2019

MELINDA WATSON, Appellee, vs. MICHAEL WATSON, Appellant. : Reply Brief

Utah Court of Appeals

Theodore R. Weckel; counsel for appellant.
Robert Peterson; counsel for appellee.

IN THE UTAH COURT OF APPEALS,
450 S. State Street, Salt Lake City. Utah 84078
(801) 578-3900

MELINDA WATSON,	:	APPELLANT'S REPLY BRIEF
Appellee,	:	
vs.	:	Case No. 20190290
MICHAEL WATSON,	:	
Appellant.	:	

APPELLANT'S REPLY BRIEF

THE HONORABLE DAVID M. CONNORS PRESIDING
ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

DAVID S. PACE
Counsel for Appellee
2409 E. Fort Union Blvd., Suite 112
Cottonwood Heights, UT 84121
Telephone: (801) 801-355-9700
david@pacelawutah.com

THEODORE R. WECKEL, JR.
Counsel for Appellant
299 S. Main Street, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 535-4385
tweckel@hotmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . ii-iii

ARGUMENT

I. MELINDA'S RULE 108 ARGUMENT WAS PRESERVED. 1-5

II. THE MARSHALING ARGUMENT FAILS. 5-8

III. MELINDA'S BRIEF MET THE CRITERIA FOR BRIEFING 9-10

IV. THE ATTORNEY FEE ARGUMENT FAILS. 10

CERTIFICATE OF COMPLIANCE. 11

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Baird v. Baird, 2014 UT 08, 322 P.3d 728 6

Coombs v. Dietrich, 2011 UT App. 136, 253 P.3d 1121 6

Day v. Barnes, 2018 UT App. 143, 427 P.3d 1272 4

United States v. Lynn, 592 572 (4th Cir. 2010). 3

Widdison v. Kirkham, 437 P.3d 1055, ¶9 (UT App. 2018) 8

STATUTES

U.C.A. § 75-5-106.5. 5

COURT RULES

Utah R. Civ. P. 108 . . . . 2, 5

Utah R. App. P. 11(h) 10

IN THE UTAH COURT OF APPEALS,
450 S. State Street, Salt Lake City. Utah 84078
(801) 578-3900

MACAELA DANYELE DAY,	:	APPELLANT'S REPLY BRIEF
Appellee,	:	
vs.	:	Case No. 20190277
TYLER BARNES,	:	
Appellant.	:	

ARGUMENT

I. MELINDA'S RULE 108 ARGUMENT WAS PRESERVED.

On page eight of his brief Michael cites to various authorities for the notion that Melinda failed to preserve her Rule 108 objection to Michael's exhibits used at the evidentiary hearing. However, it is untrue that Melinda ever waived her objection to Michael's exhibit 1. Exhibit 1 was introduced by Michael (a text chain between the parties which implies she was not afraid of him), and Melinda objected to the text as irrelevant (due to it being a basis for a separate contempt action). R.

314, 7-21. Melinda's objection was overruled, and her objection was clearly preserved. R. 315, 15-18; R. 391, 16-25. Also, Melinda had immediately objected to the use of the video evidence during the hearing – having never seen it previously, i.e., exhibits 2 and 3. In so doing, Melinda cited to the general prohibition against presenting new evidence that had not been presented to the Commissioner unless there had been a substantial change in circumstances pursuant to Civil Rule 108(c). R. 322, 25; 323, 324, 10. Nevertheless, Michael correctly cites to the fact that Melinda, upon the Court's ruling to allow the video evidence, and upon reviewing the videos at the evidentiary hearing, stipulated to the court's consideration of the video tape as evidence of Melinda's response to his stalking behavior – because she thought the evidence proved that Michael had stalked her (and that her responses were simply defensive).

Nevertheless, upon being denied the opportunity to present a rebuttal email evidence on her phone at the end of the hearing (and prior to beginning her closing argument), Melinda renewed her Rule 108 objection about the unfairness of allowing Michael's exhibits without proof of a substantial change of circumstances, but denying her the opportunity to present rebuttal evidence. R. 556, 15-25; R. 557, 14-25; R. 558, 1-7. The Court denied Melinda's renewed objection – even though the presentation of evidence had closed moments earlier in

this bench trial. R. 558, 9. Therefore, the record clearly states that Melinda had renewed her Rule 108 objection at the end of the evidentiary hearing – regardless of what happened earlier on.

Additionally, Michael's reference to Melinda's stipulation to exhibits 1 and 4 – as being evidence of her consent for the District Court's consideration of that evidence materially – in incongruous to precedents in the American common law. That is, it is reasonable to infer that in light of the District Court's ruling regarding evidence not presented to the Commissioner being allowed generally during the beginning and throughout the evidentiary hearing, that Melinda only stipulated to those exhibits as to their authenticity – while preserving her objection as to the Court's abuse of discretion under Civil Rule 108. *Cf. United States v. Lynn*, 592 572, 578 (4th Cir. 2010) (where the federal court abandoned a formalistic approach to lodging a standing objection when an objection had been previously made and the court had previously rejected the party's arguments).

