the court compared and adopted the definition of emotional distress as set forth in tort claims for IIED. See National Ctr. for Victims of Crime, *The Model Stalking Code Revisited*, 49 (2007), at <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=45930> (citing *Wallace v. Van*

Pelt, 969 S.W.2d 380, 386 (Mo. Ct. App. 1998)). Therefore, the intent of the 2007 Model Code was not to abrogate existing case law establishing a correlation between the definition of emotional distress in stalking cases with that of IIED tort cases.

Because the plain language of the definition does not conflict with this Court's holding in *Lopez* and the commentaries to the 2007 Model Code specifically cited a case adopting the definition of emotional distress from IIED, this Court should conclude that the addition of the definition of emotional distress in the 2008 stalking statute did not intend to abrogate the outrageous and intolerable standard articulated in *Lopez*. Therefore, *Lopez* remains the relevant standard to determine whether Mr. Herbert's actions would have caused a reasonable person in Ms. Butters's circumstances to suffer emotional distress.

B. Mr. Herbert's conduct did not rise to the intolerable and outrageous level necessary to violate the stalking statute, even when considered in the context of the parties' previous encounters.

In *Lopez*, this Court held that the emotional distress required by section 76-5-106.5(2) of the Utah Code "results from conduct that is 'outrageous and intolerable in that it offends the generally accepted standards of decency and morality.'" 935 P.2d at 1264 (quoting *Russell*, 842 P.2d at 905 (Utah 1992)). This Court also stated, "Additionally, the emotional distress element is not satisfied by causing mere anxiety or annoyance." *Id.* Similarly, in *Allen*, this Court quoted the Utah Supreme Court's explanation of outrageous and intolerable conduct in the context of IIED:

To be considered outrageous, the conduct must evoke outrage or revulsion; it must be more than unreasonable, unkind, or unfair. Conduct is not necessarily outrageous merely because it is tortious, injurious, or malicious, or because it

would give rise to punitive damages, or because it is illegal. The liability for IIED clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

2011 UT App 19 at ¶ 16 (quoting *Bennett v. Jones, Waldo, Holbrook & McDonough*, 2003 UT 9, ¶ 64, 70 P.3d 17). Furthermore, this Court concluded in *Allen* that even if the respondent's behavior in one incident was outrageous under *Lopez*, there had to be at least one more incident of outrageous behavior to violate the stalking statute. *Id.* at ¶ 22. This Court concluded in *Allen* that none of the respondent's subsequent actions "rise to the severe and outrageous level necessary to violate the 2003 stalking statute, even when considered in the context of [the respondent's] prior behavior." *Id.* (citing *Ellison*, 2006 UT App 150 at ¶¶ 25-33).

In this case, Mr. Herbert's actions that were directed toward Ms. Butters or of which she was aware consist of (1) Mr. Herbert speaking to Ms. Butters's sister in a store in the Riverwoods mall in December of 2004; (2) Mr. Herbert with his hand in the area of his genitals for a very short time while at the gym in an action that admittedly was not masturbation and could very possibly have been Mr. Herbert adjusting while he was working out in December of 2004 or January of 2005; (3) Mr. Herbert allegedly choking Ms. Butters's sister in July of 2005 when Ms. Butters was not present; (4) Mr. Herbert circling Ms. Butters's car in his car for several minutes while she was inside a Smith's store in April of 2009, over four years after their last encounter; (5) Mr. Herbert staring at Ms. Butters from one to three feet away for forty to sixty seconds and then from a distance at the University Mall in July of 2009, approximately three months later; and (6)

Mr. Herbert circling Ms. Butters's car on foot five to ten times and then pacing and staring at her for one minute over one year later in August of 2010.

Mr. Herbert's actions were not outrageous and intolerable in any of these incidents, even when considered in light of his prior behavior. There was some insinuation at the hearing that Ms. Butters was alarmed by Mr. Herbert's conduct in Gold's Gym in December 2004 or January 2005 because of the allegation in February of 2004 that he masturbated for several seconds in the mall while watching a Nordstrom employee; however, there was no testimony or other evidence presented that Ms. Butters even knew of the February 2004 incident, so that should not have been considered by the court in concluding that Mr. Herbert's conduct would have caused a reasonable person in Ms. Butters's circumstances to suffer emotional distress.

