

2005

# Kimber Lee Ellison v. Joshua D. Stam : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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**UTAH COURT OF APPEALS**

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KIMBER LEE ELLISION,

Petitioner/Appellant/Cross  
Appellee,

v.

JOSHUA D. STAM,

Respondent/Appellee/Cross Appellant.

Appellate Case No. 20050228 - CA

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**BRIEF OF CROSS APPELLANT/RESPONSE OF APPELLEE**

---

APPEAL FROM ORDER DENYING RESPONDENT' S VERIFIED  
APPLICATION OF ATTORNEY' S FEES AND COSTS  
IN THE SEVENTH JUDICIAL DISTRICT COURT  
IN AND FOR CARBON COUNTY STATE OF UTAH  
THE HONORABLE BRYCE K. BRYNER PRESIDING

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**FILED**  
**UTAH APPELLATE COURTS**  
OCT 18 2005

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## **CROSS APPELLANT'S BRIEF**

### **PARTIES**

Petitioner/Appellant/Cross Appellee Kimber Lee Ellison is an individual who on information and belief currently resides in Utah County, Utah.

Respondent/Appellee/Cross Appellant is an individual who is currently serving a religious affiliated mission in the Dominican Republic.

### **STATEMENT REGARDING JURISDICTION**

Original appellate jurisdiction of this matter was proper before the Utah Supreme Court pursuant to Utah Code Ann. § 78-2-2-(3)(j). Pursuant to Utah Code Ann. § 78-2-4 the Utah Supreme Court transferred the case to the Court of Appeals. Therefore, this Court has jurisdiction pursuant Utah Code Ann. § 78-2-2(4).

### **STATEMENT OF THE ISSUE AND STANDARD OF REVIEW**

**Issue:** Did the Trial Court err in ruling that Utah Code Ann. § 78-27-56 governs the award of attorney's fees involving civil stalking injunctions when the applicant's application for fees does not invoke the statutory provision.

**Standard of Review:** Whether attorney's fees are recoverable in an action is a question of law reviewed for correctness. *Dejavue, Inc. v. U.S. Energy Corp.*, 199 UT App 355, ¶8, 993 P.2d 222. When reviewing attorney fee decisions that involve questions of law or in interpreting statutes, appellate courts review for correctness. *A.K. & R. Whipple Plumbing v. Guy*, 2004 UT 47, ¶ 6, 94 P.3d 270.



Preservation of Issue: This issue was preserved by the Notice of Appeal filed on April 14, 2005.

### **STATEMENT OF CASE**

Appellee/Cross Appellant and Respondent below appeal the Trial Court's denial of his Verified Application for Attorney's fees and Costs.

Petitioner filed a Petition for a Civil Stalking Injunction on October 1, 2004. The Trial Court entered an Ex Parte Civil Stalking Injunction the same day. Upon service, Respondent timely requested a hearing pursuant to Utah Code Ann. § 77-3a-101(6). The hearing was held on November 30, 2004. Petitioner presented her case and rested. Respondent moved for a directed verdict<sup>1</sup>. After argument of counsel, the Trial Court took the matter under advisement. The Trial Court, having previously issued a written ruling granting Respondent's motion for directed verdict, entered an Order Dissolving Ex Parte Civil Stalking Injunction on December 23, 2004. Respondent filed a Verified Application for Attorney's fees and Costs pursuant to Utah Code Ann. § 77-3a-101(16) on December 21, 2004. Petitioner filed an objection; Respondent filed a reply and a Request to Submit for Decision. Petitioner filed a Notice of Appeal pertaining to the Order Dissolving Ex Parte Civil Stalking Injunction on February 25, 2005<sup>2</sup>. The Trial

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<sup>1</sup> Respondent's Motion for Directed Verdict should have actually been termed as a motion to dismiss. Respondent more fully explains this issue in Section II of Respondent's Response to Appellant's Brief. For consistency, Respondent will continue to refer to the motion as one for directed verdict.

<sup>2</sup> Petitioner initially filed a Notice of Appeal on December 27, 2004, prior to the Trial Court issuing a ruling on Respondent's application for attorney's fees. The appeal was transferred to the Court of Appeals by the Supreme Court and was assigned case

Court entered an Order Denying Respondent's Verified Application for Attorney's fees & Costs on March 15, 2005. Respondent filed a timely Notice of Appeal on April 14, 2005.

### **STATEMENT OF FACTS**

The law regarding motions for directed verdict, as well as motions to dismiss, require that all evidence must be considered by the Trial Court in the light most favorable to the party against whom the motion is directed. *Cerritos Trucking Co. v. Utah Development Co.*, 645 P.2d 608, 612 (Utah 1982) (citations omitted). On appeal, the appeals court applies the same rule. *Id.* Based on this rule of law, Respondent accepts Petitioner's facts as set forth in her Appellant Brief as accurate for purposes of analyzing Respondent's motion for directed verdict and this cross appeal regarding the denial of Respondent's Verified Application for Attorney's Fees and Costs, with the following exceptions. First, in Petitioner's Statement of Facts she attempts to provide citations to the evidentiary hearing as "(R. at x)". Respondent suggests that the citations are inaccurate as they are not citations to the record, but are actually citations to the Reporter's Transcript of the Proceedings dated November 30, 2005, which is found in the

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number 20041135-CA. Respondent moved the Court of Appeals to dismiss the appeal based on the Order Dissolving Ex Parte Stalking Injunction not being a final appealable order. Petitioner conceded and the Court of Appeals dismissed the appeal based on the lack of jurisdiction on February 4, 2004. The Trial Court entered its ruling on Respondent's application for attorney's fees on February 18, 2005. Petitioner filed the Notice of Appeal in this case on February 28, 2005. However, since Utah R. Civ. P. 7 requires an order on the ruling and the fact that the Trial Court had required one on its ruling on the Ex Parte Civil Stalking Injunction, Petitioner's Notice of Appeal was arguably untimely. However, pursuant to Utah R. App. P. 4(c), Respondent did not object since Petitioner presented an order, which the Trial Court entered on March 15, 2005.

record at 152 (hereinafter referred to as “R 152 at x”). In addition, in Petitioner’s Statement of Facts she provides citations to counsel’s opening statements, which are not evidentiary in nature.

The only substantive evidence Respondent presented in this matter was his Verified Application for Attorney’s Fees and Costs, which was simply verified by counsel as to the nature of the proceedings and the necessity and reasonableness of the fees.

