

2011

Ken Merena, an individual, and dba Merena
Investments v. Alice Davis (fka Alice Merena) :
Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

William P. Morrison; Morrison & Morrison; Attorney for Appellee.

Loren M. Lambert; David S. Head; Attorneys for Appellant; Arrow Legal Solutions Group.

Recommended Citation

Brief of Appellee, *Merena v. Merena*, No. 20110377 (Utah Court of Appeals, 2011).
https://digitalcommons.law.byu.edu/byu_ca3/2872

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KEN MERENA, an individual, and :
dba MERENA INVESTMENTS, :
 : Case No.: 20110377-CA
Plaintiff and Appellant, :
 :
v. :
 :
ALICE DAVIS (fka ALICE MERENA), :
 :
Defendant and Appellee, :

BRIEF OF APPELLEE

On Appeal from a Ruling of the Third District Court,
Salt Lake Department, Honorable Denise P. Lindberg presiding

Loren M. Lambert
David S. Head
Arrow Legal Solutions Group
266 East 7200 South
Midvale, UT 84047
Attorneys for Appellant

William P. Morrison (7587)
MORRISON LAW OFFICE, INC.
352 East 900 South
Salt Lake City, UT 84111
Tel: (801) 519-9772
Attorney for Appellee

ORAL ARGUMENT NOT REQUESTED

UTAH

TABLE OF CONTENTS

	<u>Page:</u>
TABLE OF AUTHORITIES.....	iii
JURISDICTION OF THE COURT.....	1
CONTROLLING CONSTITUTIONAL AND OTHER AUTHORITIES.....	1
STATEMENT OF THE CASE.....	2
A. Nature of the Case	2
B. Trial Court Proceedings & Disposition	4
C. Merena's Prior Efforts to Appeal	4
D. Statement of Facts	5
SUMMARY OF ARGUMENT	14
ARGUMENT.....	16
I. THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE A FINAL ORDER HAS NOT BEEN ENTERED.....	16
II. MERENA DID NOT PROPERLY PRESERVE THE ISSUES HE IS NOW SEEKING TO APPEAL	20
III. THE LOWER COURT WAS WELL WITHIN ITS AUTHORITY TO SANCTION MERENA, AND IT ACTED APPROPRIATELY IN DOING SO	23
IV. MERENA HAS NO STANDING TO REQUEST A CHANGE IN UTAH LAW	28
CONCLUSION.....	29
CERTIFICATE OF SERVICE.....	30
ADDENDUM.....	32
1. Merena's previous efforts to appeal	
2. Judge Medley Contempt Order	
3. Declaration of Kenneth Merena	

TABLE OF AUTHORITIES

Page:

Cases:

<u>Badger v. Brooklyn Canal Co.</u> , 966 P.2d 844 (Utah 1998)	21, 22
<u>Bradbury v. Valencia</u> , 2000 UT 50, ¶9, 5 P.3d 649	20
<u>Brookside Mobile Home Park, Ltd. v. Peebles</u> , 2002 UT 48, 48 P.3d 968	21, 22
<u>Giusti v. Sterling Wentworth Corp.</u> , 2009 UT 2, 201 P.3d 966 (Utah 2009)	17, 18, 19
<u>Montgomery v. Cottam</u> , 2011 UT App 308	20

Statutes:

Utah Code § 78-2-2(3)(a)	2
--------------------------------	---

Rules:

Utah R. App. P. 10(a)(1)	1, 16
Utah R. App. P. 24(a)(5)(A)	22
Utah R. Civ. P. 7(f)(2)	2, 17, 18, 19

IN THE UTAH COURT OF APPEALS

KEN MERENA, an individual, and :
dba MERENA INVESTMENTS, :
 :
Plaintiff and Appellant, :
 :
v. :
 :
ALICE DAVIS (fka ALICE MERENA), : Case No.: 20110377-CA
 :
Defendant and Appellee, :

JURISDICTION OF THE COURT:

Appellee maintains that this Court lacks jurisdiction to hear this appeal, because the Appellant has improperly sought to appeal a nonfinal order. This issue is more fully addressed at Argument I below. Inasmuch as this Court lacks jurisdiction to hear the appeal, it should dismiss the appeal forthwith.

CONTROLLING CONSTITUTIONAL AND OTHER PROVISIONS:

Rule 10(a)(1) of the Utah Rules of Appellate Procedure governs motions to dismiss an appeal for lack of jurisdiction. It provides: "A party may move at any time to

dismiss the appeal or the petition for review on the basis that the appellate court lacks jurisdiction."

Rule 7(f)(2) of the Utah Rules of Civil Procedure governs orders entered by the district courts. It provides:

Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

STATEMENT OF THE CASE:

A. Nature of the Case:

This case concerns a claim for defamation, filed by Ken Merena against his former spouse, Alice Davis. Following the filing of this case, the parties' marital relationship was subsequently dissolved through an annulment.

At different stages throughout the pendency of this case, Merena has been represented by several different attorneys, and he also has represented himself. Contemporaneously with the pendency of this action, Merena has also been engaged as a party in a number of other legal

proceedings involving Davis, including but not limited to a divorce/annulment action, a protective order proceeding, an action to challenge Davis' bankruptcy filing in the State of Montana, and a second defamation case he filed against Davis in district court in Utah. Merena has been represented by counsel in these other matters. Employing an army of attorneys to represent him, and using litigation as a sword, he has mounted a persistent, ongoing campaign to harass Davis, strangle her with litigation, and destroy her financially.

Merena's litigation abuse has not gone unnoticed. Instead, it has resulted in multiple sanctions being levied against him, including monetary sanctions for costs and attorney fees, civil contempt sanctions and also the filing of criminal charges in the State of Montana (which remain pending and unresolved). Facing mounting pressure to meet his legal responsibilities, Merena has now fled from Utah. To the best of Appellee's knowledge, he is currently residing out of the country, where he appears content to litigate this matter from a perceived safe-distance, all with the active aid and assistance of counsel.

A more detailed account of Merena's abusive and

vexatious litigation tactics, and the efforts undertaken by different courts of law to deal with those tactics, is more particularly set forth in the Appellee's Statement of Facts, *infra*.

B. Trial Court Proceedings & Disposition:

The course of the proceedings in this case, and the disposition of the case below, is found *infra* in the Appellee's Statement of Facts.

C. Merena's Prior Efforts to Appeal:

This appeal is not the first occasion by Merena to seek an appeal of the lower court's decisions. Instead, he has already twice attempted unsuccessful appeals. His prior appeals have either been summarily denied or summarily dismissed, as more particularly noted below:

1. First Effort to Appeal: On or about September 4, 2009, Merena filed a petition for interlocutory appeal, which was assigned case number 20090723-CA. Merena's petition was summarily denied as *untimely* by Order of this Court dated September 11, 2009. Addendum 1.

2. Second Effort to Appeal: On or about November 10,

2009, Merena attempted a second appeal by filing a notice of appeal, purporting to appeal the "final" order of the lower court dated October 30, 2009. Addendum 1. This second appeal was transferred to the court of appeals and assigned case number 20090941-CA. This Court subsequently issued a Sua Sponte Motion for Summary Disposition on December 1, 2009, asserting that it appeared that Merena was seeking to take an appeal from a non-final order. Merena's appeal was promptly dismissed by this Court on December 21, 2009, pursuant to the parties' stipulation of dismissal. Addendum 1. Shortly before dismissing the appeal, this Court also entered an Order dated December 4, 2009, denying Merena's Petition for Emergency Relief for Stay of District Court Proceedings. Id.

