

2003

Keene v. Bonser : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

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

Randall Gaither; Attorney for Appellee.

James A. McIntyre; McIntyre & Golden; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Keene v. Bonser*, No. 20030841 (Utah Court of Appeals, 2003).

https://digitalcommons.law.byu.edu/byu_ca2/4582

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

ANDREA N. KEENE,
Petitioner-Appellee,

vs.

ASHLEY J. BONSER,
Respondent-Appellant.

)
)
)
)
)
)
)
)
)
)

BRIEF of APPELLEE

Case No. 20030841-CA

**BRIEF OF THE APPELLEE
ANDREA N. KEENE**

**APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
DAGGETT COUNTY, JUDGE JOHN R. ANDERSON**

Randall Gaither
Attorney for Appellee
159 West Broadway, Suite 105
Salt Lake City, Utah 84101

James A. McIntyre
McIntyre & Golden, L.C.
Attorneys for Appellant
3838 S. West Temple, Suite 3
Salt Lake City, Utah 84115

FILED
UTAH APPELLATE COURTS
MAY 24 2004

**IN THE UTAH COURT OF APPEALS
STATE OF UTAH**

ANDREA N. KEENE,
Petitioner-Appellee,

vs.

ASHLEY J. BONSER,
Respondent-Appellant.

)
)
)
)
)
)
)
)

BRIEF of APPELLEE

Case No. 20030841-CA

**BRIEF OF THE APPELLEE
ANDREA N. KEENE**

**APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT,
DAGGETT COUNTY, JUDGE JOHN R. ANDERSON**

Randall Gaither
Attorney for Appellee
159 West Broadway, Suite 105
Salt Lake City, Utah 84101

James A. McIntyre
McIntyre & Golden, L.C.
Attorneys for Appellant
3838 S. West Temple, Suite 3
Salt Lake City, Utah 84115

TABLE OF CONTENTS

| | |
|--|-----------|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| SUBJECT MATTER AND APPELLATE JURISDICTION. | 1 |
| STATEMENT OF THE ISSUES PRESENTED FOR REVIEW | 1 |
| CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS | 2 |
| STATEMENT OF THE CASE. | 3 |
| STATEMENT OF FACTS AND TESTIMONY AT TRIAL | 4 |
| SUMMARY OF ARGUMENT | 10 |
| ARGUMENT Point I | 11 |
| ARGUMENT Point II | 14 |
| CONCLUSION AND REQUEST FOR RELIEF | 15 |
| MAILING CERTIFICATE | 16 |

TABLE OF AUTHORITY

CASES:

| | |
|---|----------|
| Utah Code Annotated 30-6-1. Definitions. | 2 |
| Utah Code Annotated 30-6-2. | 3 |
| <i>Dipoma v. McPhie</i> , 29 P.3d 1225(Utah 2001) | 11 |
| <i>Willey v. Willey</i> , 951 P.2d 226, 230-31 (Utah 1997). | 11 |
| <i>State v. Pena</i> , 869 P.2d 932 (Utah 1994). | 11 |
| <i>State v. Thurman</i> , 846 P.2d 1256 (Utah 1993). | 11 |
| <i>Bailey v. Bayles</i> , 2002 UT 58 (Utah 06/25/2002) ... | 13 |
| <i>Reid v. Mutual of Omaha Ins. Co.</i> , 776 P.2d 896, 899 (Utah 1989) (quoting Utah R. Civ. P. 52(a)) | 13 |

| | | |
|----------------------|---|-----------------------|
| ANDREA N. KEENE, |) | BRIEF OF THE APPELLEE |
| |) | |
| Petitioner-Appellee, |) | |
| |) | |
| vs. |) | |
| |) | Case No: 20030841-CA |
| ASHLEY J. BONSER, |) | |
| |) | |
| Respondent-Appellant |) | |

The Court has jurisdiction from this appeal of a final order based upon Rule 3 of the Utah Rules of Appellate Procedure.