The remaining conduct consists of Mr. Herbert talking to Ms. Butters's sister, allegedly choking Ms. Butters's sister, circling Ms. Butters's car on two separate occasions, and staring at Ms. Butters. While Mr. Herbert disputes that he ever choked Ms. Akana, Ms. Butters's sister, he concedes that such conduct would be considered outrageous and intolerable. However, the Utah Supreme Court has stated that in the context of an IIED claim, extreme and outrageous conduct that occurs outside of the presence of a plaintiff "may not contribute to a claim of intentional infliction of emotional distress except under particularly compelling circumstances," part of which is establishing that "the conduct was undertaken in whole or in part, with the intention of inflicting injury to the absent plaintiff." *Cabaness v. Thomas*, 2010 UT 23, ¶ 30, 232 P.3d 486 (quoting *Hatch v. Davis*, 2006 UT 44, ¶ 26, 147 P.3d 383). Mr. Herbert asserts

that this test applies in the application of the *Lopez* standard for emotional distress as well as IIED cases. Moreover, the remaining conduct that was alleged by Ms. Butters—circling Ms. Butters’s car and staring at her—cannot be considered outrageous and intolerable even if the alleged choking incident is considered. *See Allen*, 2011 UT App 19 at ¶ 22 (citation omitted). The Supreme Court noted in *Bennett* that liability for IIED does not result from “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” 2003 UT 9 at ¶ 64. Mr. Herbert’s alleged conduct of circling Ms. Butters’s car can, at most, be considered threats, annoyances, or otherwise trivial behavior.

Similarly, Mr. Herbert’s alleged actions of staring at Ms. Butters on two or three separate occasions is not conduct that is outrageous and intolerable. Ms. Butters conceded as much when she stated that Mr. Herbert’s actions of being at the gym when she was there were not normal and showed a lack of decency and respect. Ms. Butters’s own language echoes the language of *Bennett* of “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Id.* It is also similar to this Court’s review of the trial court’s decision in *Ellison*, when it stated, “While it may be simply ‘ungentlemanly’ for a man to glare at a woman and place himself in close physical proximity to her when he has no prior history with her, to do the same after making her the ‘victim of a vicious sexual assault’ may indeed be outrageous under generally accepted standards of decency and morality.” 2006 UT App 150 at ¶ 33.

Mr. Herbert’s only prior history with Ms. Butters was incidental to his relationship with Ms. Akana. Ms. Akana testified that she was not aware of Ms. Butters and Mr.

Herbert ever having a conversation. (R. at 284:25.) While Ms. Butters was aware of the history between Ms. Akana and Mr. Herbert, as noted above, extreme and outrageous conduct that occurs outside of the presence of a plaintiff “may not contribute to a claim of intentional infliction of emotional distress except under particularly compelling circumstances,” part of which is establishing that “the conduct was undertaken in whole or in part, with the intention of inflicting injury to the absent plaintiff.” *Cabaness*, 2010 UT 23 at ¶ 30 (quoting *Hatch*, 2006 UT 44 at ¶ 26). There is no evidence that Mr. Herbert’s alleged conduct toward Ms. Akana was undertaken in whole or in part with the intention of inflicting injury to the absent Ms. Butters. Therefore, rather than being outrageous and intolerable, any conduct on Mr. Herbert’s part was, at the most, ungentlemanly or rude based on the lack of prior history between Ms. Butters and Mr. Herbert.

Furthermore, in *Retherford v. AT&T Communications*, 844 P.2d 949, 978 (Utah 1992), the Utah Supreme Court agreed with the defendants in a claim for IIED that “[c]ertainly, . . . merely following or making faces at someone, without more, does not constitute conduct of such objective offensiveness that it can give rise to a claim of intentional infliction of emotional distress.” However, the court found that the plaintiff had stated a claim for IIED because she alleged her co-workers persecuted her for months by following her at work, intimidated her with threatening looks and behavior, and made her work much more stressful in retaliation for her reporting sexual harassment. *Id.*

Here, Mr. Herbert’s alleged conduct was even less objectively offensive than the conduct identified by the Supreme Court as conduct that is “certainly” not objectively

offensive of following someone and making faces at them. In contrast to the defendants' conduct in *Retherford*, Mr. Herbert's alleged conduct consisted of being in the same location as Ms. Butters and staring at her, not even making threatening faces or other gestures at her. Moreover, the conduct complained of by Ms. Butters was separated by several months at the least and several years at the most. The lapse of several months or years between the occurrences of the various incidents should be considered by the court in determining whether Mr. Herbert's conduct was outrageous and intolerable such that it would cause significant mental or psychological suffering in a reasonable person in Ms. Butters's circumstances. *See Coombs v. Dietrich*, 2011 UT App 136, ¶ 15, 253 P.3d 1121 (stating that lapse of time between incidents should be considered as part of context in which reasonable likelihood of fear is considered).

