

2015

**Monica Judd Appellee and Plaintiff , vs . Eric Irvine Appellant and Defendant .**

Utah Court of Appeals

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IN THE  
**UTAH COURT OF APPEALS**

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**CASE # 20150134 - CA**

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Monica Judd

Appellee and Plaintiff,

VS.

Eric Irvine

Appellant and Defendant.

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**APPEAL**

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**TAKEN FROM THE FINAL ORDER OF THE FOURTH DISTRICT  
COURT, PROVO, UT  
(ON THE RECORD @ 39)**

THE HONORABLE FRED D. HOWARD, JUDGE.

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**BRIEF OF THE APPELLANT**

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FILED  
UTAH APPELLATE COURTS

MAY 11 2015

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**STATEMENT OF JURISDICTION:**

Pursuant to Rule 4(a) of the Utah rules of Appellate procedure which states:

**Appeal from final judgment and order**

In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.

This Appeal is taken from the Final Order of Judge Fred D. Howard of the Fourth District Court in Provo, UT.

The Utah Court of Appeals has Jurisdiction pursuant to § 78A-4-103 (2)(j) which states:

- (2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
  - (j) cases transferred to the Court of Appeals from the Supreme Court.

This case has been transferred to the Court of Appeals the Supreme Court of Utah.

## **STATEMENT OF THE ISSUES:**

**ISSUE: A course of conduct was not "clearly" established at the time of trial; Two or more clearly defined instances of stalking were not established on the record in a manner compliant with statute, and applicable case law.**

During the Trial of September 15th 2014 the Plaintiff and her witnesses alleged the following:

An instance or instances in which an uncomfortable remark or remarks were made; An instance or instances in which staring occurred; A message or messages sent via Facebook to Brian Le containing threatening language; Allegations as to it's or their authorship; And of hearing other statements defined as hearsay by the trial court.

During the trial only one clear date was given for these events, that of August 16th. This raises a question concerning the correct interpretation and application of current statutes and applicable case law.

**STANDARD OF REVIEW:**

(STATE VS. REDD 37 P.3d 1160, ANALYSIS[1] [2001])

"A proper interpretation of case law is a question of law which we review for correctness, according no deference to the magistrate's legal conclusion."

(Moon v. Moon 973 P.2d 431 [Utah App. 1999])

"The Court of Appeals reviews questions of law for correctness, according no particular deference to the trial court's actions."

**PRESERVATION OF THE ISSUE ON THE RECORD,**

**CITATION TO RECORD INDEX @46:**

(TRANSCRIPT, VOL.1/1 [PAGE:LINE] 09/15/14)

**ALLEGED REMARKS**

**MONICA JUDD, 5:10-16:**

10 Then he said a comment when we were talking when I  
11 was taking him home that made me very uncomfortable that said  
12 he loved women with big boobs. Then he just -- I just dropped  
13 him off.

DENISE JUDD, MOTHER OF PLAINTIFF 24:10, 12-14:

10 you know, all guys will make comments.

12 She told me about that comment that he said in the car

13 about the, you know, that he liked [girls] with big boobs. She

14 totally ignored it.

SPENCER CANNON, SHERIFF, FAMILY FRIEND 14:20-22:

20 she was tearful and that this caused her a lot of concern, not

21 knowing what his intention might be in making the comments

22 either directly to her when he was in her car or.....

**ALLEGED STARING**

MONICA JUDD, 6:2-3:

2 He has constantly stared at me. He has --

3 I've heard people saying, "Gosh, he always stares at you."

**ALLEGED MESSAGE[S] SENT TO FEANCEE BRIAN LE**

MONICA JUDD, 6:9-12:

9 No, he messaged Brian, my fiancé, and saying

10 that -- says, "No worry, I will make her pay for what she has

11 done to you and what she has done to me. If I have tried stop,

12 you will get hurt. I will have my revenge,"



THE COURT & MONICA JUDD, 7:21-25:

21 THE COURT: Are you reading them, or what are you  
22 doing?

23 MS. JUDD: No, I'm -- they're all right here if you do  
24 want to see them.  
25 (Court reviewing document)

SPENCER CANNON, SHERIFF, FAMILY FRIEND 14:23:

23 and then the comments to her fiancé.

DENISE JUDD, MOTHER OF PLAINTIFF 24:23-24:

23 Then he goes just this last week, messaged to the  
24 boyfriend that he's going to make her pay.

**ALLEGED CONTENT & AUTHORSHIP OF MESSAGE[S]**

MONICA JUDD, 9:10-25:

10 MS. JUDD: "Your girlfriend sucks cock, bro. What I'm  
11 saying is she gives amazing head. (Inaudible) understand why  
12 she tells everyone about you. It's like she wants you to know.  
13 She'll be all like, 'Oh, this is his name. This is where he  
14 lives. Oh, yeah, and she has a tiny dick.' You would think he  
15 -- she would just suck it and blow, right? Who the F wants to  
16 hear the life story. I didn't. So are you really cool with

17 her? Because if you are, I'm down for another."

18 THE COURT: Did he say something threatening that you  
19 mentioned?

20 MS. JUDD: Yeah, what I'm reading right here. Then he  
21 said, "No worry, I will make her pay for what she has done to  
22 you and what she has done to me. If you try to stop, you will  
23 get hurt. I will have my revenge. She is a whore. She only  
24 knows how to use people. She uses you and she uses me. She  
25 must pay."

THE COURT & MONICA JUDD, 6:3-4:

3 THE COURT: What has he done directly to you?

4 MS. JUDD: He has threatened me.

ERIC IRVINE & DENISE JUDD, MOTHER OF PLAINTIFF 25:12-15:

12 BY MR. IRVINE:

13 Q. Have you, yourself, witnessed me threaten your  
14 daughter in any way?

15 A. Through the messages on Facebook.

**OBJECTIONS TO ALEGED CONTENT AND AUTHORSHIP**

ERIC IRVINE, 17:14-16:

14 As for these remarks she claims I made to her boy-  
15 friend, I would like to see proof of that because I know I did

16 not make those.

