2019

MELINDA WATSON, Petitioner/Appellant, v. MICHAEL WATSON, Respondent/Appellee. : Brief of Appellee

Utah Court of Appeals

IN THE UTAH STATE COURT OF APPEALS

MELINDA WATSON, Petitioner / Appellant, v. MICHAEL WATSON, Respondent / Appellee.	Court of Appeals Case No. 20190290

BRIEF OF APPELLEE

Appeal from Final Order of Dismissal of a Protective Order entered by Judge Michael S. Edwards of the Second District Court

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ORAL ARGUMENT REQUESTED

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BRIEF OF APPELLEE

INTRODUCTION

Appellant Melinda Watson (Melinda) appeals a final order issued by the Second District Court which dismissed a protective Order against her ex-husband, Appellee Michael Watson (Michael) which had been issued by the commissioner. Melinda claims exhibits entered by Michael which she either stipulated to, did not object to as to Rule 108, or did not object to, should not have been admitted into evidence because of Rule 108, URCP. Melinda's appeal should be dismissed.

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

Melinda presents the following issues on Appeal:

ISSUE I. "Whether the judge erred in allowing a videotape and new emails to be introduced during the second part of an evidentiary hearing (which occurred thirty days after the first evidentiary hearing), when the evidence was never given to the other party prior to the second hearing, and the offering party had not moved to introduce the evidence prior to the second hearing." (Appellant's Brief at 1-2)

Michael objects to this statement of the issue insofar as it misrepresents the record on appeal.

Determinative law:

State v.Winfield, 2006 UT 4, ¶ 14, 128 P.3d 1171("[U]nder the doctrine of invited error,we have declined to engage in even plain error review when 'counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].'" (second and third alterations in original)).

Generally, a party cannot raise an issue for the first time on appeal. See *In re E.R.*, 2001 UT App 66, ¶ 9, 21 P.3d 680. Instead, the party must preserve the issue for appeal by presenting it "'to the trial court in such a way that the trial court has an opportunity to rule on that issue.'" *Robertson's Marine, Inc. v. 14 Solutions*, 2010 UT App 9, ¶ 10 (quoting *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51). "This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the

course of the proceeding." *Id*. (internal quotation marks omitted). Issues that are not properly preserved are usually deemed waived. See *438 Main St.*, 2004 UT 72, ¶ 51.

Standard of review:

"'Pure questions of law . . . are reviewed for correctness.'"*Doyle v. Doyle,* 2009 UT App 306, ¶ 6, citing *Huish v. Munro*, 2008 Ut App 283, ¶ 19, 191 P.3d 1242.

Preservation:

Appellant Melinda failed to preserve this issue by stipulating to the admission of Respondent's exhibits 2 and 3(R. 344-345, ll. 9-25; 1-3); by failing to object to the admission of Respondent's exhibit 4 (R. 396, ll. 17-23) and by failing to object to the admission of Respondent's Exhibit 1 on any purported grounds but relevance and materiality (R. 389-390, ll. 8-25; 1-25; R.312, ll. 24-25; R. 314-315, ll. 6-25, 1-18).

ISSUE II. "Assuming the wrongful evidence is excluded, whether the protective order should be reinstated?" (Appellant's Brief at 2).

Standard of review:

"[A] trial court's findings of fact will not be overturned unless they are clearly erroneous, and the trial court's application of the statute to those findings will not be reversed absent an abuse of discretion." *Clark v. Clark,* 2001 UT 44, ¶ 14, 27 P.3d 538.

Preservation:

R. 581-582.

STATEMENT OF THE CASE

Appellee Michael incorporates those facts referenced above as they may be relevant to any issue stated here.

On December 31, 2018, Appellee Michael Watson (Michael) objected to the commissioner's recommendation of a bare protective order requested by Appellant, his ex-wife Melinda Watson (Melinda) 14 days after a recommendation was entered on December 17, 2018. The trial court conducted an evidentiary hearing *de novo* on February 28, 2019, and March 28, 2019. There was no scheduling order prior to the hearing. The trial court took direct testimony from the parties and admitted evidence previously proffered to the commissioner. R. 302, ll. 4-10. Melinda made a preliminary objection based on Rule 108 without reference to a specific exhibit, to which the trial court stated, "I'm not going to make any preliminary rulings. We'll deal with the objections as they come up." R. 304, ll. 11-13. Melinda did not raise any objection to Michael's exhibit 1 under Rule 108, but objected as being not relevant or material, R. 314, ll. 9-25, which the court overruled. R. 315. Noting that objection alone, the court admitted Michael's exhibit 1. R. 389-90, ll. 6-25, 1-18. Exhibit 1 contained a text message from Melinda to Michael stating:

> FYI I am planning on residential pickups during the summer.
> I don't have many responsibilities on Friday, so I'll have to
> wait around and play your games. I hope Eileen is up for it.
> Give her my condolences.

Michael's exhibit 1

Melinda objected to Michael's exhibits 2 and 3, videos taken by Michael, under Rule 108 URCP, before they were shown to the court. R. 323-324, ll. 3-25, 1-11. As part of his response, Michael stated that the evidence had been proffered to the commissioner. R. 324, ll. 16-20; R. 325, ll. 14-24. The court noted that the evidence had been proffered to the commissioner and overruled the objection. R. 326, ll. 9-13. After the videos were seen and testimony provided by Michael corroborating the videos, Melinda stipulated to their admission as exhibits 2 and 3 when they were offered by Michael. R. 344-345, ll. 9-25; 1-3. Exhibit 2 was a video from October 31, 2018, inside Michael's residence showing his doorbell ringing for approximately 6 minutes, with Melinda honking her car horn outside at least twice at the beginning of the video. Michael testified that the honking and doorbell ringing began about 6 minutes before the start of the video. R. 330, ll. 11-17. This had started about 15 minutes before the end of Michael's parent time for the evening. R. 319, ll. 16-23. Exhibit 3 showed Michael and Melinda taking video of each other for less than a minute while Melinda slowly backed out of her parking space and drove away. Melinda had testified that Michael had stood in front of her car for about 5 minutes. R. 168, ll. 10-13

When Michael offered his exhibit 4 (an email from Melinda) as evidence, Melinda made no objection. (R. 396, ll. 17-23). Michael's exhibit 4 was an email from Melinda to

Michael dated September 29, 2018, asking if they were going to sit together at the soccer game that day.

Michael testified and Melinda acknowledged that Melinda had been found in contempt of court for violating multiple provisions of the parties' divorce decree and had served 28 days in jail for contempt of court in summer of 2018. R. 210, ll. 14-20. Michael filed a petition to modify the decree based on that contempt on September 5, 2018. R. 215, ll. 19-22. Melinda filed a petition for a protective order on November 13, 2018. R. 215-16, ll. 23-25, 1.

At the close of evidence the court entered detailed oral findings and an order on the record dismissing the protective order against Michael, and then signed an order of dismissal of the protective order in open court on March 28, 2019. Melinda filed a Notice of Appeal claiming that Michael's exhibits should have been excluded under Rule 108.