Even when viewed in light of all of Mr. Herbert's prior conduct, his conduct of circling Ms. Butters's car and staring or looking at Ms. Butters on various occasions separated by the lapse of months or years is not outrageous and intolerable in that it offends the generally accepted standards of decency and morality as required by *Lopez*. Mr. Herbert's conduct was therefore not in violation of section 76-5-106.5(2) of the Utah Code, and the trial court's decision should be reversed and the stalking injunction dismissed.

III. THE COURT SHOULD GRANT MR. HERBERT HIS ATTORNEY FEES INCURRED IN THE TRIAL COURT AND ON APPEAL.

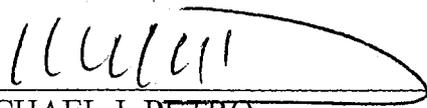
Section 77-3a-101(16) of the Utah Code provides that the court "may enter an order requiring any party to pay the costs of the action, including reasonable attorney

fees.” Pursuant to this section, the trial court granted attorney fees and costs in favor of Ms. Butters in the amount of \$9,837.00. (R. at 285:151; 286:16.) Mr. Herbert requests that if this Court reverses the decision of the trial court and dismisses Ms. Butters’s stalking injunction, it grant Mr. Herbert his attorney fees incurred at trial and on appeal pursuant to section 77-3a-101(16) of the Utah Code.

CONCLUSION

For the foregoing reasons, Ms. Butters’s stalking injunction should be dismissed, and Mr. Herbert should be granted his attorney fees incurred in the trial court and on appeal.

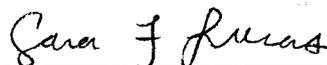
DATED this 28th day of November, 2011.


MICHAEL J. PETRO
SARA F. LUCAS
Attorneys for Appellant

CERTIFICATE OF SERVICE

Pursuant to rule 21(d) of the Utah Rules of Appellate Procedure, I hereby certify that on this 28th day of November, 2011, I caused a copy of the foregoing document to be delivered via first class mail, postage prepaid to:

Stephen Quesenberry
Jessica Griffin Anderson
Hill, Johnson & Schmutz
RiverView Plaza, Suite 300
4844 North 300 West
Provo, Utah 84604-5663


SARA F. LUCAS

APPELLANT'S ADDENDUM

Utah Code Annotated § 77-3a-101. Civil stalking injunction -- Petition -- Ex parte injunction.

(1) As used in this chapter, "stalking" means the crime of stalking as defined in Section 76-5-106.5. Stalking injunctions may not be obtained against law enforcement officers, governmental investigators, or licensed private investigators, acting in their official capacity.

(2) Any person who believes that he or she is the victim of stalking may file a verified written petition for a civil stalking injunction against the alleged stalker with the district court in the district in which the petitioner or respondent resides or in which any of the events occurred. A minor with his or her parent or guardian may file a petition on his or her own behalf, or a parent, guardian, or custodian may file a petition on the minor's behalf.

(3) The Administrative Office of the Courts shall develop and adopt uniform forms for petitions, ex parte civil stalking injunctions, civil stalking injunctions, service and any other necessary forms in accordance with the provisions of this chapter on or before July 1, 2001. The office shall provide the forms to the clerk of each district court.

(a) All petitions, injunctions, ex parte injunctions, and any other necessary forms shall be issued in the form adopted by the Administrative Office of the Courts.

(b) The offices of the court clerk shall provide the forms to persons seeking to proceed under this chapter.

(4) The petition for a civil stalking injunction shall include:

(a) the name of the petitioner; however, the petitioner's address shall be disclosed to the court for purposes of service, but, on request of the petitioner, the address may not be listed on the petition, and shall be protected and maintained in a separate document or automated database, not subject to release, disclosure, or any form of public access except as ordered by the court for good cause shown;

(b) the name and address, if known, of the respondent;

(c) specific events and dates of the actions constituting the alleged stalking;

(d) if there is a prior court order concerning the same conduct, the name of the court in which the order was rendered; and

(e) corroborating evidence of stalking, which may be in the form of a police report, affidavit, record, statement, item, letter, or any other evidence which tends to prove the allegation of stalking.