THE COURT, ERIC IRVINE & MONICA JUDD; 18:24-25, 19:1-19:

24 THE COURT: She's indicated the statements that were  
25 made to her on Face -- or her fiancé on Facebook. Is that  
1 something you dispute?

2 MR. IRVINE: I have no idea what she's talking about.

3 I'd like to see proof of that also. I don't -- I did not say  
4 those words.

5 THE COURT: All right, do you wish to examine him about  
6 that subject?

7 MS. JUDD: Yes.

8 THE COURT: Come and -- you can come to the lectern  
9 here and ask your questions.

10 MS. JUDD: Do you want me to bring the proof?

11 THE COURT: Yes, you can. Do you want to show it to  
12 him.

13 MS. JUDD: There's some right here.

14 MR. IRVINE: It seems she left it right here.

15 MS. JUDD: Yep, that's it.

16 MR. IRVINE: I see no proof on here that this message  
17 came from me. It just says, "Facebook user."

18 THE COURT: Do you want to ask him a question?

19 MS. JUDD: I have no questions.

ERIC IRVINE & DENISE JUDD, MOTHER OF PLAINTIFF 25:12-25:

12 BY MR. IRVINE:

13 Q. Have you, yourself, witnessed me threaten your  
14 daughter in any way?

15 A. Through the messages on Facebook.

16 Q. Those messages --

17 A. -- that you sent her.

18 Q. -- weren't sent by me, your Honor.

19 A. That's just what I'm -- your name was at the top.

20 That's what I've seen.

21 Q. My name is not at the top.

22 A. On her phone it is, that Shannon sent her.

23 Q. Those are all (inaudible) [my questions you Honor].

24 A. It says your name at the top.

25 THE COURT: All right, you can step down. Thank you.

**ALLEGED COURSE OF CONDUCT, DATE GIVEN**

**THE COURT & MONICA JUDD, 8:3-8:**

3 THE COURT: Is this one communication or many or what  
4 is it you're -- I'm not sure that I'm following you.

5 MS. JUDD: What do you mean?

6 THE COURT: That's what I don't understand. Is this  
7 one communication or many or what dates or what --

8 MS. JUDD: Well, he has messaged Brian.

**THE COURT & MONICA JUDD, 8:21-24:**

21 Can you identify -- you've identified a Facebook communication  
22 to your fiancé. Do you know when that was?

23 MS. JUDD: Well, he just gave them to me a couple days  
24 ago, but it says it was on August 16th.

DENISE JUDD, MOTHER OF PLAINTIFF 24:23-24:

23 Then he goes just this last week, messaged to the  
24 boyfriend that he's going to make her pay.

SPENCER CANNON, SHERIFF, FAMILY FRIEND 14:5-6:

5 I don't remember the exact day, it was  
6 about a month, month-and-a-half ago, maybe.

**ISSUE: Certain Rules of Evidence were misapplied,  
unevenly applied, or not applied where they should have  
been; The evidence did not constitute a preponderance of  
evidence.**

During the Trial of September 15th 2014, the Judge  
chose to entertain evidence that was not admitted into  
evidence. Also, an original was not kept on the record.

The facts surrounding this evidence, how it was

recieved and presented by the Plaintiff, was no different than other evidence deemed to be Hearsay by the Judge.

This raises a question as to whither or not the evidence entertained aught to be treated as such in it's absence from the record.

When this fact is taken, along with the contradictions in the Plaintiff's testimony, a long shadow of doubt is cast on the accuracy and truthfulness of her claims. Or at the very least on the weight of the evidence and testimony itself. Raising a question as to whither or not it constituted a preponderance by definition.

**STANDARD OF REVIEW:**

(State vs. Souza 846 P.2d 1313, supply and furnish, definition, [1][2][3][4][5] 1993)

"Because interpretation of statutory language is a question of law, we review the definition provided ~~in the jury instruction~~ as supplemented by the offered dictionaries, for correction of error without affording deference to the decision of the trial court.

(Moon v. Moon 973 P.2d 431 [Utah App. 1999])

"The Court of Appeals reviews questions of law for correctness, according no particular deference to the trial court's actions."

**PRESERVATION OF THE ISSUE ON THE RECORD,**

**CITATION TO RECORD INDEX @46:**

(TRANSCRIPT, VOL.1/1 [**PAGE:LINE**] 09/15/14)

**CONTRADICTIONS IN PLAINTIFF'S TESTIMONY**

MONICA JUDD, 5:3:

3 and like -- we were never friends. We were nothing.

MONICA JUDD, 5:13-14:

13 ~~him off.~~ Then I did give him a ride home again after, but my  
14 other friend was with me.

MONICA JUDD, 7:4-6:

4 MS. JUDD: He's just saying all these lies, saying that  
5 I did stuff with him when I took him home, and I have never  
6 done anything with him.

MONICA JUDD, 9:5-6:

5 Well, saying that I was a whore and stuff

6 because I did stuff with him and that --

MONICA JUDD, 10:9-13,17:

9 THE COURT: Has he done anything to you, directed to  
10 you?

11 MS. JUDD: No, I'm just scared of him. I don't want  
12 another girl to have to deal with someone --

13 THE COURT: Has he directed anything to you, though?

17 MS. JUDD: No, he has not done anything directly to me.

MONICA JUDD, 11:4-9,16-18:

4 MS. JUDD: No, he's like -- I'm engaged. I'm happily  
5 -- I'm happy. I don't know why he's trying to get with me.

6 THE COURT: What is it that he said that would cause  
7 you to have fear?

8 MS. JUDD: Well, I guess because I've heard from  
9 Shannon what has happened with her.....

16 THE COURT: It has nothing to do with the idea that  
17 because someone else has stalking injunction against him that  
18 you get one, too.