D. Statement of Facts:

The following facts are pertinent to the disposition of this appeal:

1. Merena and Davis were at one time briefly married to each other, but the parties' relationship deteriorated and they separated in August of 2007. R. at 2-3. Davis subsequently filed a petition for divorce from Merena on

August 20, 2007. R. at 3.

2. Thereafter, Merena initiated the instant case by filing a complaint for defamation and injunctive relief against Davis on October 22, 2007, civil number 070915206, Judge Lindberg presiding. R. at 1-10. Merena's complaint was filed with the assistance of counsel. Id.

3. On or about January 30, 2008, Davis filed a petition for Chapter 13 bankruptcy relief in the District of Montana, case number 08-60066, Judge Kirscher presiding. The following day, Davis filed a notice of Chapter 13 bankruptcy filing with the district court in the case at hand. R. at 42-45.

4. Davis subsequently converted her Chapter 13 bankruptcy petition to one under Chapter 7, and filed a notice of case conversion with the district court on May 2, 2008. R. at 66-68.

5. Merena was listed as a creditor in the bankruptcy case. With the assistance of counsel, he applied for and subsequently obtained an unopposed order granting him relief from the Bankruptcy Stay, thus allowing him to continue to litigate his defamation claims against Davis in state court. See, e.g., R. at 69-74.

6. Simultaneously in the State of Montana, Merena through counsel lodged an adversary proceeding against Davis, seeking to object to her bankruptcy discharge. See R. at 1248-75.

7. The parties engaged in discovery in state court in the instant case, which resulted in numerous discovery disputes arising. Judge Lindberg held a hearing on October 30, 2008, to resolve the discovery disputes. R. at 718-20, 733. Both parties were represented by counsel at this juncture of the case.

8. At the hearing on October 30, 2008, Judge Lindberg determined that both parties were responsible for the discovery disputes that had arisen, but found that the plaintiff, Ken Merena, was primarily at fault. The court ruled as follows: "The Court finds that a significant amount of the fault here lies with the plaintiff, as he has been too over-reaching in his discovery requests. Moreover, plaintiff's subpoenas have been plagued with mistakes, including a lack of proper advanced notice regarding the issuance of subpoenas calling for the production of documents, as well as the untimely service of deposition notices. However, the Court also finds that the defendant

is not blameless. In particular, the defendant has been noncooperative with discovery, specifically with respect to stalling discovery. But for the defendant's bankruptcy filing, which remains an open and active case, the Court would deem it appropriate to appoint a special master to assist with the resolution of further discovery disputes, and the Court would make a preliminary allocation of special master costs to be borne 75% by the plaintiff and 25% by the defendant, while reserving for later determination a final allocation of such costs." R. at 940.

9. Merena's adversary complaint in bankruptcy court eventually came on for a trial in Montana, resulting in the issuance of a lengthy memorandum decision ruling against Merena on all counts. As part of the bankruptcy court's ruling, and of particular note to this proceeding, Judge Kirscher found that Merena was "**not a credible witness**", and that he [Merena] had an "**apparent desire to strangle Alice [Davis] through legal proceedings**". R. at 1248-75 (emphasis added). Judge Kirscher dismissed Merena's adversary complaint with prejudice. Id.

10. With the continued assistance of counsel, Merena promptly appealed the dismissal of his adversary complaint,

but his appeal was denied. R. at 2576-2626. Following the denial of Merena's bankruptcy appeal, Davis' Chapter 7 bankruptcy petition was finally approved and discharged. R. at 2563-66.

11. Thereafter, Merena continued to pursue his defamation case against Davis in state court. However, in light of Davis' bankruptcy discharge, Judge Lindberg issued a ruling precluding Merena from seeking monetary relief against Davis. The court limited Merena's sole remaining claim to injunctive relief. R. at 2140-46.

12. Although Judge Lindberg allowed Merena's claim for injunctive relief to proceed, she quickly became concerned with his abusive litigation tactics, which were now occurring pro se. She expressed concern that Merena might be using this case for an improper purpose to vex and harass Davis, and deemed it appropriate to warn him about his conduct, issuing a ruling as follows:

a. "[T]he Court does not want discovery to be a tool for Mr. Merena to harass Defendant". R. at 1377-81.

b. "To be sure, the nature of Plaintiff's [discovery] questions to Defendant and Mr. Morrison [Defendant's counsel], as well as Mr. Merena's other

tactics, lead the Court to question the legitimacy of this law suit, or whether the suit is just an avenue for him to harass Defendant. For now, the Court will give Mr. Merena the benefit of the doubt and allow him to pursue his claims. However, Mr. Merena is put on notice that the Court will not tolerate further obstreperous behavior on his part. Mr. Merena cannot continue with abusive discovery practices."

Id. (emphasis added).

13. In a subsequent Ruling and Order dated June 22, 2009, Judge Lindberg granted Merena a limited extension of discovery for the sole purpose of taking three final depositions. However, the Court placed a one-hour time limit on those depositions, ordered that they be completed within 45 days, and explicitly instructed Merena to comply with the Standards of Professionalism and Civility as promulgated by the Utah Supreme Court. [R. at 1860-63].

14. After being explicitly warned by Judge Lindberg to improve his behavior in this case, and to limit his discovery to certain well-defined parameters, Merena proceeded to commit additional discovery abuses, ignoring the limitations that had been imposed upon him. R. at 2213-87.

15. In response to Merena's improper, abusive litigation tactics, Davis filed a motion for sanctions against him. As part of the motion, Davis sought the dismissal of Merena's complaint. Id. In ruling on the matter, Judge Lindberg found Merena to be in clear violation of her orders and finally deemed it necessary to dismiss his remaining cause of action with prejudice. She also imposed additional monetary sanctions against Merena. R. at 2498-2505.

16. Thereafter, Merena refused to comply with the court's sanction orders, refusing to pay the monetary sanctions in a timely fashion. As a result, Davis commenced contempt of court proceedings against him. On August 18, 2010, Judge Lindberg found Merena in contempt of court. Among other things, she imposed court fines of \$2,000.00 against him, and issued a bench warrant for his arrest, setting a cash only bail in the amount of \$20,007.00. R. at 2842-51.