### **SUMMARY OF ARGUMENT**

Respondent requested an award of attorney’s fees and costs based solely on the statutory authority to award attorney’s fees found at Utah Code § 77-3a-101(16). In her objection to Respondent’s application, Petitioner asserted that Utah Code Ann. § 78-27-56 supplements the attorney’s fee provisions in § 77-3a-101(16). Petitioner analyzed her position using the three-prong test articulated in *Chipman v. Miller*, 934 P.2d 1158 (Utah Ct. App. 1997). The Trial Court, in issuing its ruling on the application for attorney’s fees ruled that Utah Code Ann. § 78-27-56 governs the award of attorney’s fees in actions involving civil stalking injunctions.

The Trial Court applied the three-prong test set forth in *Chipman*. The Trial Court concluded that Respondent satisfied the first prong but did not satisfy the second and third prongs and denied Respondent’s request for fees and costs on that basis.

The Trial Court erred in ruling that Utah Code Ann. § 78-27-56 governs the award of attorney’s fees involving civil stalking injunctions when the applicant’s application for fees does not invoke the statutory provision. Since the Respondent only based his

application for fees and costs on the provisions of Utah Code Ann. § 77-3a-101(16), the Trial Court should have conducted its analysis under that specific statutory scheme. The Trial Court erred in conducting its analysis under Utah Code Ann. § 78-27-56 and the matter must be remanded for an analysis under Utah Code Ann. § 77-3a-101(16).

### **ARGUMENT**

#### **THE TRIAL COURT ERRED IN RULING THAT UTAH CODE ANN. § 78-27-56 GOVERNS THE AWARD OF ATTORNEY'S FEES INVOLVING CIVIL STALKING INJUNCTIONS WHEN THE APPLICANT'S APPLICATION FOR FEES DOES NOT INVOKE THE STATUTORY PROVISION.**

Utah adheres to the prevailing common-law rule that attorney's fees are not recoverable in the absence of a contractual or statutory basis. *Dixie State Bank v. Bracken*, 764 P.2d 985, 988-89 (Utah Ct.App.1988). In the present case, Respondent requested an award of his attorney's fees and costs based only on the statutory authority to award fees found at Utah Code Ann. §77-3a-101(16). The Trial Court concluded that Utah Code Ann. § 78-27-56 governed the application.

To the extent the Trial Court analyzed Respondent's application for fees under both statutes, the standard for award are in conflict and therefore the Trial Court erred in applying one standard over the other.

When appellate courts are faced with two statutes that purport to cover the same subject, they seek to determine the legislature's intent as to which applies. *Taghipour v. Jerez*, 2002 UT 74, ¶11, 52 P.3d 1252 (citations omitted). Appellate courts follow one general rule of statutory construction, which provides that the best evidence of legislative intent is the plain language of the statute. *Id.* at ¶13. In addition, to determine legislative

intent, our rules of statutory construction provide that "when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision." *Id* at ¶11.

Title 77, Utah Code of Criminal Procedure, Chapter 3a Stalking Injunctions, Section 101, Civil Stalking Injunction – Petition – Ex Parte Injunction, (16) provides: “After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney's fees.”

Title 78, Judicial Code, Chapter 27, Miscellaneous Provisions, Section 56, Utah Code Ann. § 78-27-56 Attorney's fees--Award where action or defense in bad faith— Exceptions provides:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Respondent requested an award of his attorney’s fees and costs based solely on the attorney’s fee provision contained in § 77-3a-101(16). Respondent did not request his attorney’s fees based on the contention that Petitioner’s application for a Civil Stalking

Injunction was made in bad faith or was meritless.<sup>3</sup> Petitioner, in her objection to Respondent's application, asserted that the application for attorney's fees should be analyzed under both § 77-3a-101(16) and § 78-27-56. Although the Trial Court recognized that § 77-3a-101(16) grants the trial court discretion in awarding attorney's fees and costs, (Ruling on Verified Application for Attorney's Fees and Costs; R. at 137), the Trial Court ruled that Utah Code Ann. § 78-27-56 governs the award of attorney's fees in actions involving civil stalking injunctions (*Id.*; R at 138). The Trial Court did not conduct an analysis under § 77-3a-101(16).

In determining whether the Trial Court incorrectly applied § 78-27-56, this Court need look no further than the plain language of each statutory provision. Utah Code Ann. § 78-27-56's title clearly indicates when the legislature intended this statutory provision to apply i.e. "Attorney's fees--Award where action or defense in bad faith—Exceptions". (emphasis added). The plain language of subsection (1) directs the trial court to award fees "to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith". Utah Code Ann. § 78-27-56(1). Clearly Utah Code Ann. § 78-27-56 is to be used where a prevailing party requests the court to award fees because the action or defense was without merit and not brought or asserted in good faith. However, there is no language in § 78-27-56 that supports the proposition that it should supplement other statutory provisions that allow for an award of attorney's fees. An exhaustive search of Utah case law presents no

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<sup>3</sup> Respondent reserves the right to base his claim for an award of attorney's fees on bad faith if this matter is remanded for further proceedings consistent with Section II of Appellee's Response to Appellant's Brief.

precedent in which a trial court applied § 78-27-56 as a supplement to another statutory provision allowing for an award of attorney's fees. In substantially all the reported cases regarding this issue, the trial court was requested to make a determination that the prevailing party was entitled to an award of fees based on the "bad faith" or "meritless" standard. *See generally: Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶23, 61 P.3d 1009; *Warner v. DMG Color, Inc.*, 2000 UT 102, ¶21, 20 P.3d 868; *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998); *Baldwin v. Burton*, 850 P.2d 1188, 1199 (Utah 1993); *Chipman v. Miller*, 934 P.2d 1158 (Utah Ct. App 1997).

In reviewing the plain language of Utah Code Ann. § 77-3a-101(16) it is abundantly clear that the Utah Legislature intended that in cases where a "hearing" is requested, and held, pursuant Utah Code Ann. § 77-3a-101(6)(a), the trial court "may" award any party the costs of the hearing, including reasonable attorney's fees. Subsection 16 states in relevant part that "After a hearing...the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney's fees."

In resolving conflicting statutes the more specific statute will prevail over the more general statute. *Taghipour, supra*. Section 78-27-56 is found in the Judicial Code Title of the Utah Code in a chapter containing miscellaneous provisions. Section 77-3a-101(16) is found in the Title containing the Utah Code of Criminal Procedure in a chapter pertaining exclusively to Civil Stalking Injunctions. The more specific statute is clearly the one which on its face specifically references hearings on civil stalking injunctions and specifically provides the trial court discretion to order one party to pay costs of the hearing, including attorney's fees.

## CONCLUSION

The Trial Court incorrectly determined that Respondent's application for attorney's fees and costs was governed by Utah Code Ann. § 78-27-56 when his application was submitted pursuant to Utah Code Ann. § 77-3a-101(16). Respondent respectfully requests that the matter be remanded with instructions that the Trial Court review and analyze Respondent's application for attorney's fees and costs exclusively under Utah Code Ann. § 77-3a-101(16).