Here, Melinda went beyond the *Lynn* holding, and effectively made a standing objection to Michael's exhibits. She had advised the District Court of the Rule 108 prohibition for allowing evidence not presented to the commissioner (R. 160-61; R. 556, l. 17-24; R. 557, 14-25; R. 558, 1-6; R. 564, 21-25). Melinda then stated effectively that she objected to any evidence that did not comport with Rule

108's limitations on presenting new evidence (R. 299, 21-25; R. 300-304, 1-17). Therefore, whether the District Court violated Civil Rule 108 in allowing Michael's evidence which had not been presented to the Commissioner was effectively preserved under the authority cited in the American common law.

Secondly, on pages eight and nine of his brief, Michael alleges that because Melinda did not provide a copy of the transcript for the commissioner hearing, her appeal is fatally flawed. However, in *Day v. Barnes*, 2018 Ut 143, 427 P.3d 1272, this Court stated that the District Court must make independent findings related to an objection of a commissioner's recommendation. *Id.* at 1276, ¶19. Therefore, whether evidence was or wasn't presented before the commissioner is generally less important in the context of an objection made to the Commissioner's recommendation because the District Court has ultimate discretion to consider what evidence it wants – assuming it does so fairly under *Day* and the principle of due process. However, here, it is abundantly clear that Michael's representations to the District Court during the evidentiary hearing about having presented "a lot of evidence" to the District Court persuaded the latter to allow presentation of the previously undisclosed exhibits 1 and 4 due to lack of prejudice (R. 326, 9-11). Therefore, whether Michael in fact presented his exhibits to the commissioner is material for that reason.

Lastly, Michael failed to address Melinda's fair notice argument on page 26 of her brief related to his failure to succinctly state his objection to the Commissioner's ruling as required by Civil Rule 108. Indeed, in his objection, Michael failed to mention anything about the evidence he had allegedly proffered to the commissioner as a basis for the objection. R. 99-101. Furthermore, the commissioner's minute entry for the hearing actually states that Michael only offered a DCFS report. R. 85. It is black letter law that when a party fails to respond to a party's argument, it effectively concedes that point. Therefore, the Court should find that Michael concedes the fact that he had not provided notice of the exhibits in his written objection.

II. THE MARSHALING ARGUMENT FAILS.

On page 10 of his brief, Michael contends that Melinda failed to marshal the evidence generally. However, here the important issue is whether the District Court misapplied the law regarding stalking, and the need to consider Melinda's particular vulnerabilities pursuant to *Baird* and the stalking statute generally, i.e., U.C.A. § 75-5-106.5. On page 10 of his brief, Michael correctly cites to authority for the notion that credibility determinations are generally in the province of the District Court. However, credibility of the party witnesses was not the central issue here. In the Court's oral findings, it found that Michael had stalked Melinda. R.

581, 14-25; R. 582, 1-11.

The Court then misapplied as a matter of law the cumulative effect of Michael's stalking of Melinda. That is, the Court simply and inappropriately downplayed the cumulative effect of the stalking behavior in the context of a high conflict divorce. R. 582, 14. Indeed, the Court ruled that because the parties had engaged in videotaping each other regularly (Michael initiating and Melinda recording to obtain evidence of the stalking, R. 585, 1-7), that such behavior was normal for the parties (R. 585, 1-7), that fact was crucial to the Court's application of the individualized objective standard (R. 580, 24, 581, 13), and that Michael would not have known that his continual stalking behavior caused Melinda to fear (R. 584, 25; R. 585-1-7) or to be emotionally upset – let alone Melinda being actually fearful or upset.

However, this approach was wrong as a matter of law for three reasons. First, the standard for a person causing fear in the stalking context is the objective, reasonable person – not Melinda's subjective lack of fear due to her history of high conflict with Michael which induced tolerance. *Baird v. Baird*, 2014 UT 08, 322 P.3d 728, 734-35, ¶22-25.

Second, and most importantly, continual stalking behavior equates to continued fright rather than tolerance or indifference as a matter of the Utah

common law. For example, in *Coombs v. Dietrich*, 2011 UT App. 136, 253 P.3d 1121, 1125, ¶13, this Court held that the crime of stalking, by its very nature, when repeated induces accumulated fear in the victim. Therefore, there are far more reasonable inferences to draw from Melinda's offering to sit next to Michael at the children's soccer match, e.g., as a means to appease her victimizer out of fright, or to save the children from conflict and/or public embarrassment (while suppressing her fear), or to avoid the stalking behavior by moving toward other persons in the area. However, the District Court's conclusion that Melinda's decision to sit next to Melinda at the soccer match after a history of a high conflict divorce, the appointment of a special master, numerous requests for rulings by the special master, and harsh sanctions imposed by the court, because she exercised her parent-time while safely at curb side at Michael's residence with her windows rolled up and car doors locked is simply not supported by *Coombs.* Consequently, the District Court missed entirely the cumulative impact on a reasonable person of being subjected to continuous photographing and videotaping in the stalking context. The Court reached its conclusion despite it also finding that Melinda had presented a great deal of evidence for a pattern of Michael's stalking and her subjective fear (R. 167-69). Therefore, there is no material fact to marshal in Michael's favor – given the Court's finding of historic stalking behavior by

Michael. Thus, the marshaling requirement should not be given much weight – if any – in this instance.