MONICA JUDD, 6:4:

4 [He] has threatened me.

MONICA JUDD, 12:4-9:



4 THE COURT: All right. Has this been something kind of  
5 roundabout that you've discovered that you've been concerned  
6 about; is that what it amounts to? Hasn't really been directed  
7 to you?

8 MS. JUDD: No, it hasn't been directly to me except  
9 for what he said when I took him home and I was being nice,

MONICA JUDD, 5:15-16:

15 Then he never -- after that he has never -- I've never  
16 had contact with him after we worked.....

**DEFENDANT'S TESTIMONY, SUPPORTING CLAIM OF NO CONDUCT:**

ERIC IRVINE, 17:23-25:

23 After -- after my release from employment I basically  
24 just sat around hoping for another phone call or something.it  
25 never came.

ERIC IRVINE, 21:6-9:

6 as a result of that experience. I did buy Monica flowers, it's  
7 true, after an encounter we had. I then proceeded to wait for  
8 a reply that never came because I didn't have the courage to  
9 do much else, because of my past experiences.

**STATEMENT OF LEGAL PROVISIONS:**

**(STATUTES, COURT RULES, CASE LAW.)**

**PROVISIONS IN LINE WITH 1ST ISSUE:**

**DETERMINATIVE LAW:**

(Utah Code Ann. § 76-5-106.5[2][a][b])

"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, to fear for the person's own safety or the safety of a third person; or to suffer other emotional distress."

(Utah Code Ann. § 76-5-106.5[1][b])

A "Course of conduct" means two or more acts directed at or toward a specific person.

**DETERMINATIVE CASE LAW:**

(Coombs v. Dietrich, 253 P.3d 1121 ¶15 [2011])

"The Stalking Statute, however, defines "course of conduct" broadly, and does not require that the actions that constitute a course of conduct be committed within a certain period of time."

(State vs. Kintz 238 P.3d 470,¶1 [2010])

The "term *separate occasions*, as used in stalking statute, is unambiguous, and [the] only reasonable interpretation of the term is a distinct, individual, noncontinuous occurrence or incident."

**PROVISIONS IN LINE WITH 2ND ISSUE:**

**DETERMINATIVE LAW:**

(Utah Code Ann. § 77-3a-101[6][a])

"The burden is on the petitioner to show by a preponderance of the evidence that stalking of the petitioner by the respondent has occurred."

**DETERMINATIVE COURT RULES:**

(Utah Rules of Evidence Rule 1002, Rule 901[a]&[b][1], Rule 1004, and Rule 1007 respectively.)

**1002 - Requirement of the Original:**

An original writing, recording, or photograph is required in order to prove its content, except as otherwise provided in these rules or by other rules adopted by the Supreme Court of this State or by statute.

**901[A]&[B][1] - Authenticating or Identifying Evidence:**

In General, to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

**Examples:**

The following are examples only, not a complete list, of evidence that satisfies the requirement.

1. Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

**1004 - Admissibility of Other Evidence of Content:**

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(A)all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(B)an original cannot be obtained by any available judicial process;

(C)the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a

subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or  
(D) the writing, recording, or photograph is not closely related to a controlling issue.

**1007 - Testimony or Statement of a Party to Prove Content:**

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

("Hearsay Rule" 802, and "Exceptions to Hearsay" Rule 804)

(CITED IN PART, SEE ADDENDUM)

**802 - The Rule Against Hearsay:**

Hearsay is not admissible except as provided by law or by these rules.

**804 - Exceptions to Rule Against Hearsay:**

The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) Former Testimony.
- (2) Statement Under the Belief of Imminent Death
- (3) Statement Against Interest.

### **DEFINITION OF LEGAL TERMS:**

(Definitions taken from [utcourts.gov/resources/glossary.htm](http://utcourts.gov/resources/glossary.htm))

### **PREPONDERANCE OF EVIDENCE:**

Evidence which is (even minimally) of greater weight or more convincing than the evidence which is offered in opposition to it. This is the standard by which a plaintiff must prove his/her case in a civil suit.

### **DUE PROCESS:**

The guarantee of due process requires that no person be deprived of life, liberty, or property without a fair and adequate process.

### **STATEMENT OF THE CASE:**

On or around August 20th 2014 Plaintiff and Appellee, Monica Judd, filed a Petition for Relief with the Fourth District Court in Provo, Utah. The relief sought was the granting of a Temporary No-Civil-Stalking Injunction, which was granted. The defendant exercised his right to a trial within ten days.

The Trial took place on September 15th 2014. After

hearing testimony and reviewing evidence the Judge, Fred D. Howard, granted the Plaintiff's petition for a Permanent Injunction. The Apellant/Defendant filed a Notice of Appeal within 30 days of the descision.

This appeal was later dismissed as premature due to the lack of a Final Order. The appeal was dismissed without prejudice to the timely filing of a new appeal.

On January 21st 2015 a Final Order was signed upon Motion of the Defendant. A new timely Notice of Appeal was then filed on February 17th 2015. It is from this Final Order that this appeal is taken.

### **STATEMENT OF THE FACTS:**

(All citations are to the record @ 46)

This matter comes before the court on Appeal taken from the final Order resulting from the trial of September 15th 2014. The trial was held in the Fourth District Court of Provo, Judge Fred D. Howard presiding.