SUMMARY OF ARGUMENT

Michael proffered exhibits to the court commissioner at a protective order hearing, including 2 short videos (Michael's exhibits 2 and 3). R. 302, ll.4-10; R. 324, ll. 16-20; R. 325, ll. 14-24. Melinda's brief fails to acknowledge that any of Michael's exhibits were proferred to the commissioner. R. 302, ll.4-10. Melinda does not point out where she preserved any specific objection to any of Michael's 4 exhibits under Rule 108. Melinda made an objection for relevance and materiality as to Exhibit 1. R. 314, ll. 9-25. Melinda stipulated to the admission of exhibits 2 and 3. R. 344-345, ll. 9-25; 1-3. Melinda made

no objection to the admission of exhibit 4. R. 396, ll. 17-23. Melinda invited error and failed to preserve any objection to the admission of Michael's exhibits 1, 2, 3, and 4 with respect to Rule 108.

Melinda's brief fails to describe or cite to any of her specific objections to Michael's exhibits. Melinda's brief fails to address Michael's claim and the court's finding that Michael's exhibits had been proffered to the commissioner. Melinda's brief fails to provide any argument for other reasons to exclude Michael's exhibits.

ARGUMENT

FAILURE OF PRESERVATION

Generally, a party cannot raise an issue for the first time on appeal. See *In re E.R.*, 2001 UT App 66, ¶ 9, 21 P.3d 680. Instead, the party must preserve the issue for appeal by presenting it "'to the trial court in such a way that the trial court has an opportunity to rule on that issue.'" *Robertson's Marine, Inc. v. 14 Solutions*, 2010 UT App 9, ¶ 10 (quoting *438 Main St. v, Easy Heat, Inc.*, 2004 UT 72, ¶ 51). "This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding." Id. (internal quotation marks omitted). Issues that are not properly preserved are usually deemed waived. See *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51.

See generally *State v.Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171: ("[U]nder the doctrine of invited error,we have declined to engage in even plain error review when

'counsel, either by statement or act, affirmatively represented to the [trial] court that he or she had no objection to the [proceedings].'" (second and third alterations in original)).

A party may challenge an evidentiary ruling on appeal only if the party preserved the challenge at trial by timely objecting to the ruling on the specific ground asserted on appeal. *State v. Clark*, 2016 UT App 120, 376 P.3d 1089, cert. denied 406 P.3d 251.

Defendant could not complain on appeal about introduction of alleged hearsay evidence, where defense counsel, at time evidence was introduced, expressly stated that counsel had no objection. *State v. Dibello*, 780 P.2d 1221 (UT 1989).

Melinda did not object to exhibit 1 with respect to Rule 108. R. 389-90, ll. 6-25, 1-18. Melinda stipulated to the admission of Exhibit 2 and 3. R. 344-345, ll. 9-25; 1-3. Melinda did not object to the admission of Exhibit 4. (R. 396, ll. 17-23) Melinda has no legal grounds on appeal to object to the admission of any of Michael's exhibits based on Rule 108. *State v.Winfield*, 2006 UT 4, ¶ 14, 128 P.3d 1171.

Melinda has not provided support for any other legal argument to exclude Michael's exhibits 1, 2, 3, and 4.

LACK OF RECORD PRECLUDES FINDING THAT EXHIBITS WERE NOT PROFFERED TO THE COMMISSIONER

The appellant, as the party alleging error, has the duty and responsibility of supporting [her] allegations by an adequate record. *Ajinwo v. Chalesko*, 2018 UT App 39. "Neither the court nor the appellee is required to correct appellant's deficiencies in

providing the relevant portions of the transcript." Utah R. App. P. 11(e)(2). When an appellant fails to provide an adequate record for review, appellate courts will presume the regularity of the proceedings below. *State v. Nielsen*, 2011 Ut App 211. The court of Appeals would presume that trial court's findings were supported by competent and sufficient evidence, where entire record was not before the court. *Sampson v. Richins*, 770 P. 2d 998 (UT Ct. App 1989), cert. denied, 776 P.2d 916.

Melinda objected to Michael's exhibits 2 and 3 as being "new evidence" not submitted to the commissioner under Rule 108(c). R. 323-324. Michael stated that the exhibits had been proffered to the commissioner. R. 324, 325 ll. 17-20, 12-24. Melinda's failure to include any record of the commissioner's proceeding is fatal to her claim that the evidence was not submitted to the commissioner. *Sampson v. Richins*, 770 P. 2d 998 (UT Ct. App 1989), cert. denied, 776 P.2d 916. The record indicates that Michael's exhibits were proffered to the commissioner in accordance with Rule 108 (c). R. 302, ll.4-10; R. 324, 325 ll. 17-20, 12-24. Melinda's failure to present the record or any evidence in the record to contradict this prevents this court from finding the trial court's ruling was incorrect with respect to URCP 108.

DEFERENCE TO TRIAL COURT ON FINDINGS OF FACT

Factual determinations of the trial court will not be disturbed unless they are clearly erroneous; in making such determination, the appellate court considers evidence in the light most favorable to the trial court. *Mule-Hide Products Co., Inc. v. White*, 2002

UT App 1. Utah R, Civ. P. 52(a). Melinda makes no effort to marshal the evidence to demonstrate the evidence in support of the trial court's ruling, and she does not include the trial court's findings in her addendum.

"Credibility determinations are within the province of the district court judge, who is uniquely equipped to make factual findings based exclusively on oral testimony due to his or her opportunity to view the witnesses firsthand, to assess their demeanor, and to consider their testimonies in the context of the proceedings as a whole." *Meyer v. Aposhian*, 2016 UT App 47. The Court of Appeals may not substitute its judgment for the trial court regarding witness credibility, as trial courts are in a better position to weigh conflicting evidence and evaluate the credibility of witness testimony. *Lunt v. Lance*, 2008 UT App 192.

The trial court had ample evidence to support its findings. Michael testified as to the content of exhibits 2 and 3 apart from the exhibits themselves. R. 327-28, ll. 21-25, 1-8. R. 326, ll. 4-24. Melinda makes no effort to marshal the evidence in support of the trial court's ruling. *438 Main St. v, Easy Heat, Inc.*, 2004 UT 72. There is no legal basis for overturning the trial court's ruling, regardless of the admission of Michael's exhibits.

MELINDA's BRIEF MAY NOT MEET MINIMUM STANDARDS FOR BRIEFING AND ACCURACY PURSUANT TO Utah R. App. P. 24

Melinda's brief may fail to meet the minimum standards for briefing or accuracy pursuant to Utah R. App. P. 24, and to the extent this court may find that to be the case,

Michael requests his reasonable attorney fees under Utah R. App. P. 24(h). Melinda misstates the record and the basis for the trial court's findings on numerous occasions. Melinda fails to attach the court's findings of fact in her addendum, as required by URAP 24 (a)(12). Melinda claims evidence was not submitted to the commisioner, and fails to include the record of the hearing before the court commissioner. Melinda fails to make reference to any specific objections she made to Michael's proposed exhibits to demonstrate her preservation for claim of error with respect to Rule 108 URCP. Melinda fails to marshal the evidence to demonstrate the facts which support the trial court's findings.

Critically, Melinda states throughout her brief that "Michael introduced evidence of a videotape, a text, and emails, which had never been presented to the Commissioner . . . " (Appellant's Brief at 3, 11, 21, 24-25, 26, 29, 30, 33). Nowhere in Melinda's Brief or Summary of the Case does Melinda note that the trial court was informed that Michael had proffered "lots of evidence" to the commissioner, including "two videos." (R. 302, ll.4-10). Melinda nowhere advises this court that Michael had indicated to the court that evidence submitted would be kept "within the scope of the request for the protective order." (R. 301, ll. 16-17). But most strikingly, nowhere in her Brief or in the Record on Appeal does Melinda present any attempt to delineate what evidence "whether by proffer, testimony, or exhibit" was presented or not presented to the Commissioner to form the basis of an objection pursuant to Rule 108(c), Utah R. Civ. P. In fact, the record is

uncontroverted that Michael did in fact proffer his video evidence to the commissioner to avoid conflict with Rule 108(c):

"Q: And did you proffer the video to Commissioner Morgan at the hearing?