1. THE APPELLATE COURT SHOULD AFFIRM THE ORDER WHICH IS A SUBJECT OF THE REVIEW BY THIS COURT ON THE BASIS THE GROUNDS FOR REVIEW ARE SO INSUBSTANTIAL AS NOT TO MERIT FURTHER PROCEEDING

1

Citation to Record: the courts ruling is set forth in the transcript of the hearing on Protective Order. (Page 90 to 92) The Protective Order issued by the District Court after the hearing and signed and the day of the hearing and personally signed on the Respondent is set forth in the record pages 88 to 92.

2. THE TRIAL COURT MADE SUFFICIENT FINDINGS AS TO THE ISSUE OF WHETHER THE RESPONDENT WAS A COHABITANT.

Standard of review: Under Rule 52A of the Utah Rules of Civil Procedure the trial Court finding the facts should not be set aside unless clearly erroneous and due regard should be given to the opportunity of the trial court judge of the trial court to judge the credibility of witness. Peterson v. Peterson, 818 P.2nd 1305 (Utah 1991); Bruno D'aston v. Dorothy, 844 P.2nd 345 (1992).

Citation to Record: the courts ruling is set forth in the transcript of the hearing on Protective Order. (Page 90 to 92) The Protective Order issued by the District Court after the hearing and signed and the day of the hearing and personally signed on the Respondent is set forth in the record pages 88 to 92.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL

Utah Code Annotated 30-6-1. Definitions.

As used in this chapter:

(1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

(2) "Cohabitant" means an emancipated person pursuant to Section **15-2-1** or a person who is 16 years of age or older who:

(a) is or was a spouse of the other party;

- (b) is or was living as if a spouse of the other party;
- (c) is related by blood or marriage to the other party;
- (d) has one or more children in common with the other party;
- (e) is the biological parent of the other party's unborn child; or
- (f) resides or has resided in the same residence as the other party.
- (3) Notwithstanding Subsection (2), "cohabitant" does not include:
 - (a) the relationship of natural parent, adoptive parent, or step-parent to a minor; or
 - (b) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.
- (4) "Court clerk" means a district court clerk.
- (5) "Domestic violence" means the same as that term is defined in Section 77-36-1.
- (6) "Ex parte protective order" means an order issued without notice to the defendant in accordance with this chapter.
- (7) "Foreign protective order" means a protective order issued by another state, territory, or possession of the United States, tribal lands of the United States, the Commonwealth of Puerto Rico, or the District of Columbia which shall be given full faith and credit in Utah, if the protective order is similar to a protective order issued in compliance with Title 30, Chapter 6, Cohabitant Abuse Act, or Title 77, Chapter 36, Cohabitant Abuse Procedures Act, and includes the following requirements:
 - (a) the requirements of due process were met by the issuing court, including subject matter and personal jurisdiction;
 - (b) the respondent received reasonable notice; and
 - (c) the respondent had an opportunity for a hearing regarding the protective order.
- (8) "Law enforcement unit" or "law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.
- (9) "Peace officer" means those persons specified in Title 53, Chapter 13, Peace Officer Classifications.
- (10) "Protective order" means an order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner and respondent have been given notice in accordance with this chapter.

Utah Code Annotated 30-6-2. Abuse or danger of abuse -- Protective orders.

- (1) Any cohabitant who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of abuse or domestic violence, may seek an ex parte protective order or a protective order in accordance with this chapter, whether or not that person has left the residence or the premises in an effort to avoid further abuse.
- (2) A petition for a protective order may be filed under this chapter regardless of whether an action for divorce between the parties is pending.
- (3) A petition seeking a protective order may not be withdrawn without approval of the court.

TATEMENT OF THE CASE

Nature of the case

This is an appeal from a ruling granting a Protective Order to the Petitioner by the Eighth Judicial District Court in and for Daggett County, Manila Department, State of Utah.