(5) If the court determines that there is reason to believe that an offense of stalking has occurred, an ex parte civil stalking injunction may be issued by the court that includes any of the following:

(a) respondent may be enjoined from committing stalking;

(b) respondent may be restrained from coming near the residence, place of employment, or school of the other party or specifically designated locations or persons;

(c) respondent may be restrained from contacting, directly or indirectly, the other party, including personal, written or telephone contact with the other party, the other party's employers, employees, fellow workers or others with whom communication would be likely to cause annoyance or alarm to the other party; or

(d) any other relief necessary or convenient for the protection of the petitioner and other specifically designated persons under the circumstances.

(6) Within 10 days of service of the ex parte civil stalking injunction, the respondent is entitled to request, in writing, an evidentiary hearing on the civil stalking injunction.

(a) A hearing requested by the respondent shall be held within 10 days from the date the

request is filed with the court unless the court finds compelling reasons to continue the hearing. The hearing shall then be held at the earliest possible time. The burden is on the petitioner to show by a preponderance of the evidence that stalking of the petitioner by the respondent has occurred.

(b) An ex parte civil stalking injunction issued under this section shall state on its face:

(i) that the respondent is entitled to a hearing, upon written request within 10 days of the service of the order;

(ii) the name and address of the district court where the request may be filed;

(iii) that if the respondent fails to request a hearing within 10 days of service, the ex parte civil stalking injunction is automatically modified to a civil stalking injunction without further notice to the respondent and that the civil stalking injunction expires three years after service of the ex parte civil stalking injunction; and

(iv) that if the respondent requests, in writing, a hearing after the ten-day period after service, the court shall set a hearing within a reasonable time from the date requested.

(7) At the hearing, the court may modify, revoke, or continue the injunction. The burden is on the petitioner to show by a preponderance of the evidence that stalking of the petitioner by the respondent has occurred.

(8) The ex parte civil stalking injunction and civil stalking injunction shall include the following statement: "Attention. This is an official court order. If you disobey this order, the court may find you in contempt. You may also be arrested and prosecuted for the crime of stalking and any other crime you may have committed in disobeying this order."

(9) The ex parte civil stalking injunction shall be served on the respondent within 90 days from the date it is signed. An ex parte civil stalking injunction is effective upon service. If no hearing is requested in writing by the respondent within 10 days of service of the ex parte civil stalking injunction, the ex parte civil stalking injunction automatically becomes a civil stalking injunction without further notice to the respondent and expires three years from the date of service of the ex parte civil stalking injunction.

(10) If the respondent requests a hearing after the ten-day period after service, the court shall set a hearing within a reasonable time from the date requested. At the hearing, the burden is on the respondent to show good cause why the civil stalking injunction should be dissolved or modified.

(11) Within 24 hours after the affidavit or acceptance of service has been returned,

excluding weekends and holidays, the clerk of the court from which the ex parte civil stalking injunction was issued shall enter a copy of the ex parte civil stalking injunction and proof of service or acceptance of service in the statewide network for warrants or a similar system.

(a) The effectiveness of an ex parte civil stalking injunction or civil stalking injunction shall not depend upon its entry in the statewide system and, for enforcement purposes, a certified copy of an ex parte civil stalking injunction or civil stalking injunction is presumed to be a valid existing order of the court for a period of three years from the date of service of the ex parte civil stalking injunction on the respondent.

(b) Any changes or modifications of the ex parte civil stalking injunction are effective upon service on the respondent. The original ex parte civil stalking injunction continues in effect until service of the changed or modified civil stalking injunction on the respondent.

(12) Within 24 hours after the affidavit or acceptance of service has been returned, excluding weekends and holidays, the clerk of the court shall enter a copy of the changed or

modified civil stalking injunction and proof of service or acceptance of service in the statewide network for warrants or a similar system.

(13) The ex parte civil stalking injunction or civil stalking injunction may be dissolved at any time upon application of the petitioner to the court which granted it.

(14) The court clerk shall provide, without charge, to the petitioner one certified copy of the injunction issued by the court and one certified copy of the proof of service of the injunction on the respondent. Charges may be imposed by the clerk's office for any additional copies, certified or not certified in accordance with Rule 4-202.08 of the Code of Judicial Administration.

(15) The remedies provided in this chapter for enforcement of the orders of the court are in addition to any other civil and criminal remedies available. The district court shall hear and decide all matters arising pursuant to this section.

(16) After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney fees.