A:I did."

(R. 321, ll. 8-10).

Melinda misrepresents the cause for the court scheduling two days of evidentiary hearing. Michael's trial counsel was late for the 2nd day of the hearing, on the afternoon of March 28, 2019, after having an issue with another court (R. 295; R. 298, ll. 17-23). The hearing was concluded and the order issued that same day, so this delay did not cause any apparent prejudice to any party, even though they stayed until after 8 pm. (R. 122-125). The hearing was continued to a second date after appellant rested her case in chief after 5 pm on the first hearing date, February 28, 2019. (R. 278, ll.3-18). Inexplicably, Melinda claims that "Judge Edwards conducted [the hearing] on two days rather than one due to Michael's lawyer showing up very late on the day of the first hearing." (Appellant's Brief at 3).

These seem to be blatant and puzzling misstatements of the record to the court of appeals, and appears to be a violation of Utah R. App. P. 24. Failure to adhere to the requirements of Rule 24 "'increases the costs of litigation for both parties and unduly burdens the judiciary's time and energy.' Failure to adhere to the requirements may invite the court to impose serious consequences, such as disregarding or striking the briefs, or

assessing attorney fees against the offending lawyer." *In re Pahl*, 2007 Ut App 389 ¶ 17 citing *State v. Green*, 2004 UT 76 ¶ 11.

An appeal without legal or factual basis in the record may be grounds for the award of attorney fees. *Porco v. Porco*, 752 P.2d 365 (Utah App., 1988). Utah R. App. P. 40(a).

Michael has been forced to re-cite the record in order to accurately present the facts and record of this case to the Court of Appeals. To the extent that this court believes that Melinda's brief may be deficient, or that it fails to adequately to present any good faith basis for its legal arguments, Michael requests an award of attorney fees, that Melinda's brief be stricken, or such other relief as the court may deem appropriate.

ATTORNEY FEES FOR FRIVOLOUS APPEAL

Utah R. App. P. 33 provides that "if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined by Rule 34, and / or reasonable attorney fees to the prevailing party." "For the purposes of these rules, a frivolous motion, appeal, or brief . . . is not grounded in fact, [or] not warranted by existing law *Robertson's Marine, Inc. v. 14 Solutions*. . ." Utah R. App. P. 33(b). Attorney fees may be awarded in appeal from divorce decree where appeal is frivolous, regardless of trial court's ruling on fees. *Burt v. Burt*, 799 P.2d 1166 (Utah 1990). Appeal was frivolous and not warranted in law when appellants "were not forthright in their presentation of

facts relevant to appealability of issue they sought to raise." *Debry v. Cascade Enterprises*, 935 P.2d 499, rehearing denied (Utah 1997).

In this case, Appellant appeals based on the admission of evidence not proffered to commissioner under Rule 108 (c), when the record indicates the exhibits submitted were actually proffered to the commissioner, R. 302, ll.4-10; R. 324, ll. 16-20; R. 325, ll. 14-24. Appellant did not disclose this in her brief. Appellant did not disclose in her brief that she stipulated to the admission of two of the exhibits, (the only exhibits to which she made a specific objection under rule 108) which she now claims were improperly admitted. R. 344-345, ll. 9-25; 1-3. If the facts of the case were properly presented in appellant's brief, it would be clear under existing law that appellant did not object to any exhibits under Rule 108, the exhibits which were admitted had been proferred to the commissioner in compliance with Rule 108 (c), and the exhibits had been admitted by stipulation. On that set of facts on review of the record, Appellant could present no good faith legal argument for the exclusion of any exhibits under Rule 108. Yet appellant presents a brief which neglects to include any of those facts in the record, fails to include any portions of the transcript relating to her objections in the addendum, and then misrepresents the record of her objections to the appellate court. Under these circumstances Appellee believes an award of attorney fees and costs pursuant to U.R.A.P. 33 is warranted.

CONCLUSION

Appellee Michael Watson respectfully requests that the Court of Appeals deny Appellant Melinda Watson's appeal. All exhibits complained of by Appellant were admitted without relevant objection or by stipulation, which was not disclosed to this court in Appellant's brief. If appropriate as requested herein, Michael Watson requests his attorney fees and costs on appeal.

DATED this October 16, 2019.

_/s/ David S.Pace_____
David S. Pace
Attorney at Law

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because this brief contains 15 pages, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the addendum requirements of Utah R. App. P. 24(a)(12) because the addendum contains a copy of any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief; the order, judgment, opinion, or decision under review and any related minute entries, findings of fact, and conclusions of law; and materials in the record that are the subject of the dispute and that are of central importance to the determination of the issues presented for review, such as challenged jury instructions, transcript pages, insurance policies, leases, search warrants, or real estate purchase contracts.

3. This brief complies with rule 21(g).

Dated this October 16, 2019.

_/s/ David S.Pace_____
David S. Pace
Attorney at Law

CERTIFICATE OF MAILING

I hereby certify I submitted the Original and Five Copies (Six copies total), with attachments, of the foregoing Brief of Appellee to the clerk of the Appellate Court, and that I mailed two true and correct copies, postage pre-paid, of the foregoing *Brief of Appellee,* with attachments (or hand-delivered), on this October 16, 2019, to the following, as well as delivering by email. A Non-conforming brief was lodged on October 15, 2019.

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ADDENDUM

EXHIBIT A

say. Hey, she's a bad person. This judge sent her to jail for 30 days so, therefore, Judge, you got to do the same thing. You got to blow this off. This woman doesn't have any credibility. That's what they're trying to say to you.

The question is: Is the evidence under the preponderance standard more likely than not that this man committed domestic violence repeatedly against this woman? That's what the question is. And that's a determination you're going to have to make. And I would say on the evidence before the Court that there is plenty of evidence that indicates that this happened.

Let me see if there's anything else here, Your Honor.

That's all I have to say, Your Honor.

THE COURT: Thank you. The Court is prepared to issue its ruling in the matter of Watson versus Watson case number 184701858.

The Court has carefully considered the evidence and the arguments of the parties and their counsel, both today and on February 28, 2019.

I've got 15 pages of handwritten notes of the testimony of the different rulings I made, the different exhibits that were admitted, et cetera. I

am prepared to rule.

This is a hard situation for both of you parties. And I feel for both of you. I feel, perhaps, most poignantly for your children. I'm a father of five and a grandfather of three now. Thank God I've lived long enough to see all this. But let me tell you that I would just say, that it's worth whatever efforts you two can make to make sure that your sweet children are insulated from this as much as possible. When I say "this," I'm not really so much addressing just the conduct that's alleged here in both directions, I'm talking about everything that's gone on since this divorce in 2016. I think for there to be peace for the sake of your children, both of you have to decide to stop. Stop the back and forth and the comments and the different things that are raising contention between the two of you. I hope you'll do it for the sake of the children.

But that's not my duty here today. My duty is to rule on this objection. As is already mentioned, Commissioner Morgan entered on December 17th, 2018 a protective order. Sometimes we refer to it as a bare bones protective order or the restraining order provision. The main provision is the only thing that's entered in the protective

order, nothing else.