### **TRIAL:**

The trial began with an accounting of all parties

present. Both the Plaintiff and the Defendant were accounted for.[3:1-10]

Mr. Irvine and Ms. Judd were at one time prior to these events co-workers at Nu-Skin International Inc. located in Provo, UT.[5:1-2]

**PLAINTIFF'S TESTIMONY:**

After being first duly sworn in the Plaintiff, Monica Judd, appearing pro-se, was the first to take the stand.  
[4:22-25]

During her testimony Ms. Judd alleged that the Defendant had made a remark during a ride home from work which made her feel uncomfortable. [5:10-12]

She also stated that the Defendant had stared at her at work and that this also had made her feel uncomfortable.  
[6:2-3]

In addition to the staring, and the remark, she claimed to have received messages about Mr. Irvine from a former associate of his named Shannon O'dell.[5:17-18]

The Plaintiff also stated that She believed the Defendant



to be the author and sender of a certain message or messages to her Fiancé Brian Le.[6:9]

In these messages the Plaintiff claimed were threats directed at herself and Brian Le.[6:10-12]

The Judge disregarded the messages claimed to have been received from Shannon O'dell later on in the proceedings defining them as Hearsay. This because Ms. O'dell was not present to offer testimony or to be cross examined.[22:3]

After making her statements the Plaintiff stepped down. The plaintiff was not cross examined.

**FIRST WITNESS FOR PLAINTIFF:**

After being first duly sworn in Spencer Cannon, Utah County Sheriff and family friend, took the stand. He was the first witness for the Plaintiff.[14:1-4]

During his testimony he offered a similar account of events as the one provided by the Plaintiff. This, he explained, was received by hearing a first hand account given to him by the Plaintiff prior to trial.

He expressed his concerns for the safety of the Plaintiff, and stated his observations of her apparent emotional state at the time.[14:12-25]

Though the mother of the Plaintiff would later testify that Sheriff Cannon had seen the messages in question, the witness did not state so on the stand.

The witness was cross examined by the Defendant. During the cross examination the witness stated that he had not personally witnessed the Defendant threatening Ms. Judd in any way.[15:5-10]

**DEFENDANT'S TESTIMONY:**

After being first duly sworn in the Defendant, Eric Irvine appearing pro-se, took the stand.[16:4-7]

During his testimony he adamantly denied authorship of the threatening message or messages.[17:14-16]

The Defendant offered speculation as to who else might have been angry with the Plaintiff enough to threaten her and her Fiancé. This speculative statement was stricken

from the record by the Judge, who appeared to take it as an attack on the moral character and virtue of the Plaintiff, rather than for what it was intended to be, Speculation as to who else might have reason to use threatening language. As such the stricken portion will not be mentioned in this brief. It is at this point it would seem most appropriate to mention that portion of the Defendant's testimony which remains. This was a statement regarding a sexual encounter involving the Defendant and the Plaintiff, alleged to have taken place during their employment at Nu-Skin.[17:16-22]

The defendant also remarked that the messages received by the Plaintiff at the hand of Shannon O'dell were a private communication. The Defendant was accepting the apology of Shannon O'dell. He also expressed an honest and sincere hope for the future happiness of the Plaintiff should no permanent bond be established between them.  
[17:23-25, 18:1-6]

The Defendant adamantly objected to the suggestion that he had engaged in behavior that would cause a reasonable person to fear for their safety.[21:9-14]

The Defendant attempted to offer statements received from a third party, who was absent from the courtroom that day, in an effort to make it clear that Ms. Judd had earned a reputation for dishonesty. Though most of what he said was stricken from the record, and therefore will not be repeated. The remark concerning her questionable honesty remains.[18:9-11, 18:15-16]

The evidence the Defendant offered to support these claims was also not considered, likely due to the Hearsay Rule.

The Defendant was not cross examined.

**SECOND WITNESS FOR PLAINTIFF:**

After being first duly sworn in Denise Judd, Mother of the Plaintiff and second witness took the stand.[22:19-22]

During her testimony she gave an account of events nearly identical to, and admittedly received from, her daughter Monica Judd.[22:23-25, 23:1-2]

She expressed the concern any mother would have for her child. The Defendant observed this on the record.[25:9-10]

The witness was cross examined by the Defendant, in the cross examination the witness stated quite insistently that she knew the defendant was the author of the threatening message or messages. All the while the Defendant objected to, and disagreed with, that assertion just as doggedly.

[25:11-25]

The witness seemed confused about where the messages had come from.[23:3-5]

When asserting that the Defendant's name is present at the top of the document, she seems to be making reference to the message sent to Shannon O'dell, and not the message or messages sent to Brian Le. It is the latter that were alleged to have contained the threatening language.[25:22]

The Judge Fred D. Howard determined to grant the Plaintiff's Petition for a No-Civil-Stalking Injunction on the grounds that the characterisation of the ride home, and the staring at the petitioner at work, the communications on Facebook through to her fiance Brian Le, all of which he believed served to substantiate and give a basis for the granting of the order.[29:17-25]

Therefore, his conclusion was that the evidence and testimony presented to him was sufficient to establish a preponderance of the evidence, as well as a course of conduct.(SEE AUTHORITIES/STATUTORY PROVISIONS)

The Final Order which resulted from this conclusion, as well as the Judge's interpretation of the language, spirit, and intent of the law, serves as the basis from which the Defendant's appeal is taken.

#### **SUMMARY OF THE ARGUMENT:**

In granting the Injunction the Judge did not operate within the boundaries of the law and applicable case law. A course of conduct must be two or more separate, distinct, non continuous events.

The Defendant believes State vs. Kints is a provision set forth to protect the defendant from one event being treated as multiple events. Ellison vs. Stam establishes a standard by which a course of conduct is established on the record.

The Fourth District Court took one continuous event and treated it as three separate events.