Andrea Keene commenced on June 4, 2003, when the Eighth Judicial District Court in and for Daggett County, Manila Department, State of Utah, issued an *ex parte* Protective Order against the Respondent. An evidentiary hearing was held on September 5, 2003 and the District Court issued an *ex parte* Protective Order after a hearing in Court with witnesses on September 5, 2003.

Disposition at Hearing on Petition

Following the evidentiary hearing on the Petition, the Trial Court found that Appellant and Appellee resided as cohabitants in Manilla, Utah. The Trial Court then found that “domestic violence or abuse” had occurred and issued a Protective Order under Utah’s Cohabitant Abuse Act, Utah Code Annotated 30-6-1 seq. (sometimes referred to as the “Act”).

At the hearing the Court made specific findings based upon testimony of the Respondent, Ashley J. Bonser, that he had used a firearm in a dangerous and threatening manner. The Court made specific and detailed oral findings from the bench of the facts on the record before both of the parties after the evidentiary hearing at which witnesses were called by both sides and cross-examined (see Exhibit Two attached to Appellant’s

Brief).

STATEMENT OF FACTS AND TESTIMONY AT TRIAL

1. The Petitioner, Andrea Keene filed a verified petition for a Protective Order in this matter on June 4, 2003. (Record Page 6)

2. The Petition for a Protective Order was filled out without the assistance of an attorney on the pre-printed form used by the District Courts in cohabitant abuse matters. (See Petition, at Record Page 6)

3. The matter came for hearing before the Court on September 5, 2003 and both parties were represented by privately retained counsel. (See Minutes for Hearing, Record Page 79)

4. At the hearing, the first witness was the Petitioner-Appellee, Andrea Keene, and she testified that she resided in a trailer home located at Scott's Trailer Haven in Manilla, Daggett County, Utah. (Transcript Page 2)

5. After identifying the Respondent- Appellant, Ashley Bonser, in Court Andrea Keene testified that she met him when she was employed as a waitress/bar-tender at a business establishment in Manilla, Utah in February of 2003. (Transcript Page 3)

6. She indicated that the Respondent sometimes began to stay overnight at her residence in March of 2003 and toward the end of March, 2003 he began staying there 2-3 nights a week. (P.R. Transcript Page 4)

7. The Petitioner testified that in April Mr. Bonser started spending 6-7 days a

week, and in May, 2003 he began moving his personal effects and property into the residence at the trailer park. (Transcript Page 4)

8. She testified that the Respondent first moved clothing into the residence in April of 2003 and toward the end of April, he began moving many items including his tools, fishing gear, bathrobe, dryers, and a DVD unit. (Transcript Page 5)

9. The witness testified that the Respondent also moved personal effects and grooming items, such as a toothbrush, deodorant, shampoo, and other similar items into the trailer home. (Transcript Page 5)

10. Andrea Keene indicated that in May, 2003 that Mr. Bonser was staying with her overnight and that he would stay everyday unless he was out of town with work. (Transcript Page 5)

11. The witness testified that beginning approximately to May 31, Mr. Bonser contributed joint living expenses including grocery shopping and other items. (Transcript Page 6)

12. The Petitioner testified that after the incident, the Daggett County Sheriff had removed pictures, picture frames, and clothing items and she itemized the property which the Daggett County . . . the Respondent which had been removed from the residence. (Transcript Page 7)

13. Andrea Keene then described the incident, which occurred on the basis of her obtaining a Protective Order. She indicating that her daughter, Ariyn Cook (date of birth

12-13-00) became upset and began to cry which resulted in an argument which caused the Respondent to become upset and start to load his property into his pick up truck before breaking his fishing pole in anger. (Transcript Page 9)

14. She testified that Mr. Bonser was inside the trailer home and was gathering his belongings and removing that property out of the house when she tossed back to him a key ring he had handed to her. (Transcript Page 10)

15. Ms. Keene described what happened after that as follows:

A "So then he walked over to me (inaudible) and he turned toward the oven and then turned around and walked up and he grabbed both my wrists and pinned me up against the stove with my head against the wall, over the hot oven, halfway back (inaudible) over the hot oven and half that over the counter right there. And I don't recall what he was saying at all because (inaudible) crying and I told him to please not do this in front of my little girl and it took him a few minutes and he told me that he - he started saying that he (inaudible) and he let me go. He didn't say anything after that."