I have considered all of the evidence. And I did so because I thought it was only fair to both of you for me to consider all sides of this, because the issues here are important. And they are long lasting.

So without further ado, I will turn to my analysis.

I do find, first of all, that it's up to the Court to make independent findings of facts and conclusions of law. And I will do my best to do that in the context of the statute -- statutes, rather, that we're dealing with and try to help bring clarity to a difficult situation.

First of all, the Court finds that the appropriate standard for the Court to apply is a preponderance of the evidence standard. And petitioner has the burden of proving beyond a reasonable doubt that each element of the protective order statute has been satisfied.

MR. WECKEL: Your Honor, did you say beyond a reasonable doubt?

THE COURT: If I said that, I meant to say by a preponderance of the evidence. It's not beyond a reasonable doubt. It's not clear and convincing

evidence. It is by a preponderance of the evidence. And that is established in our law.

The first issue is whether or not these parties are cohabitants. That issue is not disputed. They are cohabitants, having formerly been married and having three children together.

The next issue is whether the evidence presented by petitioner is to the -- to the effect that -- or sufficient to allow the Court to conclude by a preponderance of the evidence that she's been subjected to abuse or domestic violence or to whom there is a substantial likelihood of abuse or domestic violence.

So let me turn to that analysis. First of all, on the issue of abuse as that is defined in our statute. Abuse under Utah code 78B-7-102 subsection 1, abuse means intentionally or knowingly cause or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

I'm going to find that there isn't any evidence presented by the parties that would lead the Court to conclude by a preponderance of the evidence that abuse has occurred.

So that leads the Court to answer the

question of whether or not domestic violence has been proved by a preponderance of the evidence. Under the protective order statute, which is the same section I was talking about, under subsection 5 it says, "domestic violence," and it says it means the same as that term is defined in section 77-36-1, as we discussed previously.

So turning to 77-36-1, the Court finds that the subsection 4 defines domestic violence. It says, "Domestic violence or domestic violence offense means any criminal offense involving violence or physical harm or threat of violence or physical harm or any attempt, conspiracy or solicitation to commit a criminal offense involving violence or physical harm when committed by one cohabitant against another. Domestic violence or domestic violence offense also means commission or attempt to commit any of the following offenses by one cohabitant against another."

And I need to go through these one at a time. They are subsections A through Y.

Aggravated assault is A. That's not alleged.

B, assault is alleged, but I'm finding that the facts presented by the parties do not

support the Court in concluding by a preponderance of the evidence that the respondent assaulted the petitioner.

C, criminal homicide is not alleged.

D, harassment is alleged, so I will turn to that section, which is 76-5-106. That section says, "A person is guilty of harassment if with intent to frighten or harass another he communicates a written or recorded threat to commit any violent felony."

Though Mr. Weckel alleged that applied, I'm finding that that simply doesn't apply, given the facts that have been presented to the Court.

E is electronic communication harassment. I'm also going to find that doesn't apply, given the evidence presented to the Court. At least there isn't sufficient evidence that would allow the Court to conclude by a preponderance of the evidence that electronic communication harassment has occurred.

And let me review that code section, as well, just to clarify for the record what I'm ruling. That's under 76-9-201 of our code. Turning to that section, it says -- there's a number of definitions and things. But the core of it is under subsection 2. And it says, "A person is guilty of electronic

communication harassment and subject to prosecution in the jurisdiction where the communication originated or was received if with intent to intimidate abuse, threaten or disrupt the electronic communications of another person -- the person, A, one, makes repeated contact by means of electronic communications regardless of whether a conversation ensues or, two, after the recipient has requested or informed the person not to contact the recipient and the person repeatedly or continuously, A, contacts the electronic communication device of the recipient or, B, causes an electronic communication device of the recipient to ring or to receive other notification of attempted contact by means of electronic communication.

Then under subsection B, makes contacts by means of electronic communication and insults, taunts or challenges, the recipient of the communication or any person at the receiving location in a manner likely to provoke a violent or disorderly response. C, makes contact by means of electronic communication and threatens to inflict injury, physical harm or damage to any person or the property of any person. D, causes disruption, jamming or overload of an electronic communication system through excessive

message traffic or other means utilizing an electronic communication device. Or E, electronically publishes, posts or otherwise discloses personal identifying information of another person in a public online site or forum without that person's permission.

I'm specifically finding that that does not apply to the facts that have been presented to the Court in this case.

F is kidnapping, child kidnapping or aggravated kidnapping. That's not alleged.

G, mayhem, is not alleged.

H, sexual offenses are not alleged with the exception of voyeurism. And let me turn to that briefly.

Voyeurism is analyzed under Utah code 76-9-702.7. Under subsection 1, I'm specifically finding this does not apply to the facts of this case for the following reasons. It says, "A person is guilty of voyeurism who intentionally, using any type of technology to secretly or surreptitiously record video of a person -- video of a person, A, for the purpose of viewing any portion of the individual's body regarding which the individual has a reasonable expectation of privacy whether or not that portion of

the body is covered with clothing. B, without the knowledge or consent of the individual. And C, under circumstances in which the individual has a reasonable expectation of privacy."

I'm finding that in a situation where the evidence before the Court is the parties -- even accepting petitioner's allegation at face value, the parties were a married couple at the time living together. There isn't a reasonable expectation of privacy in that circumstance. And so I'm finding that that statute is inapplicable to the facts of our case and is not justified, given the facts that husbands and wives commonly are in a state of undress in each other's presence to. Each their own, I suppose, in some ways. But some people I know take pictures of the other person and keep them. I won't opine as to that, but I'm just saying that I don't think there's a reasonable expectation of privacy in that circumstance. So I'm finding that section inapplicable.

And I'm finding the remainder of sexual offenses inapplicable, as well.

I is stalking. I will analyze that separately in a moment.

J is unlawful detention or unlawful

detention of a minor. That doesn't apply.

K is violation of a protective order or ex parte protective order. It doesn't apply.

L is any offense against property described in title 76, chapter 6, part 1. Property disruption title 76, chapter 6, part 2, burglary and criminal trespass or title 76, chapter 6, part 3 robbery.

So let me deal with that -- each of those in turn. First, 76-6 -- let me turn to that so we're all reviewing the same thing. Dash 106, specifically criminal mischief has been alleged as far as the damage to the van. Let me say the Court finds that the evidence, obviously, clearly disputed there where petitioner is adamant that the roof of the party's van was hit and damaged by the respondent. The respondent adamantly denies that.

But I think, importantly, here in this case the Court finds there was no damage to the vehicle because by the time the police arrived, what was testified to was they couldn't see any damage to the vehicle. I believe petitioner's testimony was that the respondent had popped the dent back out so they couldn't see it. Be that as it may, the Court finds that these are the elements that are applicable

under 106 and it says, "A person" -- under subsection 2, "A person who commits criminal mischief if the person" -- and it's subsection under that under (2)(c), "Intentionally damages, defaces or destroys the property of another." That's the applicable section.

And here again, I'm finding specifically that there is no destruction, damage, defacement or destruction of the property in question. The police couldn't tell that there'd been any unlawful contact with the vehicle. And so the Court finds that section inapplicable.

Which leads me next to the burglary or criminal trespass under 76-6 subsection 206.