### APPELLEE'S RESPONSE TO APPELLANT'S BRIEF

#### **I. THE TRIAL COURT APPLIED THE PROPER LAW IN DETERMINING WHETHER A PERMANENT STALKING INJUNCTION SHOULD ENTER.**

Petitioner suggests that the Trial Court erred in applying the definition of "emotional distress" as set forth in *Salt Lake City v. Lopez*, 935 P.2d 1259 (Utah Ct. App. 1997) because *Lopez* was criminal in nature and this matter is civil in nature. In addition, Petitioner argues that the Trial Court erred in misinterpreting the plain text of Utah's civil stalking statute found at Utah Code Ann. § 77-3a-101. Second, Petitioner urges this Court to find that even if the Trial Court correctly applied *Lopez* to this case, that the *Lopez* definition should be "downplayed" in application to civil stalking injunctions on public policy grounds. Finally, Petitioner argues that the Trial Court erred in not considering the accumulative effect of Respondent's alleged conduct. Respondent disagrees with all of Petitioner's assertions.



**A. The Trial Court Correctly Applied The Definition Of Emotional Distress As Set Forth In Salt Lake City v. Lopez**

The text of Utah Code Ann. § 77-3a-101(1) is unambiguous and clear and reads in relevant part: "As used in this chapter, "stalking" means the crime of stalking as defined in Section 76-5-106.5." Section 77-3a-101(1) is explicit in directing the reader to the criminal stalking statute for the definition of "stalking". In fact, § 77-3a-101(1) contains no other legal framework or additional elements; the legal framework and elements necessary for a civil stalking injunction to issue are exclusively set forth in Section 76-5-106.5.

Consequently, the Trial Court correctly referred to, analyzed, and applied § 76-5-106.5 in determining whether a permanent stalking injunction pursuant to § 77-3a-101 should issue.

Utah Code Ann. § 76-5-106.5(1) defines three terms which are incorporated into the elements of the stalking statute. Subsection (a) defines "Course of Conduct"; (b) defines "Immediate family"; and (c) defines "Repeatedly". The Utah Legislature elected to only define these terms. Respondent suggests that this is because all other terms regarding the elements of stalking are already well defined in Utah law.

The primary source of guidance in statutory interpretation is the plain and ordinary meaning of the statutory language. *State v. Mooney*, 2004 UT 49, ¶11, 98 P.3d 420.

Utah Code Ann. § 76-5-106.5(2) states:

- 2) A person is guilty of stalking who:
  - (a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:
    - (i) to fear bodily injury to himself or a member of his immediate family; or
    - (ii) to suffer emotional distress to himself or a member of his immediate family;
  - (b) has knowledge or should have knowledge that the specific person:

- (i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or
- (ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and
- (c) whose conduct:
  - (i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or
  - (ii) causes emotional distress in the specific person or a member of his immediate family.

Each word as set forth in the elements of § 76-5-106.5(2) are either of such plain ordinary meaning that; 1) no reasonable person would argue a contrary interpretation, 2) have been previously considered by Utah Appellate Courts and articulated in legal precedent, or 3) have been defined by the legislature in other areas of the Utah code. For example, the term of "emotional distress" is defined in *Lopez, supra.*; while the definitions of intentionally and knowingly are defined in Utah Code Ann. §76-2-103.

The Trial Court correctly articulated each element of § 76-5-106.5(2) when it issued its ruling. Petitioner, who had the burden of proof, was required to establish a *prima facie* case by presenting sufficient evidence that stalking had occurred. (Ruling on Motion for Directed Verdict; R. 91). An essential element of Petitioner's claim was that she suffered "emotional distress".

In assessing Petitioner's claims, the Trial Court was required to evaluate each element to determine if stalking had occurred. If sufficient proof regarding any of the elements set forth in § 76-5-106.5(2) was found lacking, the trial court can dismiss the petition upon defendant's motion. Utah R. Civ. P. 41(b). In the present case, Respondent raised the issue that Petitioner had failed to present sufficient evidence of "emotional distress" and therefore was entitled to have the Trial Court consider a dismissal.

Emotional distress results from conduct that is "outrageous and intolerable in that it offends the generally accepted standards of decency and morality." *Lopez, supra*. (citing *Russell v. Thompson Newspapers, Inc.*, 842 P.2d 896, 905 (Utah 1992)). *Lopez* was a challenge to the constitutionality of § 76-5-106.5(2), in that it failed to define "emotional distress", thus rendering the statute both overbroad and vague. This Court held that § 76-5-106.5(2) is not facially vague for failing to define "emotional distress" as that phrase is well defined in Utah. *Lopez* at 1265. The Trial Court is obligated by the doctrine of *stare decisis* to refer to *Lopez* for the definition of emotional distress. *State v. Shoulderblade*, 905 P.2d 289, 292 (Utah 1995).

Petitioner argues that "no Utah appellate court has ever defined "emotional distress" for purposes of establishing "emotional distress" under the state's civil stalking statute..." However, the term "emotional distress" need not be redefined from one statute to the next. No separate definition is needed, nor was it intended by the Utah Legislature. Because Utah Code Ann. §77-3a-101(1) expressly refers to § 76-5-106.5 for its definition of stalking in determining whether a civil stalking injunction should issue, the Trial Court properly relied on legal interpretations of §76-5-106.5 to define "emotional distress".

It is interesting to note that Petitioner argues that the "tort law" definition should not be used in regards to the civil stalking statute because it was defined by a criminal case interpreting a criminal statute. Petitioner's logic is somewhat confusing. Since the definition of "emotional distress" used by the *Lopez* court originates from civil cases, one would think that it would be more appropriate to use the "tort law" definition in cases of civil stalking.

Petitioner's concern appears to be that by using the *Lopez* definition of emotional distress, the Trial Court "tacitly" applied the criminal standard of proof "beyond a reasonable doubt" rather than the statutory required "preponderance of the evidence" as set forth in Utah Code Ann. §77-3a-101(6)(a) & (7). Petitioner marshals no evidence that the Trial Court applied the wrong standard of proof. The Trial Court was clearly made aware of the preponderance standard. (R152 at 25) In addition, Petitioner failed to properly preserve this issue for appeal. Petitioner had the opportunity to object to the Order Dissolving Ex Parte Stalking Injunction as required by Utah R. Civ. P.7.<sup>4</sup> (R. at 110). Petitioner failed to object to the Order Dissolving Ex Parte Stalking Injunction. (Id.). One who fails to object to a written order when submitted in accordance with the rules of civil procedure, waives their right to raise the issue on appeal. *Evans v. State*, 963 P.2d 177, 180 (Utah 1998)(deciding issue under Utah R. Jud. Admin. 4-504).