Q "Okay"

A "And so then he let me go and he started to walk outside and I got my little girl and there was a period of time between that I don't remember what happened and I tried to remember and I don't. I remember he grabbed picture frames and was ripping up pictures, ripping up pictures (inaudible) frame and crinkling them and telling me that he doesn't need those and I needed (inaudible)."

16. The witness then testified that after Mr. Bonser continued to rip up the pictures when she had told him not to rip the pictures, the following took place:

A "And then I remember - the next thing I remember is he went out to his truck and he got in his truck and he was doing something in there and he started it and went backwards and then went forward and crashed it kind of into my neighbor's trailer and he was upset about that and when he got out of the truck, he turned it off and I thought he had hit my truck and I was standing outside and I was asking him if he hit my truck. And I'm not sure (inaudible) at that time. He said no and I saw him hit the side of his truck with his fists and made a big dent in the passenger side. So I turned - and I had my little girl

and I grabbed her and I was trying to shut the door and lock him out. He got his gun, his rifle out of his truck and came into my house with his rifle.”

Q “A few moments ago you gestured that you grabbed your daughter. Were you holding your daughter in your arms? Go ahead.”

A “And I tried to shut the door and he pushed his way through the door and he had his rifle and at that point I was terrified. I didn’t know what he was -“

Q “Tell us what happened next.”

A “I don’t remember what he was saying and then he handed the gun to me. So I put my daughter down and I took the gun and he told me to shoot him with it and I told him, ‘I am not going to shoot you’ and I proceeded to remove the bullets out of the gun, but I was shaking so bad that I couldn’t get the hammer back and I couldn’t get the bullets out and I got one out or two and they fell on the floor and I took the gun back into my bathroom closet and put it in there.”

Q “Okay.”

A “And then I came back through the bedroom and I grabbed my little girl and I walked - he was standing by the front door still and I walked through the kitchen through her room, into her bathroom because her bathroom had a lock on it and it was (inaudible) the back and I did not think he would follow me back there, so that’s where I went and I didn’t think (inaudible).”

Q “What happened then?”

A “I was holding my little girl and he put both his hand around by throat.”

Q “Did he do anything with his hands while they were around your throat?”

A “He just squeezed. I couldn’t breath and I couldn’t talk. I had my daughter in my left hand and I was trying to remove is fingers with my right hand.”

Q “Okay.”

A “And he was saying things to me and I can’t remember what he was saying and I remember I passed out on the ground. That’s the only thing I remember. I don’t know how long I was out and I remember waking up to my little girl slapping me, telling me to wake up.”

Q “Was there any other contact between you and Mr. Bonser at that time?”

A “Yeah, he was standing over me and spit in my face and called me a whore; and I was, it was like I was in kind of a dream state, so I just kind of disregarded it and was trying to get up and get my little girl and he was kind of helping me up and I was in the bathroom and he told me he was sorry and he started crying and I remember I couldn’t stand up. My legs were shaking so they were really wobbly. So I tried to sit on the bed and I slipped down off the bed and I was sitting on the floor holding my little girl and coughing extremely bad and I thought I was going to throw up but I didn’t - I didn’t know. He was trying to hug me from the left side and tell me he was sorry and he was kind of like laying onto me and he was crying and telling me he didn’t know why he was doing what he was doing and I told him I couldn’t breath and I pushed my left arm against his

chest and was kind of punching him off me a little bit because I was coughing really hard, like all the way toward the ground because I thought I was going to vomit and he said something and I didn't say anything and I remember he grabbed my arm and he said, '(inaudible) bitch, I'm going to break your arm' and he proceeded to break my arm, to try and break my arm."