17. Merena's noncompliance with existing court orders has not been limited to this case only, but has extended into other cases as well. The Record shows that he has not only been held in contempt of court by Judge Lindberg, but

also by Judge Medley in connection with civil number 074903538. A copy of Judge Medley's civil contempt order is found in the Record at 2816-29 (for convenience, a copy is attached hereto at Addendum 2). Judge Medley held Merena in contempt of court for violating a protective order that Davis had obtained against him. Following an evidentiary hearing at which Merena appeared and was represented by counsel, Judge Medley imposed a monetary fine against Merena in the amount of \$3,000.00, and also ordered him to serve time in jail, to be stayed upon his timely payment of the court fine and also timely payment of Davis' costs and attorney fees. Id. Pertinent portions of the findings and ruling made by Judge Medley are as follows:

a. "When [Merena's] testimony is considered in the context of what can only be described as an obsessive desire and behavior pattern by [Merena] to take advantage of every opportunity to maintain some form of contact with petitioner, [Merena's] testimony that he called petitioner's mother and did not ask her to contact petitioner is unbelievable." Addendum 2, at 7.

b. "Respondent's conduct in this regard can only be described as threatening, intimidating and demonstrates

an absence of balance and a suggestion of serious mental health challenges." Id. at 10.

c. "[R]espondent's highly suspect conduct weighs heavily against his credibility which is nonexistent." Id.

d. "The Court finds by clear and convincing evidence that the placing of the tracking device on Ms. Merena's vehicle occurred after the Protective Order was issued, and that is in clear violation of the Protective Order." Id. at 8.

e. "Irrespective of the outstanding warrants, the respondent has engaged in despicable, frightening conduct toward petitioner." Id. at 9.

18. Judge Medley's contempt order indicates that criminal charges have been filed against Merena in the State of Montana, which charges remain outstanding. Id. at 9.

19. Despite the litany of sanctions that have been imposed against him, apparently without any real effect, Merena has continued to pursue litigation against Davis. Among other things, he has caused a second complaint for defamation to be filed against Davis in Third District Court, civil number 090403270, Judge Kouris presiding. Not coincidentally, Merena is represented by the same counsel in

that case as is currently representing him in this appeal. In the second defamation action, Merena has filed a sworn declaration revealing that he has left Utah and is now residing out of the country. Addendum 3.

SUMMARY OF THE ARGUMENT

This appeal should be dismissed for lack of jurisdiction. It is undisputed that Merena has sought to appeal a non-final, non-appealable order. Merena readily admits that he is appealing the lower court's Ruling of November 20, 2009, and he readily admits that such ruling was never reduced to a final order. However, he contends that his appeal should nevertheless be allowed to proceed, because he is also appealing "other orders" of the lower court, which have been reduced to final orders. Merena cites to no case law or other legal authority to support his position, and Utah law is clearly against his position. Because no final order has been entered in this case, Merena's appeal is at best premature and must be dismissed.

Merena's appeal should also be dismissed because he has not properly preserved the issues he is attempting to appeal. Not a single issue presented in Merena's Appellant

Brief was ever properly raised at the lower court level. Because Merena has failed to timely and properly raise these issues below, he has failed to preserve these issues for appeal. His appeal should therefore be dismissed.

Finally, a fair and impartial look at the sanctions entered against Merena at the lower court level shows that such sanctions were warranted. If anything, the lower court was overly restrained with Merena. It certainly did not rush to employ harsh sanctions against him. Instead, the court employed a graduated scale of sanctions, first attempting to employ lesser sanctions before deeming it necessary to increase the severity of the same. After Merena's bad behavior continued unabated, the lower court was finally prompted to dismiss his complaint. The dismissal was entered only as a last resort, and only after Merena had been given clear, unequivocal notice that further bad behavior on his part would not be tolerated. Merena willfully chose to ignore such warnings and proceed at his peril. He cannot now be heard to complain that the sanctions that were levied against him were too harsh.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE A FINAL ORDER HAS NOT BEEN ENTERED

Appellee Davis respectfully moves this Court pursuant to Rule 10(a) of the Utah Rules of Appellate Procedure and other applicable law for an Order dismissing the instant appeal on the grounds that Merena has sought to appeal a non-final, non-appealable order. Because the lower court has not entered a final order, Merena's appeal is improper and not ripe for adjudication. Consequently, this Court lacks jurisdiction to hear the appeal, and the same should be dismissed forthwith.¹

It is undisputed that Merena is seeking to appeal the

¹On September 22, 2011, Appellee filed a motion to dismiss this appeal for lack of jurisdiction, asserting that Merena was improperly seeking to appeal a non-final order. In response, Merena filed a memorandum in opposition, admitting that he was appealing the lower court's Ruling of November 20, 2009, and admitting that said ruling was not a final order. (See Appellant's Verified Response to Appellee's Motion to Dismiss Appeal and/or Motion for Summary Disposition at 2.) However, Merena argued that he was also appealing "other orders and rulings", therefore somehow justifying his appeal. *Id.* This Court subsequently entered an Order dated October 25, 2011, deferring a ruling on the jurisdictional issue pending plenary presentation of the case and directing the Appellee to present the issue in her brief. Appellee hereby does so and respectfully re-asserts her motion to dismiss for lack of jurisdiction.

lower court's ruling of November 20, 2009, which sanctioned Merena for persistent discovery abuses and for his ongoing failure to abide by the orders of the court. (See n.1) The ruling in question is attached to Merena's Appellant Brief at Addendum C. This ruling has never been reduced to a final, written order. As such, it remains a non-final, non-appealable order. A review of the lower court docket indicates that no party has ever submitted an order in conformity with the court's ruling sufficient to satisfy the strictures of Utah R. Civ. P. 7(f)(2). While it appears that the parties may have simply treated the ruling as the final expression of the order of the court, such treatment does not pass muster for purposes of pursuing an appeal. The explicit requirements of Rule 7(f)(2) have not been satisfied. Hence, Merena's appeal is not properly before this Court, and the same should therefore be dismissed.

The case of Giusti v. Sterling Wentworth Corp., 2009 UT 2, 201 P.3d 966 (Utah 2009), is on point. In Giusti, the Utah Supreme Court had occasion to rule on the timeliness of an appeal. The court cited to Rule 7(f)(2) and noted that the entry of a final order in conformity with the requirements of the Rule is what triggers the appeal period.

The court stated as follows:

The rule is clear. A prevailing party *shall* prepare for entry a proposed order in conformity with the court's decision. There are only two exceptions to this mandate. First, if the court approves a proposed order that is submitted with an initial memorandum, then no additional order is necessary. Second, if the court directs that no additional order is necessary, then none is.

Giusti, 2009 UT 2, ¶27 (emphasis in original).

In the instant case, the lower court entered its ruling on November 20, 2009. Thereafter, it appears that neither party ever submitted an order to be entered in conformity with the ruling. This is fatal to Merena's appeal, because the requirements of Rule 7(f)(2) remain unsatisfied. The two exceptions to Rule 7(f)(2) mentioned by the Giusti court are simply not present in this case. No proposed order was ever submitted by the parties in connection with an initial memorandum. Likewise, no statement appears in the lower court's ruling of November 20, 2009, providing that it is the final expression of the court and that no further additional order is necessary. By attempting to appeal this nonfinal ruling, Merena's appeal is improper and ill-taken.

Again, according to the Giusti court, an appeal is not triggered until the mandates of Rule 7(f)(2) have been

satisfied. The Giusti court stated as follows: "It is the entry of the final order according to rule 7(f)(2) that triggers the appeal period. If the court fails to satisfy rule 7(f)(2)'s exceptions and if the prevailing party fails to prepare an order for entry, 'the appeal rights of the nonprevailing party will extend indefinitely.'" Id. at ¶35 (citations omitted).