The Trial Court correctly referred to, analyzed, and applied § 76-5-106.5 in determining whether a permanent stalking injunction pursuant to § 77-3a-103 should issue against Respondent. The Trial Court's ruling must be affirmed.

**B. Petitioner's Public Policy Argument To Clarify The Lopez Definition Of Emotional Distress Is Better Left To The Utah Legislature.**

Petitioner urges the Court to "downplay" the emphasis on the tort-law component of the *Lopez* definition of emotional distress in the name of "public policy". However, as

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<sup>4</sup> Utah R. Civ. P. 7(f)(2) provides in part: Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

the Honorable Justice Wilkins recently articulated, it is not the role of this Court to interfere with the legislative process:

This court should not pass judgment on legislative policy such as whether a new remedy is as good as the old one, whether the substitute remedy is "substantially equal in value" to the old one. Substitution of the policy of three or more judges for the policy of the legislature, absent specific constitutional authority, is contrary to our system of government....As Justice Crockett stated in *Stoker v. Stoker*, this court should leave it to the legislature, who represent the will of the people, and whose function and prerogative it is to discuss and consider public policy and enact into law those policies that, in their judgment, best serve the public welfare. 616 P.2d 590, 592 (Utah 1980). (Crockett, J., dissenting). We should adhere to the constitutionally prescribed separation of powers doctrine, and not intrude into the legislature's prerogative to change the law. *Id.* Instead, we should exercise judicial restraint, keeping our ideas as to what the law ought to be in check. *Id.* In upholding the constitution and ensuring that the legislature does not step outside of its constitutional restraints, we must not permit ourselves to stray into the legislative arena, thereby creating the risk that the policy judgment of three or more members of this court as to what the law ought to be will override the policy judgment of the legislative body, those most directly accountable to the people.

*Laney v. Fairview City*, 2002 UT 79, ¶107, 57 P.3d 1007 (Wilkins, M. dissenting).

The plain and ordinary language of the civil stalking statute is clear and unambiguous. As set forth in Section A of this brief, the Utah Legislature unquestionably intended to use the criminal stalking statute to define the elements for issuing civil stalking injunctions. By its actions in using § 76-5-106.5 in defining stalking for purposes of §77-3a-103, the Utah Legislature undoubtedly expected the civil stalking to be analyzed in the context of the criminal statute. For this Court to "downplay" the *Lopez* definition as suggested by Petitioner is the equivalent of amending the statute. Such actions of the judiciary are inappropriate and clearly constitute an abuse of power.

Respondent urges this Court to employ judicial restraint and simply review this case based on plain and ordinary language that the Utah Legislature choose to utilize.

**C. The Trial Court Correctly Considered Each Incident Of Alleged Stalking Independently In Determining Whether Stalking Had Occurred.**

"Course of conduct" and "repeatedly" are defined in Utah Code Ann. §76-5-106.5(1). Again the Trial Court correctly referred to, analyzed, and applied § 76-5-106.5(1) in determining whether Respondent "engaged in a course of conduct" directed at Petitioner. Course of conduct, when defined with the inclusion of the definition of repeatedly means: "on two or more occasions maintaining a visual or physical proximity to a person..." The plain and ordinary language of § 76-5-106.5 suggests to the reader to analyze the facts to determine whether there exists more than one occasion when an individual maintained a visual or physical proximity to a person.

Petitioner claims that § 76-5-106.5 directs that the cumulative effect be taken into consideration. (Appellant's Brief at page 32). There is nothing in the plain language of § 76-5-106.5 that directs, instructs, demands, or requires the trier of fact to analyze the cumulative effect of "two or more occasions" on the alleged victim. Occasion is defined as "An event or happening; an incident" and "The time at which an event occurs".

*American Heritage College Dictionary*, 3<sup>rd</sup> Ed. 943 (1993). The Trial Court distinguished each incident of alleged stalking, applied the allegations to the elements of the stalking statute, and determined which incidents met the statutory definition of

stalking. The Trial Court correctly interpreted the plain language of § 76-5-106.5 as a matter of law, and this Court must affirm.

**II. EVEN IF THIS COURT DETERMINES THAT THE TRIAL COURT ERRED IT MUST REMAND FOR FURTHER PROCEEDINGS CONSISTENT WITH UTAH R. CIV. P. 41(b).**

At the conclusion of Petitioner's case, Respondent moved for a "directed verdict". The Trial Court granted Respondent's motion for "directed verdict". Petitioner appeals from the judgment granting Respondent's motion for "directed verdict". Although throughout the district court proceedings, and in this appeal, the parties and the Trial Court use the term "directed verdict", as a matter of law, Respondent's motion was actually one to dismiss. *Grossen v. Dewitt*, 1999 UT App 167, ¶8, 982 P.2d 581. In the context of a bench trial where there is no jury verdict, the directed verdict's procedural counterpart is a motion to dismiss. *Id.* (citing 75A Am.Jur.2d *Trial* § 855 (1991) ("When a case is tried by the court without a jury, and a defendant moves for a judgment at the close of the plaintiffs case, the defendant is seeking an involuntary dismissal, not a directed verdict.")).<sup>5</sup>

Utah R. Civ. P. 41(b) addresses involuntary dismissals as follows:

[A]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine

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<sup>5</sup> In order to stay consistent with the district court proceedings, Appellant's Brief, and Appellee's Brief, Respondent will continue to refer to the motion to dismiss as one for directed verdict.

them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

Pursuant to Utah R. Civ. P. 41(b) the court may dismiss if "(1) the claimant has failed to introduce sufficient evidence to establish a *prima facie* case, or (2) the trial court is not persuaded by that evidence." *Grossen*, at ¶8. As with a directed verdict, whether dismissal was appropriate for failure to make a *prima facie* case is a question of law reviewed for correctness. *Id.* (citations omitted). Trial courts, as well as appellate courts, on a motion to dismiss, are obliged to construe the facts in the light most favorable to the plaintiff and to indulge all reasonable inferences in its favor. *Burnett v. Utah Power & Light Co.*, 797 P.2d 1096, 1097 (Utah1990).

Petitioner, throughout her brief, misapplies the Trial Court's findings of fact and suggests that she presented *prima facia* evidence of stalking and therefore a permanent stalking injunction should be entered by this Court. Respondent made his motion for directed verdict at the conclusion of Petitioner's case after which the Trial Court took the matter under advisement. As stated in its Ruling on Motion for Directed Verdict and its Order Dissolving Ex Parte Stalking Injunction, the Trial Court found facts in the light most favorable to the Petitioner. The Trial Court's Ruling on Motion for Directed Verdict clearly indicates that the Trial Court's findings were: "For the purpose of this motion only,...". (Ruling on Motion for Directed Verdict; R. at 89). The Trial Court determined that Petitioner was sexually assaulted because it had too, as a matter of law, in analyzing the motion to dismiss. However, because Respondent has a right to present



contrary evidence, evidence of bias, and raise issues of credibility pursuant to Utah R. Civ. P. 41(b), it is mere speculation as to what findings a trier of fact would make after a full, complete, and fair examination of the facts.