Q "Describe the type of motion he made with your arm."

A "He stood up, he grabbed my wrist and turned it clockwise and I laid on the ground and I was screaming and my little girl was screaming and I just remember laying there and crying and screaming and finally he let me go and then he laid down on the floor again and he started to cry and he was telling me that didn't know why he was doing this and he was sorry and I was just trying to breath and hold my little girl and I was trying to get out of the room and I asked him, 'will you please leave this bedroom' and he let me step over him and walk (inaudible)."

Q "All right. And do you remember about what time this would have been in the morning when he stepped out of the bedroom?"

A "I have no idea." (Transcript Page 16)

17. After the Petitioner had testified, the Respondent called several witnesses including the father of the Respondent who testified that there were times in the Spring of 2003 when he would stop by and his son had stayed over night at the trailer park in Manilla Utah. (Transcript Page 46)

18. The Respondent Ashley Bonser took the stand and testified that he became upset and broke the fishing pole in half. (Transcript Page 61) After that he testified as follows:

"After I did that, I went into the house, I gathered up - I grabbed by bag. I went in her spare bedroom and grabbed I believe there was a fishing box and maybe a back pack that were in her spare bedroom. I got those, I went out to my truck, I came back in and I asked Andrea if I could have the keys to my little sister's car and she told me to fuck off, that there was no was I was getting them. And I went over next to her door, she has this little basket ting where all the keys were. Well, I found one set of the car keys and when I got the keys, I started taking her house key of my little sister's car keys. I handed it to her and she immediately threw it back in my face and I asked her, 'Andrea, please tell me

where the other key is and I will leave.’ And at that time I started to approach her to hand her the key again and that’s when she pushed me in the face and when she pushed me, I stuck my hand out a pushed against her chest and she spun about half way around and she came back after me and hit me in the troat and slammed me I believe in the neck, is where she hit me, and then I turned around and I grabbed a hold of her and pushed her ap against the counter asking her to please stop and as soon as I let go, I go over and I turned around and walked out. I went into the bedroom and I grabbed my 12 gauge long (inaudible) 35 shotgun that was sitting behind her door and I grabbed the shells that were on her dresser and when I was walking out the door, I was loading the gun. I don’t’ know why I was putting bullets in it when I was walking out the door and I told her that if she was that miserable that she could just shoot me.

Then I had (inaudible) the rest of my stuff and I went outside to- ”

Q “Did she respond to that statement?”

A “No, she didn’t really. She did grab the gun and was trying to take the bullets out of it because I had just set it against the couch while I was grabbing some of my other things that were right there like my shoes. I had an extra pair of shoes that were there by the door.

Then, as I left I did gather up all my stuff, I went to leave and I heard crashing and thudding and I didn’t know what was going on. Well, her daughter when I walked through the door, her daughter was sitting on the couch watching (inaudible) and Andrea was in the back bedroom just throwing stuff, freaking out. I don’t know what she was doing and when I walked in, she threw some type of toy at me. I don’t know what it was and I went in to try to get her to calm down and when I approached her, she kicked me in the groin(groin) and when she kick me in the groin(groin), I pushed her up against the wall and I told her, ‘Andrea, please let’s not do this, let me just go, let me get out of here.’ That was what I was trying to do the entire time. All I wanted to do was get my little sister’s car keys and I was gone. And at that time after I pushed her against the wall, her little girl came walking in and as soon as I seen her, I turned and walked right out and I was gone and I called my father just right after that.”(Transcript Page 63)

19. On cross examination he indicated that during the dispute in the residence he

loaded the shotgun, which was not loaded prior to him placing shells in the shot gun.