Merena appears to believe that a later order entered by the lower court on April 8, 2011, is sufficient to constitute a final order for purposes of appeal. Attached to his brief at Addendum G is a copy of the order of April 8, 2011. While on its face it purports to call itself a "Final Order and Judgment", just because it calls itself a final order does not make it one. The order in question merely reduces to judgment certain monetary sanctions that had already been entered by the lower court against Merena. It does nothing more. **It certainly does not purport to be the "conforming order" contemplated by Rule 7(f)(2) with respect to the lower court's ruling of November 20, 2009.** As such, no final appealable order has yet been entered by the lower court in this matter. Merena's appeal is thus improper and must be dismissed. See, e.g., Montgomery v.

Cottam, 2011 UT App 308, ¶2 ("Generally, '[a]n appeal is improper if it is taken from an order or judgment that is not final.'" (citing Bradbury v. Valencia, 2000 UT 50, ¶9, 5 P.3d 649)).

Based upon the foregoing, this Court lacks jurisdiction to hear Merena's appeal, and should therefore dismiss the appeal forthwith.

II. MERENA DID NOT PROPERLY PRESERVE THE ISSUES HE IS NOW SEEKING TO APPEAL

Setting aside the jurisdictional problem that is fatal to this appeal, Merena's appeal should also be dismissed because he has improperly sought to appeal several issues that were never presented at the lower court level below. For example, Argument I of Merena's Appellant Brief asserts that the lower court's sanctions were too harsh and were an abuse of discretion. However, this issue was never raised below. Likewise Argument II, involving a claim that the lower court exceeded its authority in acting as a "collection agency" for Davis, was never raised below. Additionally, Argument III, involving a request to modify Utah law and afford Merena the right against self-incrimination at a civil contempt proceeding, was never

raised below. Merena is not entitled to pursue an appeal of matters that were not properly raised below. His appeal should therefore be summarily dismissed.

Utah law is clear in holding that issues must be preserved for appeal, or they will be deemed waived. Only in very limited, narrow circumstances will an appellate court review an issue on appeal that was not properly raised below. The basic rule in Utah is: "[I]n order to preserve an issue for appeal[,], the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968 (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)).

The need for a party to preserve an issue on appeal by first raising it below is not a minor, unimportant matter. Fundamentally, it serves an extremely important purpose. It serves to put the lower court on notice of the asserted error, and it allows for timely correction of the same, if appropriate. Badger, 966 P.2d at 847. For a trial court to be afforded an opportunity to correct an error, "(1) the issue must be raised in a timely fashion[,], (2) the issue

must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority." Brookside, 2002 UT 48 at ¶ 14 (quoting Badger, 966 P.2d at 847). "Issues that are not raised [below] are usually deemed waived." Id.

In this case, Merena has failed in his Appellant Brief to demonstrate that he has properly preserved the issues he is seeking to appeal. He outright concedes that his third appellate issue was not properly preserved for appeal, but he nevertheless argues for an extraordinary exception to apply (see Appellant Brief at 32-35). Regarding his first two appellate issues, his brief is woefully silent as to how or when such issues were preserved for appeal. Rule 24(a)(5)(A) of the Utah Rules of Appellate Procedure requires Merena to include in his brief a statement of the issues presented for review and "a citation to the record showing that the issue was preserved in the trial court". *Merena's brief fails to comply with this rule.* His statement of issues presented on appeal is woefully inadequate and noncompliant.

As the party bringing this appeal, Merena has the burden of complying with all necessary requirements to

perfect an appeal. Given the size of the record in this case, it is not the Appellee's obligation to ferret through the record and attempt to discern where, if at all, Merena has properly preserved his issues for appeal. Merena's noncompliant brief fails to show that he has duly satisfied his appellate requirements. Consequently, Merena's appeal is not well advanced and should be dismissed immediately, without any further cost, delay, or prejudice to Davis.

**III. THE LOWER COURT WAS WELL WITHIN ITS AUTHORITY
TO SANCTION MERENA, AND IT ACTED APPROPRIATELY
IN DOING SO**

Throughout the pendency of this case, Merena has acted as if he is a law unto himself. He has persistently refused to abide by the orders of the court, except when it has been convenient for him to do so. When rulings and orders have gone against him, he has filed motions to reconsider or to alter or amend the court's rulings. See, e.g., R. at 1758-1814. He is the classic example of a vexatious, abusive litigant.

Even Merena's appellate counsel has conceded it was appropriate for the lower court to sanction Merena for his repeated misconduct and discovery abuses. (See, e.g.,

Appellant Brief at 11: "It is uncontested that Mr. Merena's conduct warranted sanctions ...") However, counsel takes umbrage with the purported severity of the sanctions that were imposed, contending that they were too harsh. Merena's counsel argues that a simple monetary sanction would have sufficed as an appropriate punishment in this case. This argument is clearly not tenable.

In dealing with Merena's persistent misconduct, the lower court did not immediately rush to dismiss Merena's complaint. Instead, it first considered and imposed lesser sanctions against him, gradually increasing the severity of the sanctions until it became absolutely appropriate and necessary to dismiss Merena's complaint as a last resort.

Initially, the first sanction that was imposed against Merena was a monetary sanction. This sanction was imposed after Merena engaged in improper, abusive written discovery tactics. He was ordered to pay costs and attorney fees to the defendant in a fairly nominal amount (\$977.50). [R. at 938-52, 2476-788.]

Unfortunately, Merena persisted with his abusive discovery tactics. After these abuses were brought to the attention of the court, Judge Lindberg issued a ruling

expressing concern that Merena was using this case for an improper purpose, i.e., to vex and harass Davis, rather than to advance meritorious claims.² The court deemed it appropriate to warn Merena about his behavior, and directed him to improve his conduct. R. at 1377-81. The court stated that it would continue to give him the benefit of the doubt for now, but directed him to adhere to the standards of professionalism and civility. The court also explicitly cautioned him not to engage in any further obstreperous conduct. Id. The court ruled: "Mr. Merena is put on notice that the Court will not tolerate further obstreperous behavior on his part. Mr. Merena cannot continue with abusive discovery practices." Id.

After Merena sought leave to complete certain discovery requests, the lower court granted him permission to do so. At the same time, the court deemed it necessary to put certain limitations in place. In doing so, the court again put Merena on notice that he needed to comply with the

²Despite Merena's assertions to the contrary, the lower court never found his claims to be meritorious. The lower court never had occasion to reach the merits of this case, because Merena's claims were dismissed before trial. Consequently, the lower court could only, at best, deem Merena's claims to be *potentially* meritorious.

court's discovery limitations. R. at 1860-63.

Despite being given clear, ample warning by the lower court that further misconduct on his part would not be tolerated, Merena nevertheless chose to ignore such warnings. At his own peril, he willfully proceeded to disregard the discovery limitations that had been imposed upon him, intentionally violating the scope of permissible discovery by taking unnecessarily prolonged depositions and asking completely improper, irrelevant questions of deposed witnesses. [R. at 2213-87, 2498-05.] As a result, the lower court was finally compelled to dismiss his complaint, but only as a last resort.

It is important to note that Merena's malfeasance in this case was not an isolated, single event. Instead, it was part of a pattern of ongoing, egregious misconduct spanning not only the entirety of this case but also pouring over into other cases involving Merena and Davis as parties. [See, e.g., R. at 1248-75 (bankruptcy proceeding) and also Addendum 2 (protective order proceeding).]