(17) This chapter does not apply to protective orders or ex parte protective orders issued pursuant to Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, or to preliminary injunctions issued pursuant to an action for dissolution of marriage or legal separation.

Amended by Chapter 3, 2008 General Session

Utah Code Annotated § 76-5-106.5. Stalking -- Definitions -- Injunction -- Penalties.

- (1) As used in this section:
 - (a) "Conviction" means:
 - (i) a verdict or conviction;

- (ii) a plea of guilty or guilty and mentally ill;
- (iii) a plea of no contest; or
- (iv) the acceptance by the court of a plea in abeyance.

(b) "Course of conduct" means two or more acts directed at or toward a specific person, including:

(i) acts in which the actor follows, monitors, observes, photographs, surveils, threatens, or communicates to or about a person, or interferes with a person's property:

- (A) directly, indirectly, or through any third party; and
- (B) by any action, method, device, or means; or

(ii) when the actor engages in any of the following acts or causes someone else to engage in any of these acts:

- (A) approaches or confronts a person;
- (B) appears at the person's workplace or contacts the person's employer or coworkers;
- (C) appears at a person's residence or contacts a person's neighbors, or enters property owned, leased, or occupied by a person;
- (D) sends material by any means to the person or for the purpose of obtaining or disseminating information about or communicating with the person to a member of the person's family or household, employer, coworker, friend, or associate of the person;
- (E) places an object on or delivers an object to property owned, leased, or occupied by a person, or to the person's place of employment with the intent that the object be delivered to the person; or
- (F) uses a computer, the Internet, text messaging, or any other electronic means to commit an act that is a part of the course of conduct.

(c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

(d) "Emotional distress" means significant mental or psychological suffering, whether or not medical or other professional treatment or counseling is required.

(e) "Reasonable person" means a reasonable person in the victim's circumstances.

(f) "Stalking" means an offense as described in Subsection (2) or (3).

(g) "Text messaging" means a communication in the form of electronic text or one or more electronic images sent by the actor from a telephone or computer to another person's telephone or computer by addressing the communication to the recipient's telephone number.

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

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

(3) A person is guilty of stalking who intentionally or knowingly violates:

- (a) a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions;

or

- (b) a permanent criminal stalking injunction issued pursuant to this section.

(4) In any prosecution under this section, it is not a defense that the actor:

- (a) was not given actual notice that the course of conduct was unwanted; or
- (b) did not intend to cause the victim fear or other emotional distress.

(5) An offense of stalking may be prosecuted under this section in any jurisdiction where one or more of the acts that is part of the course of conduct was initiated or caused an effect on the victim.

(6) Stalking is a class A misdemeanor:

- (a) upon the offender's first violation of Subsection (2); or
- (b) if the offender violated a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions.

(7) Stalking is a third degree felony if the offender:

- (a) has been previously convicted of an offense of stalking;
- (b) has been previously convicted in another jurisdiction of an offense that is substantially similar to the offense of stalking;
- (c) has been previously convicted of any felony offense in Utah or of any crime in another jurisdiction which if committed in Utah would be a felony, in which the victim of the stalking offense or a member of the victim's immediate family was also a victim of the previous felony offense;

(d) violated a permanent criminal stalking injunction issued pursuant to Subsection (9); or

(e) has been or is at the time of the offense a cohabitant, as defined in Section 78B-7-102, of the victim.

(8) Stalking is a second degree felony if the offender:

(a) used a dangerous weapon as defined in Section 76-1-601 or used other means or force likely to produce death or serious bodily injury, in the commission of the crime of stalking;

(b) has been previously convicted two or more times of the offense of stalking;

(c) has been convicted two or more times in another jurisdiction or jurisdictions of offenses that are substantially similar to the offense of stalking;

(d) has been convicted two or more times, in any combination, of offenses under Subsection (7)(a), (b), or (c);

(e) has been previously convicted two or more times of felony offenses in Utah or of crimes in another jurisdiction or jurisdictions which, if committed in Utah, would be felonies, in which the victim of the stalking was also a victim of the previous felony offenses; or

(f) has been previously convicted of an offense under Subsection (7)(d), (e), or (f).

(9) (a) A conviction for stalking or a plea accepted by the court and held in abeyance for a period of time serves as an application for a permanent criminal stalking injunction limiting the contact between the defendant and the victim.

(b) A permanent criminal stalking injunction shall be issued by the court without a hearing unless the defendant requests a hearing at the time of the conviction. The court shall give the defendant notice of the right to request a hearing.