Utah R. Civ. P. 41(b) provides in part that: "...the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." (emphasis added). In the present case, Respondent has never waived his right to offer evidence. In fact, Respondent was prepared to move forward with the proceedings if the Trial Court denied his motion. (R. 152 at 301, *et al.*)

Respondent has a right to have all the facts concerning Petitioner's allegations examined if this Court finds that the Trial Court erred and the motion for directed verdict should not have been granted. Respondent has evidence that neither an assault nor stalking occurred (R. 152 at 25, 26, 301 & 302)<sup>6</sup>. Respondent is entitled to have this matter remanded for further proceedings if this Court determines that the Trial Court erred as a matter of law or if the Trial Court erroneously applied the facts, as suggested by Petitioner.

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<sup>6</sup> As he stated in his Reply to Objection to Verified Application for Attorney's Fees and Costs (R. at 116-119), Respondent is possibly at a disadvantage having had the Trial Court grant his motion for directed verdict because the Trial Court did not get to review his side of the story. The history of this case includes Respondent being wrongfully accused of the crime of sexual assault, a 3<sup>rd</sup> degree felony, wrongfully accused of violating College of Eastern Utah Student Code, a basis for immediate expulsion, and wrongfully being accused of stalking in this matter. The Carbon County attorney refused to prosecute, the CEU student judiciary found no supportable evidence of a student code violation, in part because Respondent passed a polygraph exam which Petitioner refused to take, and the Trial Court below found that stalking had not occurred, even upon reviewing the facts in the light most favorable to Petitioner.

### **III. THE ISSUE OF WHETHER RESPONDENT VIOLATED THE EX PARTE CIVIL STALKING INJUNCTION WAS NOT BEFORE THE TRIAL COURT.**

Petitioner alleges that the Trial Court erred in its interpretation of Utah Code Ann. § 76-5-106.5 by not finding that a violation of an Ex Parte Stalking Injunction is grounds for entry of a permanent stalking injunction and by not entering one on that basis. First, Petitioner failed to preserve this issue for appeal; and second, Petitioner's interpretation of the Utah Code is erroneous.

#### **A. Petitioner Failed To Preserve This Issue for Appeal.**

After counsel argued Respondent's motion for directed verdict the Trial Court inquired of counsel their respective positions on how the Trial Court should treat the alleged violations after October 5, 2004, the date the Ex Parte Stalking Injunction was issued by the Trial Court. Petitioner takes the position that any violations of the Ex Parte Stalking Injunction is immediate grounds for entry of a permanent injunction. (R. 152 at 292)(Appellant's Brief at 40).

The Trial Court questioned whether the issue of enforcement of violating the Ex Parte Stalking Injunction was properly before the Court. (R.152 at 303). Although Petitioner raised the issue, she failed to provide the Trial Court any relevant legal authority as required by Utah law. In fact, the Trial Court specifically asked Petitioner for supporting law, and Petitioner responded:

"If I bring that to the attention of —of Commissioner Patton, up in Provo, he will immediately enter. If I can provide credible evidence that the ex parte protective order was violated, then he will immediately enter the ex—the permanent protective order."

(R 152 at 292:3-6). Petitioner, after several minutes of attempting to provide the Trial Court legal authority, stated again:

"I would have to research it a little bit, cause I can't tell you that statute off the top of my head. All I know is that it's in -- in Commissioner Patton's courtroom it's his practice to immediately enter a protective order upon evidence that, ah, ex parte protective order has been violated."

(*Id.* at 295:15-21).

A party must introduce to the trial court "supporting evidence or relevant legal authority" to support its argument. *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 461 (Utah Ct.App.1996) (citation omitted). Although Petitioner attempted to direct the Trial Court to legal authority, she never did. The Trial Court specifically informed Petitioner that he was not satisfied that that is the law. (R152 at 303:8-9).

Therefore, as a matter of law, Petitioner failed to preserve this issue for appeal. This Court will not hear issues not properly presented in the Trial Court and raised for the first time in appeal. *Tolman*, 912 P.2d at 461.

**B. The Plain Language of Utah Code Ann. §§ 76-5-106.5 and 77-3a-103(2) Does Not Support Petitioner's Assertion that A Violation of an Ex Parte Stalking Injunction is Immediate Grounds for Entry of a Permanent Injunction.**

Petitioner raised the issue of entry of a permanent injunction based on a violation in the context the Trial Court's inquiry into how it should treat alleged stalking occurring after the Ex Parte Stalking Injunction issued. Petitioner did not address the issue outside of this context. Petitioner's assertion in her brief that Utah Code Ann. § 76-5-106.5 and or Utah Code Ann. § 77-3a-103(2) provides that a violation of an Ex Parte Stalking Injunction is grounds for entry of a permanent stalking injunction is not supported by the

plain language of either statute. Neither statute states, refers, infers or otherwise provides as Petitioner suggests. Petitioner simply adds language that does not appear in either statute.

Utah Code Ann. § 77-3a-103(2) in clear, plain and ordinary language sets forth the procedure that a petitioner must follow in order to prosecute alleged violations i.e. "by a civil action initiated by the petitioner, a criminal action initiated by a prosecuting attorney, or both." According to its plain language, the statute requires the petitioner to "initiate a civil action". Utah R. Civ. P. 3 Commencement of Action, provides in part: "(a) How commenced. A civil action is commenced (1) by filing a complaint with the court..." If Petitioner wanted to avail herself of the statutory remedy set forth in Utah Code Ann. § 77-3a-103(2) she needed to either file a separate action, complain to the local prosecuting attorney, or both. Petitioner did neither.

Petitioner urges this Court to find that the Trial Court erred by: 1) not interpreting § 76-5-106.5 to require entry of a permanent injunction upon a violation of a Ex Parte Stalking Injunction; and 2) not making specific findings that Respondent's conduct was a violation of the Ex Parte Stalking Injunction. As set forth above, the statute does not require the Trial Court to enter a permanent injunction upon evidence of a violation and therefore the Trial Court correctly interpreted and applied the statute.

Finally, as set forth in Section II of this response brief, Respondent has an absolute right to present evidence in his defense pursuant to Utah R. Civ. P. 41(b) and does not waive said right by motioning to dismiss. Respondent has not waived the right. Therefore, to the extent that this Court finds the Trial Court in error for not entering a

permanent stalking injunction, this matter must be remanded for further proceedings consistent with the prayer set forth in Section II herein.