The District Court unevenly applied the Rules of Evidence, and did not retain a copy or original of the evidence associated with a controlling issue, though no exceptions to the best evidence rule apply.

When these facts are considered, as well as the contradictions in the Plaintiff's own testimony, the evidence can hardly be called a preponderance.

### **ARGUMENT:**

(All citations are listed at the end of this section.)

The foregoing cited law and applicable case law clearly defines the boundaries within which the law must operate when enforcing against an alleged offence of stalking, or granting a civil no-stalking injunction.

A person may be found guilty of stalking, and an injunction entered, who engages in a course of conduct directed at a specific person. A course of conduct is clearly defined as two or more acts directed at or toward a specific person. Though a course of conduct may be defined broadly, and there is no requirement that the actions that

constitute a course of conduct be committed within a certain period of time; Nonetheless these events *do* need to be documented on the record, and be distinct, individual, and non-continuous in nature.

The Defendant believes that Coombs vs. Dietrich is a precedent set forth for the benefit of the plaintiff. To prevent the same from being denied relief sought on solid grounds, simply because lawyers and jurists would rather discuss the amount of time that separates one alleged event from another.

The Defendant also believes that State vs. Kintz is a precedent set forth for the benefit of the defendant. To prevent just the kind of situation the defendant/appellant finds himself in. Where a single documented continuous event, whither truthful or not, is treated as multiple events.

Although these precedents can undoubtedly be used in other ways, and have been, the Defendant believes that both of these precedents must be considered when properly applying the letter, spirit, and intent of the law.



During his research the Defendant found a single case that stands out as a fine example of the proper and correct application of the current statutes, as well as current case law, regardless of what the language of the law may have been at the time in which this case was recorded. (i.e. maintaining physical "proximity.") The Defendant feels that though the language of the law has changed, a course of conduct must still consist of two or more, defined and documented events:

In Ellison vs. Stam (*SEE ADDENDUM*) many events were listed, much more than two. And for each one save one only a date was given. Each alleged incident was detailed and a clear account was given for the record. While a court may certainly excuse the absence of a single date from a list of many occurrences; The establishment of two dates at least is crucial to the proper, and correct, application of the law.

Now discussing the Appeal at hand:

Firstly, during the trial only one continuous incident of alleged stalking was documented. Although the Fourth District Court may have determined that this single

continuous event was sufficient to satisfy the provisions of the Civil Stalking Statute;[8] The Defendant argues that this determination is in conflict with the plain language of the law, and applicable case law.

Secondly, the Fourth District Court took the written documentation of the alleged threat as a separate event. It is clear on the record however, that the plaintiff is reading something that fits the description of the threat she eluded to earlier in her testimony. [3][6:4-5]

Thirdly, the Plaintiff and her witnesses are all telling the same story. They are referring to messages sent either to Brian Le or Shannon O'dell. Whither to one, the other, or both, isn't immediately clear. The messages are alleged to have been sent a month or so prior to the trial and dated on or around August 16th.[4] No date is given for the alleged staring[2], or the alleged remark[1]. Though it is clear from the Judges own statements that he meant to treat these as a second and third documented event.[8]

Therefore, the Defendant argues that the absence of any additional, clearly defined, event on the record means this

must be treated as a single continuous event. The only way this could be treated as two separate events is if another date was given, and along with it, another clear statement establishing a distinct and separate event. The Defendant argues that although *Coombs v. Dietrich* may apply, this precedent does not free the Petitioner from their burden of proof. Nor does it shift this burden onto the Respondent. The burden to establish a course of conduct on the record, and in a manner consistent with the precedent set forth in *Ellison vs. Stam*, is borne by the Petitioner. The *State vs. Kintz* clearly states that there must be two separate, distinct, and non-continuous events before a course of conduct can be treated as established. The burden of proof; to make such a distinction, did not at any time rest on the defendant.

Additionally, the Rules of Evidence clearly state that the original is required for articles of evidence that are going to be assigned a controlling interest in a case, or be associated with a controlling issue. Although there are exceptions to this rule, the Defendant argues that these exceptions do not apply to this set of circumstances.

Firstly, the original was not lost or destroyed, and was present in the courtroom.

Secondly, the original could have been obtained by available judicial process. The Defendant argues that where it was to be given a controlling interest in this case it should have been retained on the record.

Thirdly, the Appellant/Defendant complied fully with what the Rules of Evidence required of him. The article of evidence was left on the witness stand by the Plaintiff. [19:13-15] Therefore the document containing the alleged evidence was in his possession in the court room. And neither the Court nor the Plaintiff was aware of this fact until the Defendant announced it on the record. After reviewing the document for himself, and making his observations known on the record, he returned this document thus satisfying the only burden these Rules placed on him. The defendant did not interfere with the evidence, or attempt to waylay it, or interfere with it's presentation in any way. The Defendant argues that where he was held to such a high standard of honesty and transparency by the Rules of Evidence; the Plaintiff and the Fourth District

Court should be as well.

Fourthly, the Appellant/Defendant adamantly objected to and disputed the authorship and contents of the document in question, and did so throughout the proceeding[5][6]. Thus rendering null and void any claim to the application of other exceptions within the Rules of Evidence. Namely those that might stem from making use of a statement made by the defendant himself. To clarify, the Defendant contends that these other exceptions to the best evidence rule do not apply to this case since no where on the record does the Defendant admit to sending messages containing threats, but rather adamantly denies doing so.

Additionally, The Defendant argues where the authorship as well as the content was clearly disputed on the record, simple common sense court practices required the retention of a copy or the original for review. Failure to correctly apply this provision of the Rules of evidence, namely the requirement of an original, does not constitute a fault on the part of the Defendant. Where a copy was not retained, through no fault of the Defendant, it must be presumed that this article was not meant to have a controlling interest

in this case.