(c) If the defendant requests a hearing under Subsection (9)(b), it shall be held at the

time of the conviction unless the victim requests otherwise, or for good cause.

(d) If the conviction was entered in a justice court, a certified copy of the judgment and conviction or a certified copy of the court's order holding the plea in abeyance must be filed by the victim in the district court as an application and request for a hearing for a permanent criminal stalking injunction.

(10) A permanent criminal stalking injunction may grant the following relief:

(a) an order:

(i) restraining the defendant from entering the residence, property, school, or place of employment of the victim; and

(ii) requiring the defendant to stay away from the victim and members of the victim's immediate family or household and to stay away from any specified place that is named in the order and is frequented regularly by the victim; and

(b) an order restraining the defendant from making contact with or regarding the victim, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm to the victim, including personal, written, or telephone contact with or regarding the victim, with the victim's employers, employees, coworkers, friends, associates, or others with whom communication would be likely to cause annoyance or alarm to the victim.

(11) A permanent criminal stalking injunction may be dissolved or dismissed only upon application of the victim to the court which granted the injunction.

(12) Notice of permanent criminal stalking injunctions issued pursuant to this section shall be sent by the court to the statewide warrants network or similar system.

(13) A permanent criminal stalking injunction issued pursuant to this section has effect statewide.

(14) (a) Violation of an injunction issued pursuant to this section constitutes a third degree felony offense of stalking under Subsection (7).

(b) Violations may be enforced in a civil action initiated by the stalking victim, a criminal action initiated by a prosecuting attorney, or both.

(15) This section does not preclude the filing of a criminal information for stalking based on the same act which is the basis for the violation of the stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions, or a permanent criminal stalking injunction.

Amended by Chapter 356, 2008 General Session

Exhibit A: Findings and conclusions of the trial court, R. at 285:143-152

1 THE COURT: All right. Thank you.

2 You know, I understand this is a case of
3 considerable interest and, but it's lunchtime and I want to
4 gather my thoughts before I announce a ruling. I don't
5 intend to do a written ruling but we're going to go to lunch
6 and I'm going to take a few minutes to think about it. So
7 I'm going to ask you all to come back at 2:00. All right,
8 we'll be in recess until then.

9 (Whereupon a noon recess was taken)

10 THE COURT: Thank you, please be seated. All right,
11 thanks for coming back.

12 Well, this is why I wear the robe, this is why I
13 get this job. It would be nice if I could decide these cases
14 without ever having to decide if somebody was telling the
15 truth or somebody wasn't telling the truth. It's always nice
16 to decide a conflict by finding a middle ground. I can't do
17 that in this case. It's necessary in this case that I
18 candidly and forthrightly evaluate the credibility of some of
19 the witnesses and that I make some specific findings. So
20 that's my job and that's what I'm going to do.

21 With regard to Mrs. Butters, Mrs. Butters is more
22 emotional than the usual person that comes to court and it's
23 clear from her testimony that she is not an accurate
24 evaluator of distance or time and her estimates in that area
25 just didn't make sense when we looked at other physical

1 evidence. It's also clear that she is influenced by fears
2 and concerns that her mother and the rest of her family have.
3 She tends to borrow and feed upon their concerns and their
4 emotional issues.

5 Having said that - and I have to take that into
6 account in assessing her credibility, but it's also clear
7 that her appearance in court was reasonably credible. One of
8 the things that I do when - you may have noticed during the
9 trial, I have the podium pushed to the side because I think
10 it's part of my responsibility to observe the litigants, to
11 observe them as they observe the case, to observe them as
12 they sit on the stand and I have to take into account body
13 language, appearance, reaction, all of that is part of
14 assessing credibility and as I have watched Mrs. Butters in
15 this case, her appearance in court has been reasonably
16 credible. I haven't discerned an unreasonable attempt to
17 stretch or overstate her memory. Certainly with every
18 witness she remembers some details, she doesn't remember
19 others but in general I found her presentation to be credible
20 and reasonable.

21 Mr. Herbert has some issues. He does have a direct
22 and almost unblinking and intense stare. Now, that's simply
23 a fact that I observed. His posture while sitting at the
24 table and on the witness stand tends to create an impression
25 of arrogance. There are some specific concerns though with

1 regard to the testimony. His memory and testimony of
2 specific events, I felt minimized or exaggerated when
3 convenient.

