

2005

Kimber Lee Ellison v. Joshua D. Stam : Reply Brief

Utah Court of Appeals

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Michael A. Stout; Timothy Curtis; Peterson Reed & Warlaumont & Stout; Attorney for Appellee.
Patricia Abbott; Utah Legal Services, Inc; Attorneys for Appellant.

Recommended Citation

Reply Brief, *Ellison v. Stam*, No. 20050228 (Utah Court of Appeals, 2005).
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IN THE UTAH COURT OF APPEALS

KIMBER LEE ELLISON,

Petitioner/Appellant/Cross Appellee,

vs.

JOSHUA D. STAM,

Respondent/Appellee/Cross Appellant.

Case No. 20050228-CA

RESPONSE TO CROSS APPELLANT'S BRIEF/APPELLANT'S REPLY
BRIEF

Appeal from Judgment Granting Respondent's Motion for Directed Verdict and Order
Dissolving Ex Parte Civil Stalking Injunction

In the Seventh Judicial District Court
for Carbon County, State of Utah

Honorable Bryce K. Bryner
District Court Judge

Michael A. Stout, # 8278
Timothy Curtis, #10195
Peterson Reed Warlaumont & Stout
Attorney for Respondent/
Appellee/Cross-Appellant
800 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone No. (801) 364-4040
Fax No. (801) 364-4060

Patricia Abbott, #9854
Utah Legal Services, Inc.
Attorneys for Petitioner/
Appellant/Cross-Appellee
455 N. University Ave.,
Suite #100
Provo, Utah 84601
Telephone No. (801) 374-6766
Fax No. (801) 374-0960

DEC 2 2005

FILED
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Attorney for Respondent/
Appellee/Cross-Appellant
800 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone No. (801) 364-4040
Fax No. (801) 364-4060

Patricia Abbott, #9854
Utah Legal Services, Inc.
Attorneys for Petitioner/
Appellant/Cross-Appellee
455 N. University Ave.,
Suite #100
Provo, Utah 84601
Telephone No. (801) 374-6766
Fax No. (801) 374-0960

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RESPONSE TO CROSS APPELLANT'S BRIEF

I. THE TRIAL COURT APPLIED THE CORRECT LAW IN DENYING THE RESPONDENT'S REQUEST FOR ATTORNEY'S FEES

In his Cross Appellant's Brief, the Respondent alleges that the trial court erred in denying his request for attorney's fees made under Utah Code Ann. § 77-3a-101(16), which states, "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." The Respondent alleges that the trial court erred in analyzing his request for attorney's fees using the three-pronged test set forth in Utah Code Ann. § 78-27-56 as interpreted in Chipman v. Miller, 934 P.2d 1158 (Utah Ct. App. 1997). The Court found that attorney fees were proper if (1) the party seeking fees prevailed, (2) the claim or defense asserted by the opposing party was meritless, and (3) that claim or defense was asserted in bad faith. Id. at 1161.

In A.K. & R. Whipple Plumbing and Heating v. Guy, 94 P.3d 270 (Utah 2004), the Utah Supreme Court states, "when reviewing attorney fee decisions that involve questions of law, we review for correctness . . . This is also the standard we apply when construing statutes." Id. at 272. The question of whether the Judge correctly concluded that § 78-27-56 supplements § 77-3a-101(16) is a question of law to be reviewed for correctness.

The question of whether § 78-27-56 applies to supplement § 77-3a-101(16) is a question of first impression in Utah. The trial court Judge stated, "The court is

persuaded that Section 78-27-56 governs the awarding of an attorney fee in actions involving a civil stalking injunction.” (Ruling on Verified Application for Atty’s Fees and Costs at 2).

It is reasonable that with such a broad grant of discretion in whether to grant attorney’s fees, the trial court would seek to make the decision based on sound judicial principles. In fact, the trial court is required to set forth the grounds on which it made its decision: “To permit meaningful review of the trial court’s discretionary ruling, ‘[w]e have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award . . .’” Bell v. Bell, 810 P.2d 474, 478 (Utah Ct. App. 1991). Failure by the trial court to be sufficiently detailed in its legal conclusions and findings of fact leads to remand by the appellate courts. Shinkoskey v. Shinkoskey, 19 P.3d 1005, 1010 (Utah Ct. App. 2001).