It is clear from the history of this case that Merena has not been deterred by simple monetary sanctions. He has repeatedly ignored such sanctions, and he has not paid a

single cent towards satisfying them. Hence, monetary sanctions alone have no meaning to Merena, and are absolutely not an adequate remedy to compel him to behave.

Regarding Merena's claim that the lower court should have been more lenient with him as a pro se litigant, it has already been amply demonstrated above that the court afforded him more than adequate latitude and patience, probably much more than he deserved. At this juncture of the case, Merena should not be afforded any more leniency. He is, for all intents and purposes, a professional litigant. He is no stranger to the litigation process, having been involved in numerous court actions, including a reported case dating back nearly 30 years. Fong v. Merena, 655 P. 2d 875 (Hawaii 1982). He does not respect the court system, as is clear from his lack of compliance with the numerous court orders that have been entered against him, which remain unsatisfied. (See, e.g., R. at 2498-05, 2842-48; Addendum 2.) Simply stated, Merena is not deserving of any more latitude or leniency.

Merena has not shown good cause to afford him relief from the sanctions that have been entered against him. His appeal should therefore be denied.

IV. MERENA HAS NO STANDING TO REQUEST A CHANGE IN UTAH LAW

Very little needs to be said in response to Merena's argument that Utah law should be altered to afford him a right against self-incrimination at a civil contempt hearing. Despite having been given clear notice of the contempt hearing in this case, and despite having been ordered to appear at the hearing upon threat of an arrest warrant being issued in his absence, *Merena did not even show up*. As a result, he made no incriminating statements at the hearing, and the burden of proof never shifted to him to do anything at the hearing.

The basis for holding Merena in contempt of court was well outlined in Davis' contempt motion (R. at 2669-80), in the evidence presented at the contempt hearing (see R. at 2814-15), and in the lower court's "Contempt Hearing Decision" (a copy of which is attached to Merena's Brief at Addendum E). Merena has advanced no legitimate reason to upset the contempt order sanctions that were entered against him, inasmuch as he did not even bother to attend the contempt hearing.³ His request to alter Utah law to afford

³Regarding Merena's assertion that the lower court improperly shifted the burden of proof to him on the issue

him a right against self-incrimination lacks merit. His appeal should therefore be denied.

CONCLUSION

Merena's appeal (his third attempt to file an appeal in this matter) is untimely. Merena has once again improperly attempted to appeal a non-final order. Because Merena's appeal has not been properly taken, this Court lacks jurisdiction to hear the appeal, and should dismiss the same forthwith.

Merena's appeal also fails on its merits. Merena has

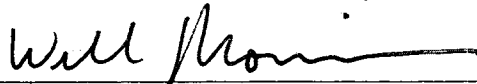
of whether he had the ability to pay contempt sanctions, this argument lacks merit and is not properly advanced on appeal. Once again, this issue was never properly raised below. Further, to the extent that Merena is attempting to challenge the lower court's contempt findings, he has not carried his marshaling burden. His argument is therefore not well taken. Moreover, the Record amply supports a finding that Merena had an ability to pay contempt sanctions. For one thing, he has never had a problem paying for the army of attorneys that have represented him in this case, nor has he had a problem paying for the army of attorneys that have represented him in the companion cases occurring simultaneously with this one. As well, he has never had a problem covering the cost of the mountain of paperwork he has filed in this case, deluging the lower court docket. A fair and reasonable inference can easily be drawn that at all times material herein he has had the ability to pay the monetary sanctions that have been entered against him. He has simply chosen not to pay those sanctions. It appears he has no intention of ever doing so.

not set forth any appropriate, legitimate basis for reversing the rulings and orders of the lower court. He was properly sanctioned by the lower court, and he has not shown any reason on appeal to upset the sanctions that have been entered against him. Further, he has not even properly preserved the issues he is seeking to appeal.

Based upon the foregoing, this Court should summarily dismiss Merena's appeal, and order that the cost bond he has posted be released to Davis. This Court should enter such further and additional relief to Davis as it may deem to be just and proper in the premises.

RESPECTFULLY SUBMITTED this 28th day of
November, 2011.

MORRISON LAW OFFICE, INC.

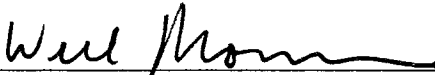


Will Morrison
Attorney for Appellee

CERTIFICATE OF SERVICE

This certifies that on the 28th day of November, 2011, I caused to be served, via U.S. mail first class and postage prepaid, two true and correct copies of the foregoing Appellee Brief, to the following:

Loren M. Lambert
David S. Head
Arrow Legal Solutions Group, PC
266 East 7200 South
Midvale, UT 84047
(Attorneys for Appellant)



Will Morrison
Attorney for Appellee

ADDENDUM

1. Merena's Previous Efforts to Appeal
2. Judge Medley Contempt Order
3. Declaration of Kenneth Merena

ADDENDUM 1

-----ooOoo-----

Case No. 20090723-CA

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Ken Merena, *Pro Se*
44 W. Broadway #1003S
Salt Lake City, UT 84101
(801) 372-9349

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

KEN MERENA, an individual, and dba
MERENA INVESTMENTS,

Plaintiff and Appellant

vs.

ALICE M. MERENA,

Defendant and Appellee

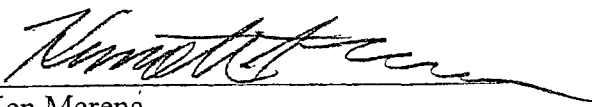
NOTICE OF APPEAL

Civil No. 070915206

Judge: Denise P. Lindberg

Notice is hereby given that Kenneth A. Merena, Plaintiff and Appellant in the above captioned case, appeals to the Utah Supreme Court the Final Order of the Honorable Denise P. Lindberg, entered in this matter on October 30, 2009. The appeal is taken from the entire judgment

DATED this 10th day of November, 2009.


Ken Merena

DEC 21 2009

---ooOoo---

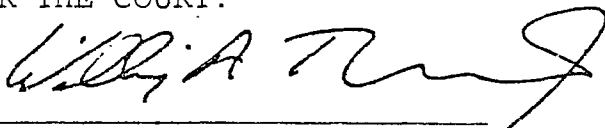
<u>Ken Merena</u> , an individual,)	:
and dba Merena Investments,)	ORDER OF DISMISSAL
)	
Plaintiff and <u>Appellant</u> ,)	Case No. 20090941-CA
)	
v.)	
)	
Alice M. Merena,)	
)	
Defendant and Appellee.)	

On December 1, 2009, this court issued a Sua Sponte Motion for Summary Disposition on grounds that the October 30, 2009 order from which this appeal is taken is not a final, appealable order and requiring the parties to submit responses stating why the appeal should, or should not, be dismissed, without prejudice, for lack of jurisdiction. The parties now stipulate that the October 30, 2009 order is not final and appealable and the appeal is premature. We construe the stipulation as a request for voluntary dismissal of the appeal filed pursuant to rule 37(b) of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the appeal is dismissed without prejudice to the filing of a timely notice of appeal after the district court enters a final, appealable order. The parties are to bear their own costs and attorney fees incurred in this appeal.

Dated this 21 of December, 2009.