4 With regard to the University Mall incident at
5 Nordstrom's, clearly the testimony of Kim Christensen and
6 Eric NicholSEN was tainted, biased and not credible. The
7 Ralph Crabb testimony which relied upon their observations
8 and their conclusions was no stronger than what they had told
9 him. The videotape didn't show much, if anything, except
10 his, Mr. Herbert's presence and Mr. Crabb's, Officer Crabb's
11 actions in pursuing and bringing Mr. Herbert back to the mall
12 were clearly influenced by the conclusions of Christiansen
13 and NicholSEN; however, having said that, Mr. Crabb's
14 testimony of the nature and circumstances of the interview
15 with Mr. Herbert was credible and was consistent with his
16 recollection of the events. His recollection, his testimony
17 about that event, I felt minimized and contradicted Officer
18 Crabb's credible testimony specifically about Mr. Herbert's
19 confession. It's, it is apparent to me he knew the nature,
20 the specific nature of the allegations. He knew, as a matter
21 of law, all disorderly conduct charges are infractions unless
22 there is an additional element that the actor has been warned
23 and persists after being warned. There's no evidence in this
24 case of any such warning, citations, like the one shown to
25 me, are commonly and typically used to charge infractions as

1 well as misdemeanors and it is difficult to check the
2 misdemeanor box. That doesn't tell me anything. But it's
3 not believable that Mr. Herbert didn't completely understand
4 what he as being accused of and that frankly he did not make
5 the confession he made to Mr. Crabb.

6 Regarding the confrontation at Riverwood, it was
7 credible that there, in fact, was a confrontation that the
8 mother and daughters and family, a cousin, I think there was
9 a cousin, anyway, they were afraid. They had seen Mr.
10 Herbert. It was obvious that they were avoiding him and they
11 were hiding at the back of the store. He confronted them
12 directly and said, Are you hiding. It is incredible that he
13 didn't observe or note the presence of Mrs. Butters,
14 particularly given that later in other circumstances he
15 quickly recognize and identified her as a sister and a member
16 of the family.

17 His testimony about the Smith Fieldhouse incident
18 also minimized the nature of that circumstance. That was a
19 serious assault, it resulted in a restraining order and an
20 assault charges. He pled no contest to those charges. He
21 was restrained from being on the campus. His testimony about
22 the Harris Fine Arts Center incident and I'll specifically
23 say that the Harris Fine Arts Center incident is only
24 relevant to this case to the extent that it demonstrates
25 credibility in his conduct. He specifically knew of the

1 restraining order and intentionally violated the order and
2 did so, did it with a casual attitude reflected in his
3 testimony today.

4 His memory of the specific restraining order that
5 he stipulated to is not credible. It's just simply not
6 believable that Mrs. Butters would have been a specifically
7 named respondent and that he would not have been able to
8 recognize her and made it his business to recognize her
9 because the consequences of violating an order like that are
10 significant and serious. It isn't believable that he would
11 have an order like that put in place, that he would still
12 have it in his possession years later and have no knowledge
13 or acquaintance with Mrs. Butters.

14 The testimony of his conduct at Gold's Gym in both
15 instances, winter of '05, '04 to '05 and on August 4th of
16 2010, again, he minimized his conduct. It was his testimony
17 specifically on August 4 was inconsistent with other
18 observers at critical times. There was testimony from his
19 relatives that were there but they didn't observe or didn't
20 testify about observations at the time that was critical to
21 this case and as I said, his characterization of the
22 confrontation at the Smith Fieldhouse was not believable. So
23 on balance I find that Mr. Herbert's testimony is not
24 convincing, it was not credible and that Ms. Butters'
25 testimony with some discount for inaccurate measurements in

1 time and distance and emotional reactions is more credible.

2 Regarding the specific incidents, first, the
3 confrontation at the store in the Riverwoods Mall, the
4 defendant was aware of the family including Mrs. Butters. He
5 directly confronted them while they were cowering in the back
6 of the store, attempting to avoid him.

7 At Gold's Gym in the fall of '04 to the winter of
8 '05, sometime during that period, I was not given, was not
9 able to nail down specifically the time, I do find to a
10 preponderance that he was intently watching Mrs. Butters
11 while she exercised and that he was watching in a posture
12 which could reasonably have been interpreted to be conduct
13 similar to the accusations from University Mall and that's
14 critical. It isn't necessary for me to find and I don't find
15 that he was or was not engaging in any lewd kind of conduct
16 but from the testimony I have, he should have know the nature
17 of the accusations from the mall and avoided being placed in
18 a circumstance where he could be accused of committing the
19 same kind of conduct.