The U.S. Supreme Court reiterated the importance of this: “A motion to a court’s “discretion” is a motion, not to its inclination or whim, but to its judgment; and its judgment is to be guided by sound legal principles.” Martin v. Franklin Capital Corp., 2005 WL 3299410 (U.S.) at 5. The Supreme Court has specifically addressed motions for attorney’s fees by stating, “When applying fee-shifting statutes, ‘we have found limits in ‘the large objectives’ of the relevant Act, which embrace certain ‘equitable considerations.’” Id.

In Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), the United States Supreme Court, in a case involving a fee-shifting statute almost identical to Utah Code Ann.

§ 78-3a-101(16), stated that Section 505 of the Copyright Protection Act provides that, “the court may . . . award a reasonable attorney’s fee to the prevailing party as part of the costs.” Id. at 517.

The Court suggested that in determining whether to award attorney’s fees under a fee-shifting statute, “. . . equitable discretion should be exercised ‘in light of considerations we have identified.’” Id. at 534. The Court further elaborated on these “equitable considerations” in Footnote 19:

Some courts following the evenhanded standard have suggested several nonexclusive factors to guide courts’ discretion. For example, the Third Circuit has listed several nonexclusive factors that courts should consider in making awards of attorney’s fees to any prevailing party. These factors include, ‘frivolousness, motivations, objective unreasonableness (both in the factual and the legal components of the case), and the need in particular circumstances to advance considerations of compensation and deterrence. We agree that such factors may be used to guide courts’ discretion, so long as such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner. Id.

In that the Chipman factors used by the trial court to guide its decision-making closely match the factors the Supreme Court listed in Fogerty, they are appropriate equitable guides.

Furthermore, the Chipman factors, as expostulated in Utah Code Ann. § 78-27-56 embody the desires of the Utah State Legislature in awarding attorney’s fees in civil actions. Because the stalking injunction in the case at bar is a civil action, it is appropriate to look to Utah Code Ann. § 78-27-56 to determine what factors

the Utah State Legislature considered important in determining whether attorney fees should be shifted to an opposing party in a civil case.

The Respondent suggests that Utah Code Ann. §§ 77-3a-101(16) and 78-27-56 somehow conflict and that the application of § 77-3a-101(16) precludes analysis under § 78-27-56. It is submitted that the statutes are not in conflict. Section 77-3a-101(16) gives the court authorization to award attorney's fees in its discretion, and § 78-27-56 provides some equitable guides for attorney fees in civil cases.

It is clearly appropriate to apply the principles of § 78-27-56 to this case because it involves a petition for court protection by a victim of an alleged sexual assault and subsequent stalking. Sound public policy dictates these victims not be afraid to petition the court for help. It would be a very serious and dangerous precedent for a trial court to begin shifting the burden of paying attorney's fees to a victim of stalking who did not prevail in the trial court. It is appropriate for the trial court to require a Respondent who wants the trial court to shift his or her defense fees to the Petitioner to first prove that the Petitioner's stalking case is without merit and was not pursued in good faith. If the trial court were to shift fees upon any lesser showing of bad faith, it would have a serious chilling effect on the willingness of stalking victims to seek the protection of the courts. Many victims might expose themselves to the danger of further stalking or assault rather than face the prospect of being ordered to pay costly attorney fees if they fail to prevail.

For the above reasons, the trial court correctly interpreted § 77-3a-101(16) through the lens of § 78-27-56 in requiring a showing of no merit and bad faith before shifting the Respondent's attorney's fees to the Petitioner. It is submitted that the Court of Appeals should find that the trial court applied the correct law in denying the Respondent's request for attorney's fees.

II. IF THIS COURT FINDS THAT THE TRIAL COURT IMPROPERLY APPLIED § 78-27-56 TO THIS CASE, IT SHOULD STILL DENY THE RESPONDENT'S REQUEST FOR ATTORNEY'S FEES BASED ON THE HARMLESS ERROR DOCTRINE.

Pursuant to the "harmless error" doctrine contained in Rule 61 of the Utah Rules of Civil Procedure, "An appellate court will not reverse a judgment for mere error, unless the error involved is substantial and prejudicial." Kesler v. Rogers, 542 P.2d 354 (Utah 1975). Furthermore, "Only when there is error both substantial and prejudicial, and when there is a reasonable likelihood that the result would have been different without it, should error be regarded as sufficient to upset a judgment or to grant a new trial." Bowden v. Denver & R.G.W.R.R., 286 P.2d 240 (Utah 1955).