Therefore, where failure to preserve the evidence for review serves the same purpose as to deprive the Defendant of his right to due process of law in any review of the case. And where If the evidence is to stand against him in its absence from the record, this serves to shift the burden of proof onto the Defendant's shoulders; Forcing him to prove his innocence, and what's worse, against evidence that has not been preserved on the record. The Defendant again argues that the evidence cannot be treated as documentation of more than a single event; if it is to be treated as documentation at all.

Consequently, as a result of the entertaining of this evidence. The Defendant argues that the Rule against Hearsay Evidence was not evenly applied in this case. The Judge chose to exclude testimony offered by the Plaintiff and recieved at the hand of Shannon O'dell as hearsay evidence.[22:3-4]

However, the Judge chose to entertain evidence offered by the plaintiff which she had recieved at the hand of

Brian Le[7:25]. This notwithstanding the fact that both persons were absent from the court room, unable to testify at the trial, or offer supporting testimony of any kind.

Therefore, the Defendant contends that the evidence in question should never have been considered due to Brian Le's absence from the court room. He further contends that the alleged evidence is absent in bad faith, he being relieved to think it might be available for review, and dismayed when he discovered that it wasn't. For if it had been preserved on the record the reviewer could have seen plainly that the defendants remarks were truthful and his name was nowhere to be seen on the page. The Defendant also contends that Brian Le's absence from the courtroom was procured and wrongfully caused by the plaintiff in order to prevent him from testifying. Or more likely, to prevent him from being present in the court room to overhear an account of events that might serve to jeopardise their relationship.[17:14-22] Regardless, the end result was the same. An absent witness and evidence that should have been excluded as hearsay. even if there had been good grounds for it's consideration, the documentation should have been preserved on the record, and

in its original form, to prove that it was what it was purported to be. Thus forever refuting any counter claim as to it's contents, or it's authorship. If the weight of the evidence was truly so great this should have been done at the very least.

Finally, When we consider that no tangible proof of any of the alegations made against the Defendant have been preserved. What we are left with is verbal testimony only. The Defendant interprets the language of the foregoing provided definition, when applied to verbal statements only, as statements deemed more likely to be true than not true. The Defendant feels this interpretation is consistent with the "greater weight," language. When the plaintiffs own testimony and the contradictions contained therein are considered[7], the Defendant believes at best they can be described only as, "as likely to be true as not true," which does not fit with the definiton of a preponderance since there is no greater weight. Statements given by the Plaintiff in support of her claims are contradicted by other statements made in other portions of her testimony. When the Defendant quotes and somewhat paraphrases the Plaintiff's language throughout the trial it sounds like:



" We were never friends, I gave him and my other friend a ride home on another night. We never did anything together, he called me a whore because I did things with him. He never directed anything towards me. He never did anything directly to me. No , he has never done anything to me, I'm just scared of him because of what I heard from Shannon. I dont want someone else to have to deal with someone like him. After that night, He never, He has never, I never had any further contact with him. But he still stalked me and this is what he did....."

The Defendant argues and contends that this is hardly a preponderance. Was she a victim of stalking or wasn't she? The Fourth District Court determined that she was. Even if the court correctly determined that the testimony offered is a preponderance of evidence; Is it sufficient to establish one event, or two or more events? The Defendant argues that it's sufficient to establish one continuous event only, dated on or around the 16th of August.

**CITATIONS IN THIS SECTION RECORDED IN STATEMENT OF THE ISSUES:**

[1] VOL. 1/1 - 5:10-13, 24:10, 24:12-14, 14:20-22.

[2] VOL. 1/1 - 6:2-3.

- [3] VOL. 1/1 - **6:9-12, 7:21-25, 14:23, 24:23-24.**
- [4] VOL. 1/1 - **8:3-8, 8:21-24, 24:23-24, 14:5-6.**
- [5] VOL. 1/1 - **9: 10-25, 6:3-4, 25:12-15.**
- [6] VOL. 1/1 - **17: 14-16, 18: 24-25, 19: 1-19, 25:12-25.**
- [7] VOL. 1/1 - **5:3, 5:13-14, 7:4-6, 9:5-6, 6:4, 10:9-17, 11:4-9, 11:16-18.**
- [8] VOL. 1/1 - **29:17-25.**

**\*\*\* All other citations are directly to the record @ 46.**

### **CONCLUSION:**

In conclusion, and for the foregoing reasons, the Apellant seeks a review, and opinion, of the following:

Firstly, whither the event dated on or around August 16th was sufficient to warrant the granting of a no civil-stalking injunction under the **authority of §76-5-106.5 of the Utah State Code**. Also, whither two dates at least are required to distinguish one event from another.

Secondly, an opinion on the matter of the correct application of the best evidence rule. Namely whither or not the orginal was in fact required, and if the evidence should be treated as such in it's absence from the record.

Thirdly, an opinion on the testimony collected; was it sufficient to be defined as a preponderance, and if so, for a single continuous event or multiple events.

Finally, the Appellant/Defendant seeks the Reversal of the Final Order of the Fourth District Court.

*(If deciding in Appellant's favor see Addendum Page 43.)*

I the undersigned respectfully submit the Brief of the Appellant for the consideration of the Utah Court of Appeals.

Eric Irvine

140 W. 1960 N. - Orem, UT 84057

(385) 201-5134

 05-08-15

**ADDENDUM:**

**FOURTH DISTRICT COURT'S CONCLUSION OF LAW:**

**(THE RECORD @ 46)**

FRED D. HOWARD, JUDGE 7:25:

25 (Court reviewing document)

FRED D. HOWARD, JUDGE 29:13-25:

13 THE COURT: All right, thank you. I appreciate --

14 I'll make my decision. I appreciate your attendance today

15 in this important matter. It may have been somewhat cluttered,

16 but I get a sense of it.