FOR THE COURT:



William A. Thorne Jr., Judge

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Ken Merena, an individual,
and dba Merena Investments,

Plaintiff and Appellant,

v.

Alice M. Merena,

Defendant and Appellee.

ORDER

Case No. 20090941-CA

Before Judges Greenwood, Davis, and Thorne.

This matter is before the court on Plaintiff Ken Merena's Petition for Emergency Relief for Stay of District Court Proceedings, filed pursuant to rule 8A of the Utah Rules of Appellate Proceedings, and Motion and Application for Stay of District Court Proceedings, filed pursuant to rule 8 of the Utah Rules of Appellate Procedure.¹

IT IS HEREBY ORDERED that the petition for emergency relief and the motion and application for a stay of the district court proceedings are each denied.

Dated this 4th day of December, 2009.

FOR THE COURT:

William A. Thorne, Judge

1. Although Plaintiff has included additional language in the titles for his petition and motion, this order disposes of all requests made in the combined filing, however captioned.

ADDENDUM 2

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

ALICE MICHELLE MERENA, nka	:	CONTEMPT HEARING DECISION
ALICE MICHELLE DAVIS,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Petitioner,	:	
	:	CASE NO. 074903538
vs.	:	
	:	
KENNETH ALLEN MERENA,	:	
	:	
Respondent.	:	

~~An evidentiary hearing was held on April 30, 2010, on the~~
petitioner's request that the respondent be found and held in contempt
of Court for alleged violations of a cohabitant abuse Protective Order.
The petitioner was present and represented by her counsel, Grant W. P.
Morrison. The respondent was present and represented by his counsel, Amy
E. Hayes Kennedy. The parties, having been duly sworn and examined under
oath, and witnesses having testified on behalf of the parties, and
documentary evidence having been marked and received by the Court, and
the Court having heard the arguments of counsel for petitioner and
respondent, and having inquired into the legal sufficiency of the
evidence so adduced, and being fully advised in the premises, does now
make and adopt the following:

FINDINGS OF FACT

1 The Court finds that these parties have an extensive, and at times extremely contentious, litigation history with one another, as follows:

a. The Annulment: The petitioner filed for divorce from respondent on August 20, 2007, in Civil No. 074903660 DA. A Bifurcated Decree of Annulment was entered on May 6, 2009. Other than dissolution of the marriage and restoration of petitioner to the use of her maiden surname, no other claims have been resolved in this case.

b. The Protective Order (the instant matter): The petitioner filed for a Temporary Protective Order on August 14, 2007. A Protective Order was stipulated to and entered on August 20, 2007. A Modified Protective Order, which allows the parties to be present at and personally participate in all hearings, meetings or other required events occurring in any civil litigation to which the petitioner and respondent are parties, was entered on April 17, 2008. The petitioner's Motion for Certification of Contempt for Violation of Protective Order and for Attorney's Fees was filed in August 2009.

c. The First Slander Case: In October 2007, the respondent filed a suit against petitioner seeking damages and injunctive relief due to alleged slanderous statements made by petitioner. In November 2009, Civil No. 070915206 MI was dismissed by Judge Lindberg as a sanction against respondent due to discovery abuses in that case. Judge Lindberg

also ordered that petitioner receive a partial award of attorney's fees, which as of the evidentiary hearing have not been determined.

d. The Bankruptcy. In January 2008, the petitioner filed for bankruptcy relief in Montana and named respondent as a creditor, prompting the respondent to initiate an Adversary Proceeding against petitioner. After a trial in December 2008, the Adversary Proceeding was dismissed on March 10, 2009.

e. The Second Slander Case: In February 2009, the respondent filed a second slander suit against petitioner, alleging further incidents of slander and seeking damages and injunctive relief. In March 2009, the petitioner filed an Answer and Counterclaim in Civil No. 090403270 in which she alleges that the respondent's conduct in the aforementioned actions support claims for wrongful civil proceedings/abuse of process, intentional infliction of emotional distress, and libel/slander. Petitioner seeks monetary damages from respondent. This action remains pending and discovery is ongoing.

f. The Small Claims Case: On or about October 16, 2007, a person by the name of Yu Zhao filed a small claims action against petitioner for recovery of a loan. On or about November 27, 2007, the Fourth District Court, State of Utah, Provo Small Claims Department, entered a Small Claims Judgment against petitioner in the total amount of \$800. Mr. Zhao and respondent are close friends and have been business partners. Respondent, assisting Mr. Zhao or acting as his

attorney, paid \$1,700 to Elwin Kirkwood, a process server in Montana, and obtained a Writ of Execution in Montana with respect to Zhao's \$800 Utah Small Claims Judgment. On or about January 17, 2008, based upon the Zhao Judgment, had petitioner's 2003 Honda Civic seized in Montana.

2 The Court finds that the in her Affidavit in Support of Motion for Certification of Contempt for Violation of the Protective Order and for Attorney's Fees, the petitioner alleges four distinct charges of contempt against respondent, which are described and hereinafter referred to as follows:

a. Charge 1: That an email sent by respondent to petitioner on September 9, 2007, violated Paragraph 2 of the Protective Order entered by this Court on August 20, 2007;

b. Charge 2: That a telephone call placed by respondent to petitioner's mother, Marlene Davis, on November 10, 2007, and the ensuing 22 minute conversation violated Paragraph 2 of the Protective Order entered by this Court on August 20, 2007;

c. Charge 3: That the respondent violated Paragraph 4 of the Protective Order entered by this Court on August 20, 2007, by allegedly placing a tracking device on her vehicle;

d. Charge 4: That emails sent by respondent to petitioner within the context of the First Slander Case and his general conduct in this and other litigation with petitioner constitutes "harassment" and

thereby violated Paragraph 1 of the Protective Order entered by this Court on August 20, 2007.

3 The Protective Order at issue in the instant action states, on page 1, "The court orders the Respondent to obey all orders initialed on this form and to not abuse or threaten to abuse anyone protected by this order". It further indicates that "No one except the court can change it". The initialed portions of the Order are stated as follows, in pertinent part,

1. Personal Conduct Order. Do not commit, try to commit or threaten to commit any form of violence against the Petitioner or any person listed on page 1 of this form. This includes stalking, harassing, threatening, physically hurting, or cause any other form of abuse.

2. No Contact Order. Do not contact, phone, mail, e-mail, or communicate in any way with the Petitioner, either directly or indirectly.

4. Stay Away Order. Stay away from: The Petitioner's current or future vehicle, job, home, premises and property.

4 Charge 1: The Court finds beyond any reasonable doubt that Kenneth A. Merena knowingly and intentionally and willfully violated the Protective Order, as follows:

a. Less than three weeks following the entry of the Protective Order, prior to the modification, which event occurred on or about September 9, 2007 (the Protective Order was issued on August 20,

2007), he sent, by email, a letter to the petitioner. Respondent admits to sending the letter to petitioner.

b. The first paragraph of the letter states, "I realize that I am taking a great risk in writing to you directly, but it is a risk that I feel that I must take. If you choose to hurt me by using the fact that I have contacted you directly, I will accept that and suffer the consequences of my own actions. However, I think it is so important that you hear certain things directly from me, that I must take the risk. I hope that you won't use this against me. I am putting my trust in you. I ask that you try to do the same for me".