Third, the Court misapplied the individualized subjective standard test set forth in *Baird*. On the one hand, the Court found that Melinda was not a vulnerable adult (R. 385, 16), despite Melinda's unimpeached testimony that she had suffered a traumatic head injury that had left her unable to lift more than five pounds and the need to wear hand braces (R. 158, 10-25; R. 184, 9-25; R. 185, 1-8). However, the Court focused on the parties' historic "banter," rather than on how Melinda's physical limitations would have caused her subjectively and a reasonable person to fear. Thus, the Court also misapplied the *Baird* test in the sense that Melinda's physical limitations had nothing to do with her banter-like communications with Michael, and the case needs to be remanded so that the Court can apply the law to the evidence correctly.

Additionally, assuming arguendo that this Court finds that Melinda failed to marshal the evidence relating to her vulnerabilities, Michael's argument fails for two other reasons. First, the marshaling requirement has been greatly relaxed recently, and failure to marshal is not a fatal flaw. *See Widdison v. Kirkham*, 437 P.3d 1055, ¶9 (UT App. 2018). Melinda acknowledges that she still must persuade this Court definitively that a mistake has been committed. *Id.* However, the

Court's misapplication of law as stated *supra* makes the marshaling requirement largely irrelevant as indicative of the clearly erroneous standard.

III. MELINDA'S BRIEF MET THE CRITERIA FOR BRIEFING.

As stated in her brief, the Court made no written findings of fact. Therefore, there was no ability to provide a written copy of the findings with her brief. The transcript for the hearing – which is part of the record – states the court's findings of fact. Therefore, this formalistic argument fails for this initial reason.

Then, on pages 11 and 12 of Michael's brief, he argues that: (1) because his lawyer told the District Court that he had presented lots of evidence to the commissioner, that he in fact did so; and, (2) because Melinda did not mention this fact in her brief, it was defective as a whole. However, the record belies Michael's position. That is, as stated, the commissioner's minute entry only shows that Michael presented a DCFS report at the hearing, and his objection does not cite to the evidence he introduced during the second hearing before the judge. Given the District Court's requirement to make independent findings under *Day,* Michael's argument on this point seems unsupported by the record and legally flawed.

Regarding Michael's allegation that Melinda had "blatantly" violated Utah R. App. 24 because she had argued that Michael's counsel had shown up late to the first hearing before the District Court, this argument is flawed. Melinda

acknowledges that Michael's counsel did not show up late to the first hearing. However, he did show up 1 hour and 37 minutes late to the second hearing. The hearing was scheduled for 1:30 P.M. (R. 114) and the hearing began at 3:07 when counsel arrived (R. 295). Melinda simply got the dates wrong. The fact remains that the lateness did occur. However, to speculate that Melinda had a malicious motive in raising this issue of fact without definitive proof violated Rule 14-301(3) for the Rules of Professionalism and Civility.

IV. THE ATTORNEY FEE ARGUMENT FAILS.

On page 14 of his brief, Michael requests attorney fees. He alleges that his counsel's proffer to the District Court that he had provided exhibits used in the objection hearing – without providing any proof that he had – mandates an attorney fee award. However, as stated, the record indicates that Michael never proffered exhibits 1 and 4 to the commissioner. Michael was free to provide a transcript of the hearing before the commissioner by motion or by stipulation. Utah R. App. P. 11(h). Despite Melinda offering to stipulate that said transcript be made part of the record, Michael elected not to do so. Therefore, there is no basis for awarding attorney fees to Michael. Indeed, the larger question – given his misrepresentations to the District Court and this Court is whether there is good cause to award Melinda attorney fees.

CONCLUSION

Justice requires this Court to reinstate a protective order against an abusive man who has repeatedly harassed this disabled woman.

Dated this 18th day of December, 2019. /s/ Theodore R. Weckel
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(f)(1), I certify that this brief contains 2,211 words by use of Word Perfect's word counting application, and pursuant to Utah R. App. 21(g), this brief does not contain any private information.

Pursuant to Utah R. App. P. 24(g), there is no private information contained in this brief.

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2019, a true and correct copy of Appellant's opening brief was served upon counsel for the Appellee, David Pace, by email to: david@pacelawutah.com and by first class mail to the following address: 2469 E. Fort Union Blvd., Suite 112, Cottonwood Heights, UT, 84121.

/s/ Theodore R. Weckel