### **CONCLUSION**

Respondent finds no err in the Trial Court's legal conclusions and no abuses of discretion in the Trial Court's findings. The Trial Court should be affirmed in granting Respondent's motion for a directed verdict.

DATED this 18<sup>th</sup> day of October, 2005

PETERSON REED WARLAUMONT & STOUT

Michael A. Stout

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed a true and correct copy of the foregoing Cross Appellant's Brief and Appelle's Response to Appellant's Brief, this 18<sup>th</sup> day of October 2005, to the following:

Patricia Abbott, Esq.  
Utah Legal Services, Inc.  
455 North University Avenue, Suite 100  
Provo, Utah 84601

DATED this 18<sup>th</sup> day of October, 2005

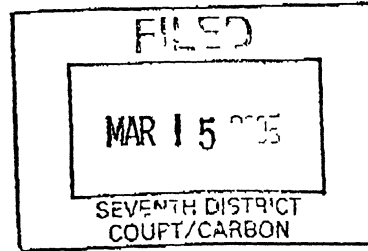
PETERSON REED WARLAUMONT & STOUT



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Michael A. Stout

Tab A



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IN THE SEVENTH DISTRICT COURT OF CARBON COUNTY

STATE OF UTAH

149 East 100 South, Price, Utah 84501

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KIMBER LEE ELLISON,

Petitioner,

vs.

JOSHUA D STAM,

Respondent

**ORDER DENYING RESPONDENT'S  
VERIFIED APPLICATION FOR  
ATTORNEY'S FEES AND COSTS**

Case No 040700756

Judge Bryner

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This issue was before the Court on the Respondent's Verified Application for Attorney's Fees and Costs, filed on December 21, 2004 seeking attorney's fees of \$4,700 00 and costs of \$78.39 incurred by the respondent in this action. The petitioner filed an Objection on December 30, 2004, to which the respondent responded with a Reply on December 27, 2004. The respondent having submitted a Request to Submit for Decision on December 27, 2004, the matter was ripe for decision.

The respondent brought his motion under Section 77-3a-101(16) of Utah Code Annotated, which states the following:

(16) After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney's fees

In addition, the court determined that U.C.A. § 78-27-56 applies to govern the award of attorney's fees in actions involving a civil stalking injunction. This section, as interpreted by



Chipman v. Miller, 934 P.2d 1158, 1161 (Utah App. 1997) dictates that in order to find that a respondent is entitled to attorney fees the court must find: (1) the respondent prevailed; (2) the claim asserted by the petitioner was without merit; and (3) the petitioner's claim must not have been brought or asserted in good faith.

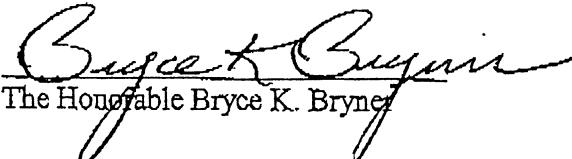
This court finds that the first prong of this test was satisfied in that the respondent prevailed as the court granted his motion for a directed verdict. This court does not find that the second and third prongs were satisfied. The court determines that this case has merit and was brought in good faith. Therefore, section 78-27-56 is not satisfied, and the motion for an award of attorney's fees and costs is denied. This decision having been fully set forth in the court's Ruling on Verified Application for Attorney's Fees and Costs on February 18, 2005,

**IT IS HEREBY ORDERED, DECREED, AND ADJUDGED:**

Respondent's Verified Application for Attorney's Fees and Costs is denied. All parties shall bear their own costs and attorney's fees heretofore incurred in this action.

DATED this 15<sup>th</sup> day of March, 2005.

BY THE COURT:

  
The Honorable Bryce K. Bryner

Approved as to form this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
Michael Stout

MAILING CERTIFICATE

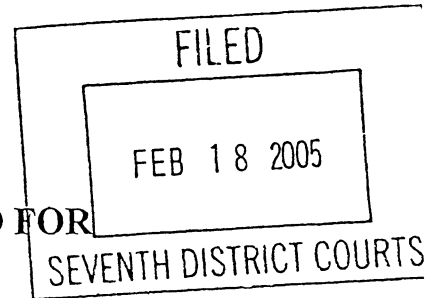
I hereby certify that I faxed and mailed a true and correct copy of the foregoing Order Denying Respondent's Verified Application for Attorney's Fees and Costs, via facsimile and US Mail postage prepaid this 3<sup>rd</sup> day of March, 2005 to the following

Michael E. Stout  
Peterson Reed & Warlaumont, L.L.C.  
800 Boston Building  
9 Exchange Place  
Salt Lake City, Utah 84111  
(801) 364-4060-- facsimile

Patricia Abbott

Tab B

IN THE SEVENTH DISTRICT COURT IN AND FOR  
CARBON COUNTY, STATE OF UTAH



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KIMBER LEE ELLISON,	)	RULING ON VERIFIED
	)	APPLICATION FOR
Petitioner,	)	ATTORNEY'S FEES
	)	AND COSTS
VS.	)	
JOSHUA DARREN STAM,	)	Case No. 040700756
	)	
Respondent.	)	Judge Bryce K. Bryner

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An evidentiary hearing on the petitioner's *Ex Parte Civil Stalking Injunction* was held on November 30, 2004. At the conclusion of the petitioner's case, the court granted the respondent's motion for a directed verdict and dissolved the Ex Parte Stalking Injunction. On December 21, 2004, the respondent filed a *Verified Application for Attorney's Fees and Costs* seeking attorney fees of \$4,700.00 for 47 hours of work, and costs of \$78.39. The petitioner filed an *Objection* to which the respondent filed a *Reply*. The matter is ripe for decision.

The respondent brings his motion under authority of Section 77-3a-101(16) Utah Code Annotated, which provides as follows:

(16) After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney's fees.

It is clear that the foregoing statute grants the court discretion in awarding attorney's fees and costs. The respondent argues, however, that the standard to be applied by the court in exercising its discretion is a "fairness" standard whereas the petitioner contends the court's discretion is limited by the provisions of Section 78-27-56 Utah Code Annotated, which reads:

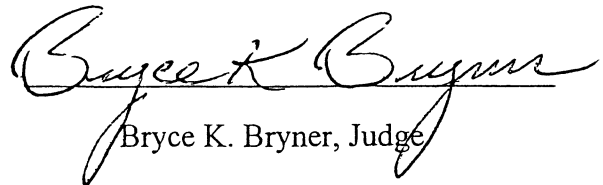
(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action of defense to the action was without merit and not brought or asserted in good faith. . .