(Transcript Page 65) He admitted on cross examination that there was no need for him to

load the shotgun in the middle of an argument. (Transcript Page 66)

20. Mr. Bonser further admitted that loading the shotgun could have been interpreted as a threat and he acknowledged that the shotgun was a dangerous weapon. (Transcript Page 66)

21. He testified that at one point in time he put his hands on the Petitioner's chest and "they may have slid up around her neck".(Transcript Page 67) He testified that his hands were around her neck without her consent while angry for maybe five to ten seconds. (Transcript Page 67)

22. The Respondent admitted that in the kitchen of the trailer he grabbed her wrist and backed her up against the counter claiming that she was hitting him at the time. (Transcript Page 68) However, he admitted that there was enough pressure that he possibly left marks on her wrist from the pressure. (Transcript Page 68)

SUMMARY OF ARGUMENT

The facts justify the trial Court in issuing a Protective Order for conduct directly within the scope and purpose of protective order proceeding. The Respondent was in fact a cohabitant and subject to the Order and the Court reviewed evidence and correctly applied the law to the facts concerning the domestic threats that occurred in Manilla, Utah. The Protective Order Petition proceeding is a summary proceeding designed to protect persons from future abuse based on proof of actual abuse from a past cohabitant.

ARGUMENT

POINT I

THE COURT SHOULD AFFIRM THE ORDER WHICH IS A SUBJECT OF THE REVIEW BY THIS COURT ON THE BASIS THE GROUNDS FOR REVIEW ARE SO INSUBSTANTIAL AS NOT TO MERIT FURTHER PROCEEDING

A hearing on the Petition was held in the above entitled matter and witnesses were placed under oath and testified. The Respondent, Ashley Bonser testified and his testimony is detailed in the above Statement of Facts in this Brief. The testimony and his admission standing alone as adequate factual basis to issue the Protective Order and for the Court to affirm the District Court's Order granting the Petition of Andrea Keene and issuing the Protective Order.

It is well settled that the Appellate Court in Utah should affirm the judgment appealed from "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court." *Dipoma v. McPhie*, 29 P.3d 1225(Utah 2001). In this matter, the Legal theory applied by the Trial Court is straight forward and based on the basic language of the statute.

The Appellate Court is entrusted with ensuring legal accuracy and uniformity and should defer to the Trial Court on factual matters." *Willey v. Willey*, 951 P.2d 226, 230-31 (Utah 1997); *State v. Pena*, 869 P.2d 932 (Utah 1994); and *State v. Thurman*, 846 P.2d 1256 (Utah 1993). Since it is not appropriate for Court on Appeal to disregard the Trial Court's findings of fact and to assume the role of weighing evidence and making its own findings of fact, this Court is generally confined an appeal to the facts specially found by the trial court *Bailey v. Bayles*, 2002 UT 58 (Utah 06/25/2002). Here the Court carefully considered the evidence and found facts and made a decision upon them or these facts. There is more than sufficient evidence to support the findings of fact made by the Trial Court and no facts to support the appellants.

Under Utah Code Annotated, 30-6-2(1) a party has two alternative grounds upon to seek a protective order. The statute provides:

Any cohabitant . . . who has been subjected to abuse or domestic violence, or to whom there is a substantial likelihood of immediate danger of abuse or domestic violence, may seek an ex parte protective order or a protective order in accordance with this chapter, whether or not that person has left the residence or the premises in an effort to avoid further abuse.

In *Baily v. Bayles*, *supra*, the Court applied Utah Code Ann. § 30-6-2(1) (1999) noting that the statute, in relevant part, which defines "cohabitant" as a "person . . . who is or was a spouse of the other party." Utah Code Ann. § 30-6-1(2)(a) (1999), and "Abuse" as "attempting to cause, or intentionally or knowingly causing to an adult . . . physical

harm or intentionally placing another in fear of imminent physical harm." Utah Code Ann.