This Court should affirm the trial court's denial of attorney's fees to the Respondent even if this Court determines that the trial court incorrectly applied Utah Code Ann. § 78-27-56 to its decision because the trial court reached the correct outcome, even if it applied the wrong legal standard. The Utah Supreme Court has stated that "[A] trial court's failure to make findings on a material issue was harmless error where the evidence was clear, uncontroverted, and only

capable of supporting a finding in favor of the judgment.” Kinkella v. Baugh, 660 P.2d 233 (Utah 1983). Utah appellate courts often apply the “harmless error” doctrine to deny remand for mistakes that do not affect the outcome of a case. In Liska v. Liska, 902 P.2d 644 (Utah Ct. App. 1995), this Court stated the following:

The commissioner erred by failing to make a record of her communication with the Colorado magistrate regarding the assumption of jurisdiction by the Colorado court. However, such error was harmless because the commissioner’s recommendation to decline to exercise Utah’s continuing jurisdiction over this case, and the trial court’s decision based thereon, were inarguably correct. Accordingly, we affirm. Id. at 650.

Similarly, in this case, it is clear that regardless of how it reached its conclusion, the trial court was correct not to require the Petitioner to pay the Respondent’s attorney’s fees. The trial court made explicit findings supporting its conclusion:

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 (Ruling on Verified Application for Atty’s Fees and Costs at 2.)

A trial court’s findings of fact are entitled to great deference. It would be manifestly unjust to require a victim of sexual assault and subsequent stalking to

pay her assailant's attorney's fees because she could not prevail in the trial court. It is very unlikely that a court with discretion in making its decision would make the above findings and then require the victim to pay her assailant's attorney's fees. Therefore, even if the trial court was incorrect in analyzing the Respondent's request for attorney's fees by using the criteria in § 78-27-56, the decision reached was correct and should be upheld by this Court under the "harmless error doctrine."

CONCLUSION

The trial court was correct to deny the Respondent's Verified Application for Attorney's Fees and Costs under Utah Code Ann. § 77-3a-101(16). It was also correct to apply the factors from Utah Code Ann. § 78-27-56 in guiding its decision making. The trial court's decision to deny attorney's fees should be affirmed. If, in the alternative, the Court determines that the trial court should not have applied § 78-27-56, it should still affirm the trial court's denial because the application of § 78-27-56 was "harmless error" since the trial court reached the correct outcome in denying the Respondent's request that the victim of his sexual assault pay his attorney's fees.

APPELLANT'S REPLY BRIEF

I. THE TRIAL COURT ERRED IN MISINTERPRETING THE “EMOTIONAL DISTRESS” REQUIREMENT OF UTAH CODE ANN. § 76-5-106.5; PETITIONER IS REQUESTING THE COURT TO CORRECT THE ERROR, NOT TO “LEGISLATE,” AS RESPONDENT ALLEGES.

In his brief, the Respondent alleges that the Petitioner is asking the Court to “legislate” by clarifying the definition of “emotional distress” for purposes of satisfying Utah Code Ann. § 76-5-106.5. That is, Respondent suggests that if this Court rules on this issue it would constitute judicial activism.

Petitioner is not urging the Court to legislate, but rather is seeking to show that the trial court erred in applying the definition of “emotional distress” set forth in the criminal case of Salt Lake City v. Lopez, 953 P.2d 1259, 1264 (Utah Ct. App. 1997) to a civil stalking case, and to urge the Court to correct the error.

Petitioner maintains that the trial court erred in using the Lopez definition of “emotional distress,” i.e., only conduct that is ‘outrageous and intolerable’ in that it offends the generally accepted standards of decency and morality is sufficient to satisfy the “emotional distress” requirement of §§ 76-5-106.5, 77-3a-101(1). The burden of proof is different in civil cases. It is submitted that in applying the Lopez definition of “emotional distress,” the trial court used a “beyond a reasonable doubt” standard of proof rather than the correct standard, a preponderance of the evidence.