20 Regarding the Smith's in '09, I think the credible
21 testimony, again to a preponderance more than likely than
22 not, is that he did in his vehicle directly confront Mrs.
23 Butters as he drove directly at her and he deliberately
24 circled her vehicle in a confrontive manner.

25 Similarly in the University Mall parking lot later

1 on, it's also credible that Mrs. Butters would have called
2 Mall Security because she had been an employee, knew or
3 thought she knew that there was a restraining order directing
4 him to stay away from the mall. Her husband was far away and
5 the reasonable and ration thing to do for someone in that
6 circumstance would be to call the most immediate, most
7 involved law enforcement, which would be Mall Security. I
8 find to a preponderance that he walked directly to her, stood
9 in close proximity and then continued to observe her from a
10 distance. That conduct was obviously directed toward her.

11 With regard to the library incident, I find that he
12 was there, that he did smile at her but there's no testimony
13 of long-term observation or staring consistent with the other
14 incidents. The testimony that he chased her or followed her
15 out of the library is just not adequately established. It
16 may well be that she assumed that, that she feared that, that
17 she thought that was happening but that's not consistent with
18 any of the other circumstances and the only real testimony
19 that I have to base a conclusion on on that is her fleeting
20 observation as she was fleeing. I can't say it was more
21 likely than not that he took any overt action toward her at
22 that time.

23 With regards to Gold's Gym on August 4, the
24 credible evidence is that he took specific notice of her and
25 directly and intently observed her in a way similar to some

1 of the other incidents.

2 With regard to the August 11 incident, there's not
3 sufficient evidence to show that he took any kind of an
4 action directed toward her either at the gym or later at the
5 police department. There's no testimony to really indicate
6 that he knew she was even at the police department. There's
7 no testimony - I think the only testimony that indicated an
8 action toward her was her belief that he was staring at her
9 while outside looking at her inside and that's not consistent
10 with the evidence and not reasonably possible.

11 So to a preponderance I find first of all that when
12 Mr. Herbert took the actions he did, he did so knowingly and
13 intentionally. There's no evidence that he did anything my
14 mistake or that this was thoughtless action. There were five
15 incidents that I have described that in my view were
16 sustained by the evidence; the confrontation at Riverwoods,
17 the Gold's Gym incident in 2004-2005; the Smith's incident in
18 April of '09; the University Mall incident in July of '09 and
19 the Gold's Gym incident in August 4, 2010. In each of those
20 incidents that I have described, each of those five, I find
21 to a preponderance that Mr. Herbert approached, monitored,
22 observed or confronted Mrs. Butters directly, specifically
23 addressed at her and given the history of his problems at the
24 Mall and the prior orders and confrontations with the family,
25 I think the evidence reasonably establishes that he did know

1 and recognize Mrs. Butters and that he knew or should have
2 known the conduct would cause a reasonable person in her
3 place an in those circumstances to suffer emotional distress.

4 So I find that the petitioner has prevailed by a
5 preponderance of the evidence and I will authorize a stalking
6 injunction. I'm not satisfied that there's a basis in this
7 case, indeed I'm not satisfied that there's statutory
8 authority to extend the injunction beyond three years.
9 Certainly there's nothing that would prohibit a re-
10 application if there are other incidents or other reasons
11 during the 3-year period.

12 The statute does plainly and clearly authorize
13 costs or attorney's fees. There's no authority indicating
14 that that statute is unconstitutional, otherwise (inaudible),
15 it's there, it's part of the law. So I'm going to authorize
16 counsel for petitioner to make an application for fees by
17 submitting an appropriate affidavit.

18 Mr. Card, you can object to that and if you wish to
19 have a hearing, I'd be happy to schedule one to determine
20 that. I do have a protective order. I'm going to - I have a
21 copy for each of you. I'm going to ask the bailiff to
22 present the original to Mr. Herbert at this time so he can
23 acknowledge receipt of it.

24 Mr. Herbert, I'll ask you to - on the bottom page,
25 second page, I'm going to ask you to put your - fill out the

1 information there and sign that document to indicate receipt
2 of the original or a receipt of a copy. Thank you. Return
3 that to the bailiff. I'll place that in the file and we'll
4 be in recess. Thank you very much.

5 (Whereupon the hearing was concluded)

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