5 The Court finds that Mr. Merena knew of the Protective Order, having stipulated to its entry, and, further, knew that he was not to contact or email or write Ms. Davis. Indeed, Mr. Merena, in his letter, acknowledges his violation in this very writing. Irrespective of the Protective Order, Mr. Merena sent Ms. Davis an email letter, on or about September 9, 2007, in clear violation the Protective Order and particularly paragraph 2, that prohibits that very action. The Court finds that Mr. Merena's claimed justification for sending the letter to prevent petitioner from committing suicide or some other moral justification is without merit. The Court finds Mr. Merena has violated the Protective Order and he is found in contempt for this violation.

6 Charge 2: The Court finds that Mr. Merena next contacted the petitioner's mother on or about November 10, 2007 and claimed he had been

involved in a motorcycle accident and received severe head trauma and spinal cord injuries. Although the evidence is conflicting, the Court finds that respondent then asked the petitioner's mother, Marlene Davis, to pass along to Alice how sorry he was and that he wasn't thinking rationally at the time of the incident in Silver Gate, and to please tell Alice I love her and miss her.

7 The Court finds by clear and convincing evidence that Mr. Merena's communication with petitioner's mother is a clear violation of the Protective Order, particularly paragraph 2, that prohibits communicating, either directly or indirectly with the petitioner. Respondent's testimony that he did not ask Marlene Davis to communicate with petitioner is not credible. When respondent's testimony is considered in the context of what can only be described as an obsessive desire and behavior pattern by respondent to take advantage of every opportunity to maintain some form of contact with petitioner, respondent's testimony that he called petitioner's mother and did not ask her to contact petitioner is unbelievable. ★

8 Charge 3: The Court finds that Mr. Merena contacted Elwin Kirkwood, a Registered Process Server in the State of Montana in an effort to enforce Mr. Zhao's Utah \$300 small claims Judgment. The Court finds that during one or more of the conversations with Mr. Kirkwood, that Kenneth Merena advised Mr. Kirkwood that he, Kenneth Merena, had placed a tracking device on Ms. Merena's automobile. The Court finds

that Mr. Kirkwood's testimony was very credible. That Mr. Kirkwood is a disinterested third party witness who was well spoken and had excellent recall of his conversations with respondent. Mr. Kirkwood testified that respondent knew of petitioner's location, who petitioner associated with and knew of where and when petitioner's children went to school. The Court finds that respondent's stated knowledge of petitioner's and her children's daily activities is consistent with respondent's statement to Mr. Kirkwood that he (respondent) put a tracking device on petitioner's vehicle so he could follow her at all times. Further, Mr. Kirkwood testified that respondent was persistent in talking about personal themes between respondent and petitioner and that respondent threatened he was going to contact petitioner's ex-husband to try to get petitioner's children taken away from her. The Court finds respondent's obsessive and irrational behavior towards petitioner is frightening and in violation of this Court's Protective Order. Respondent's testimony that Mr. Kirkwood's testimony is full of lies, that he (respondent) doesn't recall the name of a private detective he hired and that he stipulated to the Protective Order without knowledge of what he was doing is not credible. ★

9 The Court further finds that Mr. Merena told Mr. Kirkwood to remove the tracking device from the vehicle. The Court finds by clear and convincing evidence that the placing of the tracking device on Ms. Merena's vehicle occurred after the Protective Order was issued, and that it is in clear violation of the Protective Order.

10 Charge 4: The Court finds that in November 2007, the petitioner reported the conduct described as Charges 1 and 2 to the Billings (Montana) Police Department, and that as a result, two misdemeanor charges have been filed against respondent, for which a Warrant for Arrest was issued by the Municipal Court of the City of Billings on January 31, 2008. As of the date of the present hearing, respondent has not appeared in the Montana Municipal Court and the Warrants and charges remain outstanding. Irrespective of the outstanding warrants, the respondent has engaged in despicable, frightening conduct toward petitioner. For example, he has gone far beyond the allowance given him by Judge Lindberg in the libel and slander case. He opted to represent himself, and in an email couched as a "type" of interrogatory, sought "the name, address, phone number and e-mail of the man you slept with in Bozeman, Montana on your way back to Billings, MT, after your August 21, 2007 departure from Salt Lake City." ¹ He also, in the same email, sought "The name of the person that owns the silver Honda that has been parked in your carport for the last three weeks (approximately)."

¹ Kenneth A. Merena had filed a libel and slander action against Alice Merena and deposed her on the 13th day of February, 2009. Although Judge Lindberg allowed the deposition, she was clear in a hearing prior to the deposition that Mr. Merena was not to violate the Protective Order in place. She allowed the parties to communicate only by email, and that communication could only relate to the libel and slander lawsuit. Following Alice Merena on her way back to Montana, or having her followed, is a clear violation of the Protective Order, as is the next paragraph relating to knowledge of a vehicle in her carport for the prior three weeks.

This email was sent to Alice Davis on or about the 26th day of February, 2009. In addition, he has asked questions via email that far surpassed the limits allowed by Judge Lindberg, including demanding communication "That would necessarily require you to check your specially created e-mail account for messages on a regular basis, at a minimum, daily".

11 The Court finds that respondent's conduct described herein is far beyond what was contemplated in the Amended Protective Order. Indeed, even Judge Lindberg addressed in her Memorandum Decision dismissing Mr. Merena's case against Alice Merena, (Case No. 070915206) that his excesses relating to discovery resulted in the dismissal of the case and sanctions being imposed. Mr. Merena's relying on Judge Lindberg's Order was ill taken and evidence introduced at trial did not support his argument. Respondent's conduct in this regard can only be described as threatening, intimidating and demonstrates an absence of balance and a suggestion of serious mental health challenges. However, with regard to Charge 4, the Court finds that respondent's general litigation conduct although very troubling, does not satisfy the statutory definition of harassment in Utah Code Ann., § 76-5-106, therefore, Charge 4 has not been proven by clear and convincing evidence and is ordered dismissed. It should be noted, however, that respondent's highly suspect conduct weighs heavily against his credibility which is nonexistent.

CONCLUSIONS OF LAW

1 The Court has jurisdiction over both parties and the subject matter in this case.

2 The Court finds beyond any reasonable doubt and by clear and convincing evidence as referenced herein that respondent Kenneth Merena is in contempt of the Court's Orders, without justification, as reflected in the Findings of Fact as to Charges 1, 2 and 3. Charge 4 is Ordered dismissed.

3 Based upon respondent's egregious and contemptuous conduct, respondent is Ordered to serve thirty (30) days in the Salt Lake County Jail on each of the three charges for a total of ninety (90) days, to run consecutively without any credit for good time served and not to be released to home confinement or ankle monitoring.

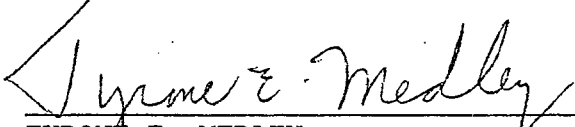
4 The Court-Ordered jail time is stayed for a period of time commensurate with the period of time the Modified Protective Order remains in effect, which under Utah Code Ann., § 78B-7-106(10), is an indefinite period of time until modified or vacated by the Court. Based upon respondent's conduct described herein, petitioner is in need of and is entitled to protection from respondent for the maximum time available under the law. This stay is conditioned upon respondent's strict compliance with the specific terms of the Modified Protective Order and timely payment of the fines, costs and attorney fees provided for herein.