Let me find in this area specifically that it's been controverted whether or not the respondent actually entered petitioner's home in violation of this code section. But I will find that there was no criminal intent. And I'll also find there's been no evidence as to his being given notice that he wasn't welcome to go in the home.

Specifically, it says, "A person is guilty of criminal trespass if under circumstances not amounting to burglary subsection A, the person enters or remains unlawfully on or causes a manned aircraft

to enter and remain unlawfully over property and one intends to cause annoyance or injury to any person or damage to any property, including the use of graffiti." I find there's no evidence to support that, at least not to a preponderance of the evidence.

Two, intends to commit any crime, other than theft or a felony, which I'm finding specifically there isn't evidence to support that, or is reckless as to whether the persons or unmanned aircraft's presence will cause fear for the safety of another. I am also finding that not to apply.

So I'm finding that criminal trespass has not been proved by a preponderance of the evidence.

And subsection L of the domestic violence code does not apply.

Subsection M, possession of a deadly weapon with criminal intent as described in section 76-10-507. It's not alleged and it doesn't apply.

Subsection N is discharge of a vehicle from -- excuse me, discharge of a firearm from a vehicle. It doesn't apply.

O, disorderly conduct. Now, that's a -- conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally

charged with a domestic violence offense, otherwise described in this subsection 4, except that a conviction of disorderly conduct as a domestic violence offense in the manner described in this subsection (4)(O) does not constitute a misdemeanor crime of domestic violence. So I don't think this applies.

I think both parties have engaged in talk back and forth that I guess could be argued to be disorderly. But I think in the context of what the parties have been going through in a high conflict divorce, I don't find that the evidence is sufficient to support by a preponderance of the evidence that the respondent has committed disorderly conduct in regard to the petitioner in this case.

P, child abuse. It's been alleged. I'm finding as a matter of fact that it's disputed as to whether or not S.W., the parties' child, was ever pushed by the respondent and thus caused to fall into a banister and get bruising of physical injury that would satisfy, technically, the child abuse statute. I'm finding that the evidence does not support, by a preponderance of the evidence, the conclusion that he made that pushing. So I'm finding that section inapplicable to the Court's conclusions here.

Q is threatening the use of a dangerous weapon; not alleged and it does not apply.

R, threatening violence. I'm finding the evidence does not support a conclusion under that section.

S, tampering with a witness; not alleged and does not apply.

T, retaliation against a witness or a victim; not alleged and does not apply.

U, unlawful distribution of an intimate image. It does not apply, under the findings I already made under the voyeurism. There's no evidence here that the respondent distributed that intimate image.

V, sexual battery; not alleged and does not apply.

W, voyeurism. I've already analyzed that separately above under the sex offenses.

X, damage to or interruption of a communication device; not alleged and doesn't apply.

And then it says an offense described in section 77-20-3.5. Turning to that, quickly, so we can get on to the stalking analysis. That is the conditions for release after arrest for domestic violence and other offenses or a jail release

agreement. That doesn't apply. It's not alleged in this case.

So the Court needs to decide clearly under subsection I or India of Utah code 77-36-1 subsection (4)(I), whether or not stalking has been proved by a preponderance of the evidence.

Here's what I find: I find that the parties have been involved in a high-conflict divorce situation since 2016. I find that there's been regrettable conduct on the part of both parties in regard to their relationship and their co-parenting. I find that they have -- petitioner and respondent have communicated with each other in ways that are regrettable. I find that there has been some bending or breaking of the Court's orders by both parties that, again, are regrettable. But that's been dealt with in other forum.

But the bottom line of that is it's led to a situation where the parties are so at odds with each other that they're in the business of regularly collecting evidence against each other for their own benefit in the litigation involving their children and their divorce. The Court wishes this were not the case. But that's a crucial fact because the Court analyzes the objective/subjective or

individualized objective standard set forth in Baird v. Baird in that context. In other words, I can't analyze the interactions of these parties in a vacuum pretending that they don't have any prior interactions or that there's been no prior problem or anything like that. This is a situation where these parties have been interacting in a very difficult fashion for a long time, and it's uncontroverted; at least since their divorce in 2016, of course, there were events that led up to the divorce or they wouldn't be divorced.

So the Court finds that context is crucial to the Court's conclusion in this case.

And turning to the stalking section, it's 76-5-106.5, as has already been cited. And there's been much discussion here. Of course, importantly, the Court has the discussed course of conduct. It means two or more acts directed at or towards a specific person. And it gives a litany of things that can apply here.

But the Court finds that there is a course of conduct if you just consider that term in and of itself. You know, the respondent has definitely allegedly -- and there's been evidence presented by the petitioner that he has taken pictures of her or

videoed her on different occasions. He's even admitted to some of that. We have video of it happening, actually, that's been presented in respondent's Exhibits 3 and 4 which the Court has considered, of course.

But anyway, there's sufficient here that if a course of conduct were all that were required, then the Court would find that a stalking injunction would be appropriate, thus that domestic violence has occurred and that this protective order is appropriate. However, the course of conduct that the respondent has engaged in and, frankly, that the petitioner has engaged in is in the context of a high-conflict divorce. And so the Court has to turn to the rest of the statute.

And that is under subsection 2 of the previously cited statute. It says, "A person is guilty of stalking who intentionally or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person, A, to fear for the person's own safety or the safety of a third person or, B, to suffer other emotional distress."

The Court finds that given the course of conduct between the parties before and after their

divorce, that the course of conduct engaged in by the respondent was not such so that it would -- he should know -- know or should know that it would cause a reasonable person in petitioner's circumstance to fear for the person's own safety or the safety of a third person.

I rely on a number of things for that. First of all, I rely on the videos that were presented as respondent's Exhibits 3 and 4. Or was it 2 and 3? Whatever the numbers were.

MR. PETERSON: Two and 3, Your Honor.

THE COURT: You're right. It's 2 and 3. I don't want to misspeak. Exhibits 2 and 3. The videos show very clearly, again, what I think is regrettable conduct. I wish people weren't technical with each other. I wish if someone arrived 10 or 15 minutes early for their parent time that the other parent would let the kid go. I mean, in a perfect world, you work with each other like that. I'm not opining that what happened there was great. I think it's regrettable.

But importantly, petitioner came to respondent's house, as she admitted and as respondent testified, she regularly did. And that supports a conclusion that she was not in fear for her own

safety or for the safety of others. She waited there for quite a long time until at the strike of the hour at nine o'clock the respondent let the boy go, their child go, and he went out to his sister.

But the respondent did come out and he -- I know there's a special master order that says he should stay in the house. But I find that he stayed in close proximity to his house. He was right there on or near his property. He didn't walk out to the road. He videotaped from up on or near his property facing the petitioner's car. And as argued, petitioner both photographed and videoed him in response. That's the best evidence I have.

And she didn't quickly take off like a person who was scared or worried would do. She slowly backed out, slowly drove down the street, turned and went away. And meanwhile, the respondent walked back to his front door, but at all times remained in close proximity to his home. That's powerful evidence that the petitioner was not in fear for her own safety or the safety of a third person.

And that the conduct involved in -- engaged in this course of conduct engaged in by the respondent was objectionable to the petitioner. She didn't like it. But it was not such that would cause

a reasonable person in her circumstances to fear for her own safety or the safety of a third person. Actually, to the contrary, you can tell from the way the parties carried on in that video it's something they were painfully used to. It was normal for them, which is unfortunate, but nonetheless, it is the case.