17 I'm not persuaded so much with the statement made

18 to Shannon, which is more of a private communication by the

19 defendant; but I do find there is a basis to support the

20 stalking injunction from the evidence that the Court has

21 received, which includes the characterization of the ride

22 home and the staring at the petitioner at work, and the

23 communications on Facebook through -- to her fiancé, all of

24 which I think substantiate and give a basis for the grant of

25 the stalking injunction which the Court will grant.

IN THE FOURTH DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

FILED  
Fourth Judicial District Court  
of Utah County, State of Utah  
1/21/15 MT Deputy

Monica Judd,

Plaintiff and Petitioner,

vs.

Eric Irvine,


Defendant and Respondent.

FINAL ORDER

CASE # 140401203

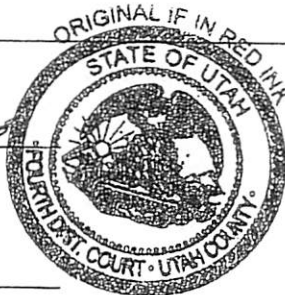
The No-Civil Stalking Injunction granted and entered on the 15<sup>th</sup> of September 2014 is the Final Order of the Fourth District Court. No additional order is necessary. This separate Final Order is granted in response to a Motion to Clarify Order filed with this court on 12-29-2014.

Comments: \_\_\_\_\_

  
(Judge's Signature)

Fred D. Howard  
(printed name)

  
(date)



I CERTIFY THAT THIS IS A TRUE COPY OF  
AN ORIGINAL DOCUMENT ON FILE IN THE  
FOURTH JUDICIAL DISTRICT COURT, UTAH  
COUNTY, STATE OF UTAH

DATE

  
DEPUTY COUNTY CLERK



**STATEMENT SEEKING COMPENSATION FOR COST OF APPEAL:**

The Defendant, if granted his appeal, would like to be compensated for the cost of representing himself. An Itemized list of the expenses is presented on the following page:

This list includes paper costs resulting from printing the various documents at 12¢ a page. The number of copies printed is in brackets beside the name.

The defendant will not need compensation for the appeal bond if it is refunded.

Also, should the court determine that the loss of the first filing fee is the fault of the Defendant, due to his clerical error, the Defendant at least requests compensation for the remainder of the listed expenses.

He chose to send all paperwork via the County Sheriff not because it was the most affordable option, but for peace of mind, knowing the Sheriff would make a note of all papers received and delivered. Having already been accused of the authorship of threatening message[s] on facebook, he did not wish to take any chances on the paperwork he was required to serve on the opposing party. He feared being accused of something else.

<u>ITEM:</u>	<u>COST:</u>
10/14/14 APPEAL BOND.....	\$300.00
10/14/14 FILING FEE, NOTICE OF APPEAL.....	\$225.00
10/14/14 COST OF SERVICE.....	\$ 57.50
10/31/14[5] FIRST DOCKETING STATEMENT.....	\$ 1.80
10/31/14 COST OF SERVICE.....	\$ 57.50
12/02/14[5] MEMORANDUM.....	\$ 4.20
12/02/14 COST OF SERVICE.....	\$ 32.50
10/14/14[5] EX PARTE MOTION TO CLARIFY- NOT SIGNED..	\$ 3.00
10/14/14 COST OF SERVICE.....	\$ 32.50
12/29/14[5] MOTION TO CLARIFY- SIGNED (FINAL ORDER)..	\$ 3.00
12/29/14 COST OF SERVICE.....	\$ 32.50
01/26/15[3] MOTION TO REINSTATE- DENIED.....	\$ 3.60
01/26/15 COST OF SERVICE.....	\$ 32.50
02/17/15 FILING FEE, SECOND NOTICE OF APPEAL.....	\$225.00
02/17/15 COST OF SERVICE.....	\$ 32.50
03/05/15[3] SECOND DOCKETING STATEMENT.....	\$ 2.52
03/05/15 COST OF SERVICE.....	\$ 32.50
05/08/15[9] APPELLATE BRIEF.....	\$ 63.49
05/08/15 COST OF SERVICE.....	\$ 57.50
10/14/14 COST OF MATERIALS(NOT INCLUDING PAPER).....	\$ 18.79
	<u>TOTAL:</u>
	\$1217.90

**(Ellison vs. Stam, 136 P.3d 1242 Background (2006))**

**BACKGROUND**

¶ 2 In 2004, Ellison and Stam were both students at the College of Eastern Utah \*1244 (CEU) in Price, Utah. In response to a petition filed by Ellison, the trial court entered an ex parte civil stalking injunction, see Utah Code Ann. §§ 77-3a-101 to -103 (2003), against Stam on October 5, 2004, which enjoined Stam from stalking Ellison and from engaging in other specified conduct. As required by the statute governing civil stalking injunctions, the trial court, upon Stam's request, held an evidentiary hearing on the injunction. See id. § 77-3a-101(6) (providing that "[w]ithin ten 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").

¶ 3 At the evidentiary hearing, Ellison presented evidence that Stam had sexually assaulted her on August 25, 2004. 2 Ellison also presented evidence of eight alleged incidents of stalking that occurred after August 25, 2004 (the eight incidents). The dates and facts of the eight incidents, as well as the entry of the ex parte civil stalking injunction, are summarized below.



**August 30, 2004**

¶ 4 Ellison was working at the cash register in the CEU cafeteria, and Stam was across the hall from her. Each time Ellison looked at Stam, Stam was glaring at her. As a result of this, Ellison switched to a different cash register.