Respondent alleges that the Petitioner failed to preserve her right to appeal the standard of proof issue by not objecting to the “Order Dissolving Ex Parte

Civil Stalking Injunction.” It is true that the Petitioner did not object to the Order pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure. This was because the trial court had entered its final order dismissing the action, and Petitioner did not wish to waste her time filing an objection to a final, dispositive judgment with the trial court. Instead, she filed a timely Notice of Appeal on February 25, 2005 appealing the final judgment of the trial court. Petitioner believes that the Notice of Appeal adequately preserved the issue for appeal.

Even if this Court does determine that the Lopez definition of “emotional distress” can properly be applied in a civil case, the Petitioner is still not asking this Court to “legislate.” The trial court erred in ruling that the only means by which the Petitioner could prove “emotional distress” was by showing that the Respondent’s conduct was “‘outrageous and intolerable’ in that it offends the generally accepted standards of decency and morality.” Id. This was not the holding in Lopez. The trial court’s decision ignores the plain text of § 76-5-106.5, which states that the conduct must be such that a “reasonable person” under the circumstances would experience emotional distress. This Court clearly applied a “reasonable person” standard in Lopez when it stated that, “Defendant had numerous contacts with G.M.M. that reasonably would cause her emotional distress. Defendant was not prosecuted merely for being in G.M.M.’s presence; he was prosecuted for causing emotional distress to G.M.M. and engaging in behavior directed at her that could reasonably be understood as threatening.” Id. at 1264-65. The Petitioner is asking this Court to properly apply the entire Lopez

definition of emotional distress, which includes the objective “reasonable person” under the circumstances test, not just the “outrageous and intolerable” portion exclusively relied on by the trial court.

Petitioner further maintains that if the Court applies the Lopez definition of emotional distress to this case, it should distinguish it from the “outrageous and intolerable” standard cited in Lopez, which is derived from tort law. Petitioner has previously cited extensive case law showing that Utah is the only state that has not yet distanced itself from the tort-based definition of “emotional distress.”

The Petitioner is asking this court to do precisely what the Tenth Circuit did in Veile v. Martinson, 258 F.3d 1180, 1189 (10th Cir. 2001). The Tenth Circuit clarified that to satisfy the “emotional distress” requirement of the Wyoming State Stalking Statute did not require any reference to tort law: “. . . We believe the absence of a discussion about the tort of intentional infliction of emotional distress in the opinion [Luplow v. State] (save for its presence in some of the cases cited in the opinion) means the tort’s requirements and elements have no bearing on the separate, statutorily-defined civil action for stalking.” In one sentence, the Tenth Circuit clarified any confusion that the Wyoming stalking statute’s definition of emotional distress should be defined by any reference to tort law. The Tenth Circuit, rather than “legislating,” was clarifying the existing definition. In his brief, Respondent states, “Respondent urges this Court to employ judicial restraint and simply review this case based on plain and ordinary language that the Utah Legislature choose (sic) to utilize” (Appellee’s Brief at 15.) This is what the

Petitioner is urging by requesting the Court to analyze this case under the objective “reasonable person” language of Utah Code Ann. §76-5-106.5 and to downplay the “separate, statutorily-defined” stalking statute’s reference to the tort of intentional infliction of emotional distress. Veile v. Martinson, 258 F.3d 1180, 1189 (10th Cir. 2001).

II. EXAMINATION OF A “COURSE OF CONDUCT” BY DEFINITION REQUIRES ACCUMULATIVE ANALYSIS, AND THE TRIAL COURT ERRED IN ANALYZING THE ALLEGED INCIDENTS OF STALKING SEPARATELY.

The Respondent alleges that the “plain and ordinary” language of Utah Code Ann. § 76-5-106.5 requires a reader to examine each alleged incident of stalking separately and determine whether there are at least two incidents that rise to the level of being “outrageous and intolerable in that [they] offend the generally accepted standards of decency and morality.” Salt Lake City v. Lopez, 935 P.2d 1259, 1264 (Utah Ct. App. 1997). It is counter-intuitive to analyze incidents constituting a “course of conduct,” separately, particularly in a stalking context. The Alaska Court of Appeals explained the reasoning behind examining the cumulative effect of individual acts of stalking:

In contrast the *actus reus* of the crime of stalking is defined as a *series of acts*. The stalking statute requires the State to prove that the defendant engaged in a “course of conduct” comprising “repeated acts of nonconsensual contact.” It is the defendant’s course of conduct, not the defendant’s individual acts that must engender the requisite fear in the victim. Moreover, in a stalking prosecution, the individual acts committed by the defendant are not necessarily criminal in themselves; rather, they become criminal because they are committed in series. Cook v. Alaska, 36 P.2d 710, 721 (Ala. Ct. App. 2001).