The court is persuaded that Section 78-27-56 governs the awarding of an attorney fee in actions involving a civil stalking injunction. Thus, in order to find that the respondent is entitled to an attorney fee the court must find: (1) the respondent prevailed; (2) the claim asserted by the petitioner was without merit; and (3) the petitioner's claim must not have been brought or asserted in good faith. Chipman v. Miller, 934 P.2d 1158, 1161 (Utah App. 1997).

The court finds that the first prong of the test has been met - the respondent prevailed inasmuch as the court granted the motion for directed verdict. However, the court finds that the second and third prongs have not been satisfied. Specifically, the claim brought by the petitioner had serious merit and was brought in good faith. The court previously found that the petitioner had been the victim of a vicious sexual assault committed by the respondent resulting in the petitioner experiencing anxiety and panic when she was around the respondent subsequent to the assault. It was therefore reasonable that the petitioner would seek to limit the respondent's ability to be in her presence through the means of a stalking injunction. Moreover, the respondent has not shown that the petitioner's claim was frivolous or that it was of little weight or importance having no basis in law or fact. To the contrary, the court finds that the petitioner's claim that the respondent was stalking her had a supportable basis in fact even though the petitioner did not prevail.

Because the respondent has not satisfied all three requirements of 78-27-56 (1) the motion for an award of attorney's fees and costs is denied.

DATED this 18<sup>th</sup> day of February, 2005.


  
Bryce K. Bryner, Judge

Tab C

U.C.A. 1953 § 77-3a-101

West's Utah Code Annotated Currentness

Title 77. Utah Code of Criminal Procedure

 Chapter 3A. Stalking Injunctions (Refs & Annos)

**➡§ 77-3a-101. Civil stalking injunction--Petition--Ex parte injunction**

(1) As used in this chapter, "stalking" means the crime of stalking as defined in Section 76-5-106.5. Stalking injunctions may not be obtained against law enforcement officers, governmental investigators, or licensed private investigators, acting in their official capacity.

(2) Any person who believes that he or she is the victim of stalking may file a verified written petition for a civil stalking injunction against the alleged stalker with the district court in the district in which the petitioner or respondent resides or in which any of the events occurred. A minor with his or her parent or guardian may file a petition on his or her own behalf, or a parent, guardian, or custodian may file a petition on the minor's behalf.

(3) The Administrative Office of the Courts shall develop and adopt uniform forms for petitions, ex parte civil stalking injunctions, civil stalking injunctions, service and any other necessary forms in accordance with the provisions of this chapter on or before July 1, 2001. The office shall provide the forms to the clerk of each district court.

(a) All petitions, injunctions, ex parte injunctions, and any other necessary forms shall be issued in the form adopted by the Administrative Office of the Courts.

(b) The offices of the court clerk shall provide the forms to persons seeking to proceed under this chapter.

(4) The petition for a civil stalking injunction shall include:

(a) the name of the petitioner; however, the petitioner's address shall be disclosed to the court for purposes of service, but, on request of the petitioner, the address may not be listed on the petition, and shall be protected and maintained in a separate document or automated database, not subject to release, disclosure, or any form of public access except as ordered by the court for good cause shown;

(b) the name and address, if known, of the respondent;

(c) specific events and dates of the actions constituting the alleged stalking;

(d) if there is a prior court order concerning the same conduct, the name of the court in which the order was rendered; and

(e) corroborating evidence of stalking, which may be in the form of a police report, affidavit, record, statement, item, letter, or any other evidence which tends to prove the allegation of stalking.

(5) If the court determines that there is reason to believe that an offense of stalking has occurred, an ex parte civil stalking injunction may be issued by the court that includes any of the following:

(a) respondent may be enjoined from committing stalking;

(b) respondent may be restrained from coming near the residence, place of employment, or school of the other party or specifically designated locations or persons;

(c) respondent may be restrained from contacting, directly or indirectly, the other party, including personal, written or telephone contact with the other party, the other party's employers, employees, fellow workers or others with whom communication would be likely to cause annoyance or alarm to the other party; or

(d) any other relief necessary or convenient for the protection of the petitioner and other specifically designated persons under the circumstances.

(6) Within ten days of service of the ex parte civil stalking injunction, the respondent is entitled to request, in writing, an evidentiary hearing on the civil stalking injunction.

(a) A hearing requested by the respondent shall be held within ten days from the date the request is filed with the court unless the court finds compelling reasons to continue the hearing. The hearing shall then be held at the earliest possible time. The burden is on the petitioner to show by a preponderance of the evidence that stalking of the petitioner by the respondent has occurred.

(b) An ex parte civil stalking injunction issued under this section shall state on its face:

(i) that the respondent is entitled to a hearing, upon written request within ten days of the service of the order;

(ii) the name and address of the district court where the request may be filed;

(iii) that if the respondent fails to request a hearing within ten days of service, the ex parte civil stalking injunction is automatically modified to a civil stalking injunction without further notice to the respondent and that the civil stalking injunction expires three years after service of the ex parte civil stalking injunction; and

(iv) that if the respondent requests, in writing, a hearing after the ten-day period after service, the court shall set a hearing within a reasonable time from the date requested.

(7) At the hearing, the court may modify, revoke, or continue the injunction. The burden is on the petitioner to show by a preponderance of the evidence that stalking of the petitioner by the respondent has occurred.

(8) The ex parte civil stalking injunction and civil stalking injunction shall include the following statement: "Attention. This is an official court order. If you disobey this order, the court may find you in contempt. You may also be arrested and prosecuted for the crime of stalking and any other crime you may have committed in disobeying this order."

(9) The ex parte civil stalking injunction shall be served on the respondent within 90 days from the date it is signed. An ex parte civil stalking injunction is effective upon service. If no hearing is requested in writing by the respondent within ten days of service of the ex parte civil stalking injunction, the ex parte civil stalking injunction automatically becomes a civil stalking injunction without further notice to the respondent and expires three years from the date of service of the ex parte civil stalking injunction.

(10) If the respondent requests a hearing after the ten-day period after service, the



court shall set a hearing within a reasonable time from the date requested. At the hearing, the burden is on the respondent to show good cause why the civil stalking injunction should be dissolved or modified.

(11) Within 24 hours after the affidavit or acceptance of service has been returned, excluding weekends and holidays, the clerk of the court from which the ex parte civil stalking injunction was issued shall enter a copy of the ex parte civil stalking injunction and proof of service or acceptance of service in the statewide network for warrants or a similar system.

(a) The effectiveness of an ex parte civil stalking injunction or civil stalking injunction shall not depend upon its entry in the statewide system and, for enforcement purposes, a certified copy of an ex parte civil stalking injunction or civil stalking injunction is presumed to be a valid existing order of the court for a period of three years from the date of service of the ex parte civil stalking injunction on the respondent.