September 3, 2004

¶ 5 Ellison and her friend were in a parking lot near Ellison's dormitory building. While in the parking lot, Ellison saw Stam and his friend in the same parking lot. When Ellison noticed Stam looking at her, she went back inside her dormitory room and waited for Stam to leave. When she returned to the parking lot, Ellison saw Stam and his friend sitting in Stam's car, and Stam was staring at her. After several minutes, Stam's car sped out of the parking lot.

**September 14, 2004**

¶ 6 Ellison was returning to her dormitory room in the evening. Ellison and Stam lived in the same dormitory building, with Ellison living on the third floor and Stam living on the second floor. As Ellison climbed the stairs to the third floor, she passed the second floor, where she saw Stam begin to climb the stairs behind her. Once she arrived at the door to her room on the third floor, Ellison saw Stam staring at her from the end of the hallway. Stam then went into another person's

room on the third floor.

CEU Activity (no specific date)

¶ 7 On this evening, Ellison attended a CEU campus activity with some friends, but only after she was told that Stam had already left the same activity. Before she and her friends arrived at the activity, Ellison saw Stam approaching them on his skateboard. After sending another of her friends to distract Stam and prevent him from coming closer to her, Ellison and one of her friends ran to another student's dormitory room and waited for Stam to leave the area. Ellison testified that, as a result of this incident, she suffered a panic attack.

**October 5, 2004**

¶ 8 Stam was served with the ex parte civil stalking injunction.

**November 5, 2004**

¶ 9 Both Ellison and Stam attended a CEU "Bingo Night" activity, along with about 100 other people. Stam took a seat one table away from Ellison, and Ellison could see Stam looking at her. Ellison reported Stam's presence to a CEU police officer. That officer urged Ellison to switch seats, which she did. Ellison testified that, as a result of this incident, she was crying and shaking.

¶ 10 Both Ellison and Stam attended "Club Competition Night" at CEU, where the students in attendance played games against each other. Ellison testified that while at this event, Stam kept "creeping closer and closer" to her. This caused Ellison to become very upset, and tears were running down her cheeks. She reported Stam's conduct to a CEU administrator, who was present at the event as an advisor. That administrator stayed with Ellison, and he tried to stay between Ellison and Stam. While the administrator was with Ellison, Stam got within ten yards of Ellison on two or three occasions. At some point, the administrator told Stam that he was in violation of the ex parte civil stalking injunction. In response, Stam denied that he was violating the injunction. Stam did not leave and continued to play games that brought him within close proximity of Ellison.

**November 19, 2004**

¶ 11 Ellison attended a CEU basketball game with friends. Stam also attended the game, but entered the venue after Ellison. Several minutes after Ellison and her friends sat down, Stam took a seat two rows behind them. This caused Ellison to become upset, and she had one of her friends report Stam's presence to a CEU police officer. When Ellison's friend asked the officer if he could do anything about Stam's proximity to Ellison, the officer said that he could ask Stam to move to a

different seat. Ellison testified that, after Stam spoke with the officer, he found a new seat farther away from Ellison. Ellison also testified that after the basketball game, she attended a CEU movie night activity with a friend and that halfway through the movie, Stam entered and took a seat directly behind her.

**November 20, 2004**

¶ 12 Ellison attended the CEU "Fall Ball" with a date. Stam also attended this event. Ellison testified that Stam stared at, continually followed, and repeatedly moved within ten to fifteen feet of her and her date throughout the event. Ellison's date testified that he tried to place himself between Ellison and Stam and that he felt Stam "was close and ... knew he was close." Ellison and her date both testified that Ellison became very nervous as a result of Stam's presence.

**RULE 804 - EXCEPTIONS TO RULE AGAINST HEARSAY:**

When the Declarant is Unavailable as a Witness;

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2)refuses to testify about the subject matter despite a court order to do so;

(3)testifies to not remembering the subject matter;

(4)cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5)is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

**But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.**

(b)The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1)Former Testimony. Testimony that:

(A)was given as a witness at a trial, hearing, or

lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a civil or criminal case, a statement made by the declarant while believing the declarant's death to be imminent, if the judge finds it was made in good faith.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is

offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

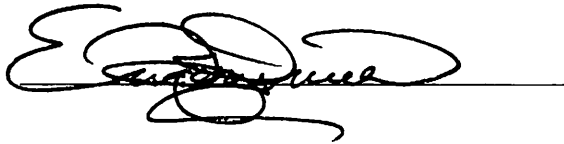
(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

**CERTIFICATE OF COMPLIANCE**

I the undersigned do hereby certify that the attached and foregoing Appellate Brief has been produced in a manner compliant with the provisions set forth in the Utah Rules of Appellate Procedure. Pursuant to §24 (f)(1)(c) of the same I produce this certificate of compliance. There are up to 1240 lines of monospaced text. This does not include the two tables, or those portions of the addendum expressly excluded from this requirement. All portions of the brief are double spaced, with no more than 10 characters per inch of text.

Signature:

A handwritten signature in black ink, appearing to be "S. J. [unclear]", written over a horizontal line.



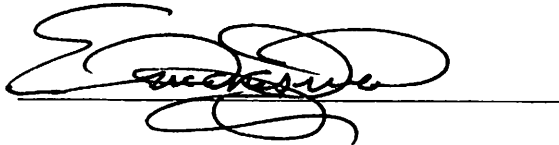
**CERTIFICATE OF SERVICE**

I the undersigned do hereby certify that 2 true and exact copies of the attached and foregoing Appellate Brief have been served on the following parties. I also certify that a copy of the disk in PDF format has been served as required. This has been done using the the following methods.

Monica Judd  
61 W. 1040 S.  
Orem, UT 84058

Hand Delivery  
Utah County Sheriff,  
Judicial Services Division.

Signature: \_\_\_\_\_

A handwritten signature in black ink, appearing to be 'Monica Judd', written over a horizontal line.

Date: 05-08-15