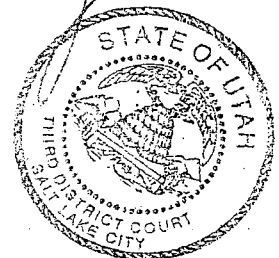
5 Based upon respondent's contemptuous conduct and Utah Code Ann., § 78B-6-310, the Court elects to impose a fine upon respondent in the amount of \$1,000 on each of the three charges, for a total of \$3,000 to be paid in full within thirty (30) days of entry of this Contempt Hearing Decision.

6 In accordance with Utah Code Ann., § 78B-6-311, and the Court's Inherent Authority, petitioner is awarded Judgment against respondent for her costs, expenses and reasonable attorney fees, to be supported by Affidavit and which shall be satisfied by respondent within thirty (30) days of entry of the Judgment. Griffith v. Griffith, 985 P.2d 255 (Ut. Sup. Ct. 1999); Envirotech Corp. v. Callahan, 872 P.2d 487 (Ut. Ct. App. 1994).

7 This signed Contempt Hearing Decision shall constitute the Order and Judgment of the Court, counsel and parties should govern themselves accordingly.

Dated this 8 day of June, 2010.


TYRONE E. MEDLEY
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Contempt Hearing Decision, Findings of Fact and Conclusions of Law, to the following, this 9 day of June, 2010:

Grant W. P. Morrison
Matthew G. Morrison
Attorneys for Petitioner
352 East 900th South
Salt Lake City, Utah 84111

Amy E. Hayes Kennedy
Attorney for Respondent
370 E. South Temple, Suite 400
Salt Lake City, Utah 84111

J. Ashley

ADDENDUM 3

Loren M. Lambert, #5101
ARROW LEGAL SOLUTIONS GROUP, PC
Attorney for Plaintiff
266 East 7200 South
Midvale, Utah 84047
Telephone (801) 568-0041
Facsimile (801) 352-0645

IN THE WEST JORDAN THIRD DISTRICT COURT IN
AND FOR SALT LAKE COUNTY, UTAH

KENNETH MERENA, an individual,

Plaintiff,

vs.

ALICE M. DAVIS (f.k.a. ALICE
MERENA),

Defendant.

**DECLARATION OF KENNETH
MERENA**

Case No. 090403270

Judge: Kouris

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

COMES NOW Kenneth Merena, who being first duly sworn, states as follows:

1. I am the Plaintiff in the above matter.
2. I am unable to travel to the United States for the indefinite future due to my current

health and economic situation.

3. Travel to the United States would be precarious to my health.
4. I have a degenerative condition of the lumbrosacral spine, especially in the area of L2, L3, L4 and L5, that prevents me from walking and even slight exercise. My intervertebral spaces are also narrowing in numerous places. I have also had neurosurgery on my lumbar spine and additional neurosurgery may be needed if less invasive measures are not successful. See Exhibit A in Memorandum in Support of Motion to Proceed in Absentia.
5. I have met with and been examined by Drs. Salazar, Guerrero, Torres, Moody, and Pingree for my medical conditions and concerns. They have all prohibited me from traveling for the indefinite future because they said to do so would be harmful to my health. See Exhibit A in Memorandum in Support of Motion to Proceed in Absentia.
6. Dr. Salazar has unequivocally prohibited me from making the necessary travel to be able to be present at the October 28th hearing as doing so could cause permanent paralysis. He has also stated that any travel in the future, such as to the United States, may prove to be impossible due to other conditions that cause me to be permanently disabled. See Exhibit A in Memorandum in Support of Motion to

Proceed in Absentia.

7. I have incurred significant economic expenses by moving out of the country, and do not have the economic means to move back to the United States in order to be present for the October 28th hearing.
8. It is not necessary for me to be present at the October 28th hearing in order for it to be able to proceed.
9. My absence from the October 28th hearing should not prejudice the opposing party or the judicial process in this case.
10. I have researched round trip tickets from Billings, Montana to Utah and they average \$300 per person; the lowest cost available was \$208. See Exhibit C in Memorandum in Support of Motion to Proceed in Absentia.
11. I know the Defendant regularly visits Salt Lake City in order for her two children to visit their father, to take part in leisure activities, to shop and visit with her many friends and acquaintances.
12. I know that in the past it has been customary for the Defendant to make trips from Billings to Salt Lake City by automobile.
13. I personally taught the Defendant how to locate and purchase airfare from discount travel websites on the internet.

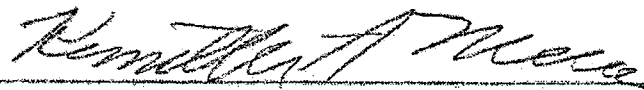
14. I know the Defendant has used and purchased airfare from discount travel websites on the internet in the past. The websites I have taught her to use are attached at Exhibit D in Memorandum in Support of Motion to Proceed in Absentia.
15. I know that the Defendant has worked in the past as a substitute teacher, and that as a substitute teacher she would contact the school district in the morning if on that particular day she wanted to work. The district would give her a substitute teaching assignment if one was available, and the Defendant would have the option of accepting or rejecting it.
16. The Defendant stated in her affidavit that she lost \$60 of income because she was not able to work on September 30th due to the scheduled hearing on October 1st, and also because she only had been given short notice of its cancellation. The Defendant could still have worked on September 30th as a substitute teacher even with short notice of the hearing's cancellation because she could have still called the school district that morning and accepted any available substitute teaching positions for that day. Moreover, in regards to Defendant's signed statement from Mrs. LaFontaine, stating that the Defendant would have worked for her, but was not able to because she had to fly out of Billings at 3:30 to Salt Lake City, I have

investigated this and I could not find a flight around that time which was available from Billings to Salt Lake City, but I did verify that later flights could have been secured that would have allowed her to work. Therefore, Defendant should be required to provide the invoice of her flight and actual boarding pass to show when the flight was booked, the price of her individual ticket and that she was actually issued a boarding pass.

7. Defendant's request for a rental car is supported by a bill of rental for 5 days. Not only is this indicative that she came for purposes other than the hearing, she should only be allowed at the most 2 days of car rental. See Exhibit F in Memorandum in Support of Motion to Proceed in Absentia.

I, Kenneth Merena, therefore, as to those matters asserted as true, declare under criminal penalty of the State of Utah that the preceding is true and correct:

EXECUTED this 27th day of October, 2010.



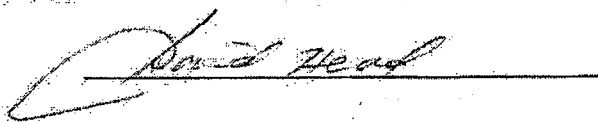
(A person is guilty of a class B misdemeanor if the person knowingly makes a false written statement as provided under Subsection, UCA § 46-5-101).

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2010, I emailed a true and correct copy of the

foregoing document to:

William P. Morrison, Esq.
Morrison & Morrison
352 East 900 South
Salt Lake City, Utah 84111

A handwritten signature, likely "David Head", is written in cursive over a horizontal line.