(b) Any changes or modifications of the ex parte civil stalking injunction are effective upon service on the respondent. The original ex parte civil stalking injunction continues in effect until service of the changed or modified civil stalking injunction on the respondent.

(12) Within 24 hours after the affidavit or acceptance of service has been returned, excluding weekends and holidays, the clerk of the court shall enter a copy of the changed or modified civil stalking injunction and proof of service or acceptance of service in the statewide network for warrants or a similar system.

(13) The ex parte civil stalking injunction or civil stalking injunction may be dissolved at any time upon application of the petitioner to the court which granted it.

(14) The court clerk shall provide, without charge, to the petitioner one certified copy of the injunction issued by the court and one certified copy of the proof of service of the injunction on the respondent. Charges may be imposed by the clerk's office for any additional copies, certified or not certified in accordance with Rule 4-202.08 of the Code of Judicial Administration.

(15) The remedies provided in this chapter for enforcement of the orders of the court are in addition to any other civil and criminal remedies available. The district court shall hear and decide all matters arising pursuant to this section.

(16) After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney's fees.

(17) This chapter does not apply to protective orders or ex parte protective orders issued pursuant to Title 30, Chapter 6, Cohabitant Abuse Act, or to preliminary injunctions issued pursuant to an action for dissolution of marriage or legal separation.


Tab D

U.C.A. 1953 § 78-27-56

West's Utah Code Annotated Currentness

Title 78. Judicial Code

Part III. Procedure

 Chapter 27. Miscellaneous Provisions (Refs & Annos)

**➡§ 78-27-56. Attorney's fees--Award where action or defense in bad faith-- Exceptions**

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

- (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
- (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Laws 1981, c. 13, § 1; Laws 1988, c. 92, § 1.

Tab E

U.C.A. 1953 § 76-5-106.5

West's Utah Code Annotated Currentness

Title 76. Utah Criminal Code

 Chapter 5. Offenses Against The Person (Refs & Annos)

 Part 1. Assault and Related Offenses

**→§ 76-5-106.5. Definitions--Stalking--Injunction--Hearing**

(1) As used in this section:

- (a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.
- (b) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.
- (c) "Repeatedly" means on two or more occasions.

(2) A person is guilty of stalking who:

- (a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:
  - (i) to fear bodily injury to himself or a member of his immediate family; or
  - (ii) to suffer emotional distress to himself or a member of his immediate family;
- (b) has knowledge or should have knowledge that the specific person:
  - (i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or
  - (ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and
- (c) whose conduct:
  - (i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or
  - (ii) causes emotional distress in the specific person or a member of his immediate family.

(3) A person is also guilty of stalking who intentionally or knowingly violates a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions, or intentionally or knowingly violates a permanent criminal stalking injunction issued pursuant to this section.

(4) Stalking is a class A misdemeanor:

- (a) upon the offender's first violation of Subsection (2); or
- (b) if the offender violated a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions.

(5) Stalking is a third degree felony if the offender:

- (a) has been previously convicted of an offense of stalking;

- (b) has been convicted in another jurisdiction of an offense that is substantially similar to the offense of stalking;
- (c) has been previously convicted of any felony offense in Utah or of any crime in another jurisdiction which if committed in Utah would be a felony, in which the victim of the stalking or a member of the victim's immediate family was also a victim of the previous felony offense; or
- (d) violated a permanent criminal stalking injunction issued pursuant to Subsection (7).

(6) Stalking is a felony of the second degree if the offender:

- (a) used a dangerous weapon as defined in Section 76-1-601 or used other means or force likely to produce death or serious bodily injury, in the commission of the crime of stalking;
- (b) has been previously convicted two or more times of the offense of stalking;
- (c) has been convicted two or more times in another jurisdiction or jurisdictions of offenses that are substantially similar to the offense of stalking;
- (d) has been convicted two or more times, in any combination, of offenses under Subsection (5); or
- (e) has been previously convicted two or more times of felony offenses in Utah or of crimes in another jurisdiction or jurisdictions which, if committed in Utah, would be felonies, in which the victim of the stalking was also a victim of the previous felony offenses.

(7) A conviction for stalking or a plea accepted by the court and held in abeyance for a period of time shall operate as an application for a permanent criminal stalking injunction limiting the contact of the defendant and the victim.

(a) A permanent criminal stalking injunction shall be issued without a hearing unless the defendant requests a hearing at the time of the verdict, finding, or plea of guilty, guilty and mentally ill, plea of no contest, or acceptance of plea in abeyance. The court shall give the defendant notice of his right to request a hearing.

(i) If the defendant requests a hearing, it shall be held at the time of the verdict, finding, or plea of guilty, guilty and mentally ill, plea of no contest, or acceptance of plea in abeyance unless the victim requests otherwise, or for good cause.

(ii) If the verdict, finding, or plea of guilty, guilty and mentally ill, plea of no contest, or acceptance of plea in abeyance was entered in a justice court, a certified copy of the judgment and conviction or a certified copy of the court's order holding the plea in abeyance must be filed by the victim in the district court as an application and request for hearing for a permanent criminal stalking injunction.

(b) A permanent criminal stalking injunction may grant the following relief:

(i) an order restraining the defendant from entering the residence, property, school, or place of employment of the victim and requiring the defendant to stay away from the victim and members of the victim's immediate family or household and to stay away from any specified place that is named in the order and is frequented regularly by the victim; and

(ii) an order restraining the defendant from making contact with the victim, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm, including personal, written, or telephone contact with the victim, the victim's employers, employees, fellow workers, or others with whom communication would be likely to cause annoyance or alarm to the victim.

(c) A permanent criminal stalking injunction may be dissolved upon application of the victim to the court which granted the order.

(d) Notice of permanent criminal stalking injunctions issued pursuant to this section shall be sent by the court to the statewide warrants network or similar system.

(e) A permanent criminal stalking injunction issued pursuant to this section shall be effective statewide.

(f) Violation of an injunction issued pursuant to this section shall constitute an offense of stalking. Violations may be enforced in a civil action initiated by the stalking victim, a criminal action initiated by a prosecuting attorney, or both.

(g) Nothing in this section shall preclude the filing of a criminal information for stalking based on the same act which is the basis for the violation of the stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions, or permanent criminal stalking injunction.

Laws 1992, c. 188, § 1; Laws 1994, c. 206, § 1; Laws 1996, c. 151, § 1, eff. April 29, 1996; Laws 1997, c. 10, § 129, eff. May 5, 1997; Laws 1999, c. 96, § 1, eff. May 3, 1999; Laws 2000, c. 49, § 1, eff. May 1, 2000; Laws 2001, c. 276, § 1, eff. July 1, 2001.