Further, The Court of Appeals for the District of Columbia has stated, “It is the continuing course of conduct which constitutes the offense, not the individual discrete actions making up the course of conduct.” Washington v. United States, 760 A.2d 187, 198-99 (D.C. App. 2000).

The Utah Supreme Court has stated that factors to be considered in analyzing a “course of conduct” in the context of a criminal statute, Utah Code Ann. § 76-5-415.1(3)(g), is that if “all of these acts were essentially interchangeable, occurred over a defined period of time and in the same uninterrupted course of conduct . . .” Utah v. Reed, 8 P.3d 1025, 1031 (Utah 2000).

In this case, the incidents occurred over the period of a few months, many of them on successive days. They were largely interchangeable and, if considered separately, no one incident might rise to the level of being criminal, (although this is not true of the incidents that also constituted a violation of the Ex Parte Stalking Injunction). If the trial court had examined the incidents cumulatively, it would have found that the incidents together demonstrate a clear pattern of maintaining “physical and visual” proximity to the Petitioner and clearly show the Respondent’s intent to cause her fear and emotional distress. Therefore, the trial court erred in failing to analyze the incidents collectively as a course of conduct, as required by the statute.

III. PETITIONER PROPERLY PRESERVED THE ISSUE OF WHETHER VIOLATION OF AN EX PARTE STALKING INJUNCTION IS GROUNDS FOR IMMEDIATE ENTRY OF A PERMANENT STALKING INJUNCTION PURSUANT TO UTAH CODE ANN. § 76-5-106.5(3).

The Respondent alleges in his Appellee's brief that the Petitioner failed to preserve the issue of whether violation of the Ex Parte Stalking Injunction was grounds for immediate entry of a permanent stalking injunction (Appellee's Brief at 19-20). The analysis is incorrect.

Respondent cites Tolman v. Winchester Hills Water Co., 912 P.2d 457, 461 (Utah Ct. App. 1996) to say that in order to preserve an issue for appeal, a party must provide "supporting evidence or relevant legal authority" to support its argument. Petitioner agrees, and she did so in the trial court. The Respondent alleges that the only argument Petitioner gave in support of her position was to attempt to compare a violation of an Ex Parte Stalking Injunction with a violation of an Ex Parte Protective Order. The Respondent's brief cites large portions of the Petitioner's admittedly imperfect articulation of that argument to support the proposition that Petitioner failed to cite any relevant legal authority. The fact is that the Petitioner also clearly cited and discussed Utah Code Ann. § 76-5-106.5 (3) as legal authority, which states, "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." Petitioner

cited this statute in the record at pages 293-94 and again at page 296. This discussion is more than adequate to preserve this issue for appeal.

The Respondent goes on to state that “the Petitioner adds language that does not appear in either statute.” Petitioner is clearly citing to § 76-5-106.5(3), which states in clear, unambiguous language that “a person is also guilty of stalking who intentionally or knowingly violates a stalking injunction . . .” Petitioner merely makes the natural inference that an Ex Parte Stalking Injunction is a bona fide stalking injunction falling within the purviews of this statutory provision.

CONCLUSION

This Court should reverse the trial court’s summary judgment dismissing the Petitioner’s case and enter a permanent stalking injunction against the Respondent because she proved a prima facie case of stalking in the trial court. The Petitioner further requests that a permanent stalking injunction be entered on the independent basis that the Respondent violated the Ex Parte Stalking Injunction.

CERTIFICATE OF SERVICE

I certify that on this 21st day of December, 2005, I served a copy of the attached Appellant's Response to Cross Appellant's Brief and Appellant's Reply Brief upon Michael E. Stout and Timothy Curtis, counsel for the Respondent/Appellee in this matter by mailing to them by first class mail with sufficient postage prepaid to the following address:

Peterson Reed Warlaumont & Stout
800 Boston Building
9 Exchange Place
Salt Lake City, UT 84111