§ 30-6-1(1) (1999). The Court then stated:

Therefore, according to the statute, in order for Bailey to obtain a protective order, she was required to show that she was a cohabitant and either that she had been subjected to abuse or domestic violence, or that there was a substantial likelihood of immediate danger of abuse or domestic violence to her. Bailey was a cohabitant as defined by the Cohabitant Abuse Act. Furthermore, the trial court found that Bayles threatened Bailey during their marriage by holding a pistol to her neck and by telling her he could kill her anytime he wanted. This behavior meets the statutory definition of "abuse" in that by doing those things Bayles "intentionally plac[ed] [Bailey] in fear of imminent physical harm." *Id.* § 30-6-1(1). The court of appeals' decision to affirm on alternate grounds was supported by the trial court's original findings of fact. Therefore, in view of the specific findings of fact made by the trial court, the court of appeals was correct in its decision to affirm the trial court's issuance of the permanent protective order on the alternate ground of section 30-6-2(1).

Unlike the Bailey case, the alleged abuse was a recent and specific intentional act of the Petitioner who was in the process of moving his property out of the trailer home where he had been living with the Petitioner.

POINT II

THE TRIAL COURT MADE SUFFICIENT FINDINGS AS TO THE ISSUE OF WHETHER THE RESPONDENT WAS A COHABITANT.

The test for the legal sufficiency of the evidence is set out in Civil Rule 52(a) of the Civil Rules of Procedure, which provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989) (quoting Utah R. Civ.

P. 52(a)). In light of the clear facts introduced at the hearing and the lack of legal issues the Appellant respectfully submits that the Court on appeal should grant a dismissal affirming the judgement based upon the fact that the file court has given authority to make the factual determination to issue the Protective Order. There was a clear factual basis for the Lower Court to issue the Protective Order especially in light of the loading of the firearm during the argument by the Appellant.

The facts in this case establish that the parties had been residing together in the trailer home in Manilla, Utah. After Mr. Bonser had stayed the night they had an argument in the morning, and Mr. Bonser was in the process of moving his property out of the trailer where he had been cohabitating. This above is more than sufficient facts to apply the statute to Mr. Bonser as a cohabitant when considered is the context of the clear and detailed finding of the final court there is abundant evidence and a clear need for a Protective Order.

If the Court adopts the Appellant's narrow scope of legal residency, the statute will be diluted and the protections eroded. The Courts will be limited in issuing protective orders in areas such as Manilla Utah where persons travel back and forth across State lines. A person could avoid a finding of cohabitation based upon a claim that they are of legal residence in another State or another location. The Appellee took the stand and testified at length concerning the many facts which demonstrated that Mr. Bonser was an actual and frequent co-habitant in the trailer.

The claim that the Appellant, Ashley Bonser as a Wyoming resident, was cohabitating in Utah, legal residency is a hyper-technical defense. Utah Code Annotated Section 30-6-1 defines a cohabitant as a party who is residing in the same residence of the other party. The statute also applies to persons who have resided in the residence in the past tense. Therefore the evidence of actual and physically residence introduced by the Appellant was sufficient to issue the Protective Order, irregardless of technical legal rendering concerts.

In this case, Judge Anderson listened to the evidence and made a ruling before the parties in Open Court, that ruling is set forth in the Brief of the Appellant as exhibit B in the appendix. The findings were substantially based on the testimony of Ashley Bonser and the admissions he made when he testified in Court. There is no basis to adopt the Appellant's legal theory to limit the application of the Cohabitant Abuse Act.

CONCLUSION AND REQUEST FOR RELIEF

The Appellee requests that the Court sustain the Findings and Protective Order issued by the District Court in these proceedings. The facts introduced at the hearing clearly fall within the purpose and reasoning established for the issuance of the Protective Order.

DATED this ____ day of May, 2004.

RANDALL GAITHER
Attorney for the Petitioner/Appellee

MAILING CERTIFICATE

I hereby certify that on the ____ day of May, 2004 a true and correct copy of
the foregoing BRIEF was mailed First Class, postage prepaid to:

JAMES A. McINTYRE
McINTYRE & GOLDEN, L.C.
3838 S. WEST TEMPLE, SUITE 3
SALT LAKE CITY, UT 84115

DATED this ____ day of May, 2004.