So I turn my analysis to subsection B. Should the respondent have known that what he was doing caused a person -- a reasonable person in respondent -- excuse me, in petitioner's circumstance to suffer other emotional distress. I can tell from Commissioner Morgan's ruling that he thought that the petitioner was entitled -- or that the Court should consider her as a person with particular needs or a vulnerability. I'm not finding that to be the case as in regards to this. I think that both parties have engaged in banter back and forth that could stir the other party up. But it nonetheless has been their course of conduct.

For example, in respondent's Exhibit 1, the last text message sent by the petitioner, when she says, "So I'll have time to wait around and play your games. I hope Ilene is up for it. Give her my condolences." I just -- I find that where that's the

case and respondent's Exhibit 4 where she e-mails -- where the petitioner e-mails respondent on September 29th, 2018 -- not long, frankly, before this protective order was filed in November of 2018. At any rate, she e-mails and says that she's going to come sit by him. This is not the conduct of a person that's been unduly distressed by his behavior. She's not being emotionally distressed by that. Rather, this is, again, something that the video or photographing of her or at least what she thought was happening, again, that evidence is disputed. But that was what she thought was happening. And that -- what's happening before this e-mail was sent, as I understand the evidence, is that -- I mean, in the soccer season of 2017, 2018.

And so all things considered, respondent's course of conduct was not such that he knew or should have known that it would cause a reasonable person in petitioner's circumstances applying, once again, the standard of Baird versus Baird would suffer other emotional distress.

Given those findings of fact and conclusions of law, I'm ordering that that previously entered protective order be set aside and dismissed. And of course, Mr. Weckel, you and your client have

the right to appeal that decision as established by law.

Does any -- either party require any clarification of the Court's order?

MR. PETERSON: No, Your Honor.

(Multiple voices.)

MR. WECKEL: One thing I would say, though, Your Honor, I do ask for clarification on the standard that you used because I don't think it's a reasonable person in the context of a particular person because that would be a subjective standard.

THE COURT: They call it the individualized objective standard in the case Baird versus Baird. And I'll read it to you. It says, "In applying an individualized objective standard, the courts consider several factors, such as the victim's background, the victim's knowledge of the relationship with the defendant, any history of abuse between the parties, the location of the alleged stalking and its proximity to the victim's children, if any, and the accumulative effect of the defendant's repetitive conduct."

So it's a -- it's the -- it used to be called the subjective/objective, but they call it an individualized objective standard now. And that's

the standard I have applied.

MR. WECKEL: Right. I mean, you could -- and I respect what you're saying. I'm just saying that that particular standard, you could look at it either way. You could say that there's a callousness, you know, that has occurred over time as how you're interpreting it. It also could mean that a person is more afraid because of all of the things that have happened, so --

THE COURT: That's correct, Mr. Weckel. And I -- I am finding specifically that the petitioner was not afraid given the correspondence between the parties that I've been made aware of. Given her behavior, she -- her conduct was exactly inapposite and contrary to her being afraid or to be suffering other emotional distress other than because of the angst the parties have with each other from the byproducts of their high -- highly contested and high-conflict divorce.

Any other clarifications needed by the parties?

MR. PETERSON: Just a question as to where we go from here. Do we need an initial order, a minute entry? Will the Court prepare an order? What's the Court's preference for getting a clear

indication of what happened.

THE COURT: It depends on what the parties want. If Mr. Weckel and his client intend to appeal the Court's ruling, then we probably need to reduce my ruling to a written findings and conclusions and order.

If not, I can simply print and fill out and sign a protective order dismissal form.

MR. PETERSON: We'd be fine with that.

THE COURT: If it was done online. But --

MR. WECKEL: Let me ask my client.

THE COURT: Okay.

(Discussion off the record.)

THE COURT: The clerk informs me that given the Court's ruling on the record tonight, she'll be removing the protective order from the statewide system before we leave.

MR. WECKEL: Your Honor, if you make detailed minute entry, we have the tape as to what your ruling is. If you feel -- I'm not sure at this point if we want to file an appeal, but you have the tape there and you have your notes. I mean, if you want to reduce them to a minute entry --

THE COURT: I'm not going to prepare a written ruling of my decision. If the parties want

to do that, you're welcome to do that.

MR. WECKEL: Oh, to prepare --

THE COURT: I'm not going to take the time to prepare a written ruling. I've made my ruling. I've been very detailed, I believe, in my findings and conclusions.

MR. WECKEL: Yeah.

THE COURT: I'm not going to take the time to reduce it to writing. I've already spent --

MR. WECKEL: Sure.

THE COURT: -- a lot of time on this case, so --

MR. WECKEL: No, I understand. And I think that. I think the record -- you know, your reciting it on the record is we could get a transcript of that and --

THE COURT: Okay.

MR. WECKEL: -- you know, I think that's --

THE COURT: And I'll simply do that, if it's not objectionable to the parties, then, I will have the clerk print me off a stalking in -- excuse me, a protective order dismissal form and then I'll fill that out and I'll sign it and we'll go from there.

EXHIBIT B

FILED
MAR 28 2019
Layton District Court

Order on Request to Dismiss or Vacate Protective Order

Case Number: 184701858
County: Davis

District: Second
State: Utah
Judge: Michael S. Edwards
Commissioner: T.R. Morgan

Petitioner *(protected person):*

First Name	Middle	Last
Melinda		Watson

Name and phone number of Petitioner's attorney *(if any):*

Theodore R. Weckel, Jr.
801-535-4385

Other people who were protected by this order

Name	Age	Relationship to Petitioner

Respondent *(Person petitioner was protected from):*

First Name	Middle	Last
Michael	Gordon	Watson

Street	City	State and Zip
409 N. 1322 E.	Lehi	UT 84043

Findings:

[ ] The indicated request to dismiss or vacate a protective order was filed. The court has reviewed it and makes the order that follows.

[ ] *Petitioner's Request to Dismiss Protective Order* (Notice to Respondent? [ ] Yes [ ] No)
Respondent's Request to Vacate Temporary Protective Order (Notice to Petitioner? [ ] Yes [ ] No)
[ ] *Respondent's Request to Dismiss Protective Order (issued more than 2 years ago)*
(Notice to Petitioner? [ ] Yes [ ] No)
[ ] Other *(name)* _____

[ ] The Court reviewed the request and other documents in the file, OR
[X] **There was a hearing on** *(date)*: 3/28/19 & 3/28/19. The following people were present at the hearing:
[X] Petitioner [X] Petitioner's attorney *(name)*: Theodore R. Weckel, Jr.
[X] Respondent [X] Respondent's attorney *(name)*: Robert W. Peterson

Order: The court now

[ ] **DENIES the request.** This case is not dismissed. Any protective orders issues are still valid and enforceable.

[X] **GRANTS the request.** This case is dismissed. Any protective orders issued are no longer valid.
[ ] *Temporary Protective Order (Ex Parte Order)* issued on *(date):* _____
[X] *Protective Order* issued on *(date):* December 17, 2018

Commissioner's or Judge's signature may instead appear at the top of the first page of this document.

_____ Signature ▶ _____
Date
Commissioner _____

March 28, 2019 Signature ▶ _____
Date
Judge Michael S. Edwards

STATE OF UTAH
SECOND JUDICIAL DISTRICT
Davis County Department

By signing below, Petitioner acknowledges receiving a copy of this *Order on Request to Dismiss Protective Order.*

Petitioner's Signature: _____

By signing below, Respondent acknowledges receiving a copy of this *Order on Request to Dismiss Protective Order.*

Respondent's Signature: _____

EXHIBIT C

that was elicited went beyond what was written in the request for the protective order. I think my client has a chance to respond.

Additionally, when we were before the commissioner, we proffered a lot of evidence, including -- in fact, we had a video that we offered to show Commissioner Morgan. I declined -- or two videos. He declined to see those. We have those here today. As well as a meaningful response to the issues that Mr. Weckel brought up previously.

MR. WECKEL: Your Honor, may I respond to that? First of all --

THE COURT: Briefly, yes. We're running out of time already, so --

MR. WECKEL: Yeah. The de novo concept has nothing to do with evidence. What it has to do with under the hearing -- or the ruling in Davey Barnes(ph), which is a recent Court of Appeals opinion, means that you can't rely on what the commissioner did. This is a new day in court. You're the new judge. And you can make a determination and not rely upon what the commissioner (inaudible) nothing to do with the amount of evidence.

Rule 108 has to do with the evidence. And

what happened in the last hearing, Your Honor, is we elicited testimony and some documentary evidence associated with the request for a protective order. It was very restricted.

As you may recall, cross-examination of the witness lasted, my recollection, is approximately two hours. I mean, my direct examination was very limited. I think it was about 30 minutes. And then the cross-examination is what dragged this thing on so long. All right.

So that has nothing to do with my client trying to put -- we're trying to get this over with and trying to put on evidence in an efficient manner. And now what's happening is because the cross-examination was so long, we had to reschedule the hearing, you know, for another part of it. And then because -- and I'm not faulting counsel specifically, but I mean, calendaring two hearings on the same day, now we're limited to 3:15 starting here. And now we want to bring in all kinds of other evidence which was not part of the original thing, violates the notice requirement in Rule 108.

Now, the Court, in its discretion, can consider in the sake of judicial economy if it wants to hear more evidence. But, you know, we're not

prepared to address all of these other things that he may want to bring in at this time. And I'm just bringing that up to the Court, so --

THE COURT: Well, let's cross that bridge when we get there, counsel.

For now, I do think it's a de novo hearing. I do think that with what has been presented by the petitioner, the respondent has a fair opportunity here to respond to that evidence and present what he needs to present.

I'm not going to make any preliminary rulings. We'll deal with any objections as they come up. And let's proceed so we can get done today, shall we?

Mr. Weckel, did you have anything else that you were going to present on behalf of your client?

MR. WECKEL: No, Your Honor. We had rested. We were waiting for the other party to present their evidence.

THE COURT: Okay. If that's the case, then, Mr. Peterson, take it away.

MR. PETERSON: Thank you, Your Honor. We call Mr. Michael Watson to the stand.

THE COURT: Mr. Watson, please step up to

police officer in Lehi for over an hour of why she should get to do it at my home and not have to --

MR. PETERSON: May I approach, Your Honor?

THE COURT: Please.

MR. WECKEL: Can this be marked as an exhibit, please?

THE COURT: I take it it hasn't been marked?

MR. PETERSON: It hasn't been marked yet. When we go to admit it, we can mark it, unless the Court would like us to admit them in -- mark them in advance.

THE COURT: Well, it's just convenient for reference purposes. But Counsel, that's the only thing I'm thinking, but --

MR. PETERSON: I'm happy to do that. Do you have stickers or do you want me to just write on -- I'm sorry. I don't mean to be presumptive.

THE COURT: Just want to keep it easy for everyone's reference.

MR. PETERSON: That's fair, Your Honor.

THE COURT: I'm happy to write on my copy. What are you --

MR. PETERSON: This will be marked Exhibit Number 1.

Q. (By Mr. Peterson) Mr. Watson, can you tell us what that is?

A. This is the text I received from Ms. Watson on June 15th or on or about June 15th.

Q. And how do you know it was received on or about June 15th?

A. Because I took a screen shot of this text on June 15th.

Q. And tell us who's communicating with who.

A. This is Melinda talking to me.

Q. And what does she say?

A. Here at the bottom she says, "FYI --

Q. Let's read the whole thing.

A. Oh, the whole thing. Okay. So it says, "D.W.'s phone has been turned off for quite some time now. D.W. just told me that he was forced to turn off his cell phone. This is a violation of the decree. FYI, I am planning on residential pickups during the summer. I don't have many responsibilities on Friday, so I'll have time to wait around and play your games. I hope Ilene is up for it. Give her my condolences."

Q. What's your interpretation of that text message, Mr. Watson?

A. It means she doesn't intend to comply with

my wishes to have the exchanges be done at the police station.

Q. In your opinion, does that text message convey any concern about her being at your home?

A. No.

MR. WECKEL: Your Honor, I'm going to object to this evidence. This is -- if anything, this is a contempt issue regarding her not obeying the Court order. It has nothing to do with what we're here for today, which is a protective order in terms of what she's asking about as far as following and stalking him -- her, that type of thing. And so I think it muddies the water. It's kind of like throwing mud at the wall and seeing what's going to stick and trying to disparage her character by bad acts. But it doesn't have anything to do with the protective order.

Now, they -- they could have a -- you know, they could file a contempt action and try to say that she violated the Court order. But I don't see what the materiality of this is.

THE COURT: Counsel.

MR. PETERSON: This is, very simply, Your Honor -- that was a very lengthy objection, so I'll try to respond what I think it was, which is that

this is irrelevant.

Ms. Watson testified extensively that she was terrified of my client. She testified extensively that her interactions with him were horrific. She introduced numerous bits of evidence going back to 2008 about the things that my client had allegedly done to her that caused her tremendous concern. And yet she's saying, "I'm going to come to your house and play games." I think this goes directly to whether or not she was quote, unquote terrified by my client or concerned about her interactions. He testified he's been asking her to do exchanges at a safe place. She was insisting on doing the exchanges at his home.

THE COURT: I'm going to overrule the objection. I think it's relevant.

MR. PETERSON: Thank you.

THE COURT: And material.

Q. (By Mr. Peterson) So tell us what your interpretation is of that exhibit, Mr. Watson?

A. She's obviously not intent on, you know, protecting herself. She intends to come to my house, against my wishes.

Q. So after you moved down to Lehi, between then and the events that were alleged in this

Q. And why did you take video of her on this occasion?

A. Because I have a security camera on my house that's pointed at my driveway because she was continually coming into my driveway onto my property, so I set the security camera to face my driveway. So when she noticed the security camera, she started parking in the neighbor's driveway.

Q. Okay. I want to back up for a second and get some context. October 31st was what day?

A. It was Wednesday.

Q. And you had parent time that day?

A. Yes.

Q. And you were with your son D.W., correct?

A. Yes. Correct.

Q. Okay. What time did Melinda show up to get your son D.W.?

A. She showed up 15 minutes early.

Q. And what did she do when she showed up?

A. She started honking her horn.

Q. Was this unusual to you or concerning to?

A. Yes, because it was incessant for several minutes straight.

Q. Did she make any effort to contact you at all?

do have an objection.

THE COURT: Okay. What's that?

MR. WECKEL: This is what I'm talking about. First of all, we've had a month, you know, between hearings, okay. So if counsel wanted to introduce this evidence, what would be fair is to provide me with a copy of the video so you can review it rather than surprising me with it during the course of the hearing. And this is the heart of Rule 108. Rule 108 says that you shall not present any evidence to the judge which was not presented to the commissioner. And in the sake of judicial economy, I'm quoting from paragraph C, the Court can -- may, in its discretion, consider new evidence.

But Your Honor, in this particular case, you know, it would be one thing if we just scheduled this hearing and, you know, we're all there the first time. We've had a month later postponing this thing. I don't know why this wasn't given to me, other than the fact of springing it upon us during the course of this hearing and surprising us and not giving me an opportunity to prepare any type of examination.

That's the only point I think that could be made in doing it like that. Otherwise, if you want to be fair about it, you would have said, well,

I'm going to be using this exhibit, here it is and let's exchange it and you can prepare, et cetera.

So in terms of a fair hearing, Your Honor, I don't think it's fair. I don't think it complies with Rule 108. I think it's fair to schedule two hearings, one starting, you know, within a couple hours over the lunch hour from the hearing that we have now so that it -- you know, we now go in starting at 3:15, that's all that stuff, come on, I'm just asking for fairness, okay.

And I -- so I object to this presentation.

THE COURT: What's your response, Mr. Peterson?

MR. PETERSON: My response, Your Honor, is, first of all, I resent the imputation of improper motives by Mr. Weckel. This is an objection hearing of a commissioner's recommendation. All this evidence was proffered in great detail before the hearing and these things are typically handled this way. There wasn't a pretrial order. There wasn't an exchange of witnesses or exhibits on the part of either party. Mr. Weckel himself introduced evidence last time that I had -- don't recall having seen before. This is not an ambush, this is not a surprise. The -- Ms. Watson -- I can't remember if

arguments of both parties. I think it's evidence the Court needs to see because, frankly, the credibility of the witnesses is one of the things that my decision is going to have to hinge on, obviously, in deciding whether or not stalking occurred to justify the entry of a protective order. I think video evidence will be helpful to the Court in making that determination.

And where it was proffered to the commissioner but the commissioner declined to hear it, I don't find that binds me as far as what evidence I choose to hear. And so in the interest of being complete and fair to both parties, I want to hear the evidence.

Now, the other question is -- so the objection is overruled.

How are we going to set it up so that everyone can see it.

MR. PETERSON: Well, I think, Your Honor, that my client can set it here. He can certainly come around. He can set it on the corner. Mr. Weckel and I could both see, Ms. Watson, as well.

THE COURT: Can you bring this -- that TV that we have? We have a larger TV if we could hook it up to that, that might be better. That way

(Video recording continues.)

Q. Okay. Why don't you skip it ahead to the last 30 seconds or so.

MR. WECKEL: I object. I want to watch.

MR. PETERSON: Okay. We'll watch the entire thing.

(Video recording continues.)

Q. (By Mr. Peterson) I'm going to pause for a second, Mr. Watson.

(Video recording paused.)

Q. (By Mr. Peterson) How long had that video been going at that -- sorry, how long had the behavior been happening at this point?

A. At this point, it was probably closer to 12 minutes, 13 minutes.

Q. And was it like this the entire time?

A. Yeah.

Q. Okay. Go ahead.

(Video recording played.)

Q. (By Mr. Peterson) Okay. One moment. Stop.

(Video recording stopped.)

Q. (By Mr. Peterson) Why did it change right there?

A. It changed right there because I put a

THE COURT: Do you have those we can mark, then?

Q. (By Mr. Peterson) You've got the disc, correct?

A. I have a disc, yes. I can put them on the disc.

Q. Okay.

A. I can grab that.

THE COURT: While he's preparing that, Mr. Weckel, do you have any objection to the proffer -- admission of Exhibits 2 and 3?

MR. WECKEL: I think it --

THE COURT: Two being the doorbell video, three being the outside video?

MR. WECKEL: I not only think it's (inaudible) objection I think it helps her case, Your Honor.

THE COURT: I'm sorry. Say that again, please.

MR. WECKEL: I said I don't have an objection. I not only don't have an objection, I think it helps her case. So, yes.

THE COURT: All right, then, based on the stipulation of the parties, exhibits -- excuse me, more specifically respondent's Exhibits 2 and 3 will

be admitted.

(RESPONDENT EXHIBIT NUMBERS 2 AND 3 ARE RECEIVED.)

Q. (By Mr. Peterson) Mr. Watson --

MR. PETERSON: I'm sorry. We good?

THE COURT: Yeah.

Q. (By Mr. Peterson) Mr. Watson, did you see the length of the second video that's been marked as Exhibit 3?

A. Just have to check that real quick.

I've got it as two minutes and 30 seconds.

Q. Did you hear Ms. Watson testify when she was on the stand that you stood in front of her car to four to five minutes?

A. I did.

Q. Is that possible, Mr. Watson?

A. No.

Q. Did you hear Ms. Watson testify that she was terrified and that you were menacing and angry?

A. Yes.

Q. Is there anything in that video that you construe as being menacing or angry?

A. No.

Q. In fact, you were whistling a doofy little song, weren't you?

Q. And all the practices. That were during your parent time?
A. That were during my parent time.
Q. Okay. Was Melinda at the games?
A. Yes.
Q. Did you have incidents at these games?
A. Only with her coming over and sitting by me.
Q. So there were no blowups, no complaints, no concerns?
A. No. No police reports or anything.
Q. You say she would come over and sit by you?
A. Yes.
Q. Like -- what do you mean by that?
A. There was one chair between me and her and that was A.W. so it was me, then A.W. and then her.
Q. And how often would Melinda do this?
A. Every game.
Q. Now, were you typically there first or second?
A. First.
Q. And so who would approach who?
A. She would approach me.
MR. PETERSON: May I approach, Your Honor?

THE COURT: Yes.

MR. PETERSON: I marked this. And I think we're on, what, Exhibit 4.

THE COURT: Four, I believe. Two and three have been admitted. One hasn't been proffered.

MR. PETERSON: Thank you very much.

And if I may, Your Honor, quickly, if I could correct that oversight. I didn't realize I had neglected; I'd like to move for the admission of Exhibit 1 into evidence.

THE COURT: Mr. Weckel, any objection to respondent's Exhibit 1 being admitted into evidence? It was the text message conversation -- or rather a text message string from -- allegedly from your client, as previously testified.

MR. WECKEL: Court's indulgence, Your Honor, for one second.

(Discussion off the record.)

MR. WECKEL: No objection, Your Honor.

THE COURT: All right. Then the Court will note for the record that respondent's exhibits 1, 2 and 3 have been admitted now --

MR. PETERSON: Your Honor, I want to be clear because Mr. Weckel was talking. We had just moved for the admission of Exhibit Number 1, not

A. Correct.

Q. Do you know what that screen shot is?

A. It's the text version of the exact same thing.

Q. Was there any material difference in the content?

A. No. It was the exact same question almost word for word.

Q. Do you have the original available, if necessary, for inspection?

A. I have it on my phone.

Q. Okay. But in your opinion, does it meaningfully change the content of the e-mail up above?

A. It's the exact same wording.

Q. Okay. Thank you.

MR. PETERSON: Your Honor, we would move for the admission of Exhibit Number 4.

THE COURT: Counsel, any objection?

MR. WECKEL: No, Your Honor.

THE COURT: All right. Respondent's Exhibit 4 is admitted.

(RESPONDENT EXHIBIT NUMBER 4 IS RECEIVED.)

MR. PETERSON: Okay. Thank you.

Q. (By Mr. Peterson) I'm nearly done,