

2005

J. J. Abernathy v. John Mzik : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

J. J. ABERNATHY,

Petitioner/Appellee,

v.

JOHN MZIK,

Respondent/Appellant.

Case No. 20051101-CA

District Court No. 050500870

BRIEF OF APPELLEE J. J. ABERNATHY

Appeal from the Judgment and Order of the District Court
of the Fifth Judicial District, State of Utah
the Honorable James L. Shumate, Presiding.

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**APPELLEE RESPECTFULLY REQUESTS ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED.**

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JURISDICTION OF THE COURT

This appellate review proceeding arises from the Fifth Judicial District Court's issuance of a Civil Stalking Injunction. Jurisdiction over such an appeal properly belongs in the Utah Supreme Court, pursuant to Utah Code Annotated §78-2a-3 (1953, as amended), and Rule 3 of the Utah Rules of Appellate Procedure, but is now in the Utah Court of Appeals, pursuant to a February 14, 2006 Order of the Utah Supreme Court transferring jurisdiction of this appeal to the Utah Court of Appeals.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues stated by Appellant are as follows:

Issue 1: "Did The Trial Court properly interpret 'emotional Distres' in its finding that the Respondent engaged in a course of conduct that would cause a reasonable person to suffer emotional distress, and should a public employee have a higher standard." (Appellant's Brief at 13).

Standard for Review:

The proper interpretation and application of a statute is a question of law which is reviewed for correctness, affording no deference to the District Court's legal conclusion[s]. Ellison v. Stam, 2006 UT App 150, 136 P.3d 1242, Gutierrez v. Medley, 972 P.2d 913, 914-15 (Utah1998). Although the Appellant seeks to assert a pure question of law, his Brief does not analyze the Statute, but rather attacks the trial court's Findings.

"[W]e review the trial court's findings of fact for clear error, reversing only

where [a] finding is against the clear weight of the evidence, or if we otherwise reach a firm conviction that a mistake has been made." ProMax Dev. Corp. v. Mattson, 943 P.2d 247, 255 (Utah Ct. App. 1997).

"We review the evidence in a light most favorable to the trial court's findings and affirm if there is a reasonable basis for doing so." Gillmor v. Gillmor, 745 P.2d 461, 462 (Utah App. 1987), cert. denied, 765 P.2d 1278 (Utah 1988). A prerequisite to an appellant's attack on findings of fact is the requirement that appellant marshal all the evidence in support of the findings in order to demonstrate "that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings." Grayson Roper Ltd. v. Finlinson, 782 P.2d 467 (Utah 1989). *See also* Reid v. Mutual of Omaha Ins. Co., 776 P.2d 899. (Utah 1989).

Preservation for Appeal:

This issue was not raised or preserved below as discussed in detail below. Failure to cite where in the record the issues alleged on appeal were preserved for appeal as required by Rule of Appellate Procedure 24(a)(5)(A) warrants the affirmance of the trial court's decision. State v. Lucero, 2002 UT APP 135, 47 P.3d 107.

Issue 2: "Was the Civil Stalking Junction unconstitutional by being overly broad so as to limit a person's right to free speech and criticism?" (Appellant's Brief at 18).

Standard for Review: Constitutional challenges to a statute present questions

of law, which are reviewed for "correctness." Provo City Corp. v. Thompson, 2004 UT 14, ¶ 5, 86 P.3d 735. Additionally, "legislative enactments are presumed to be constitutional," and "those who challenge a statute or ordinance as unconstitutional bear the burden of demonstrating its unconstitutionality." Greenwood v. City of N. Salt Lake, 817 P.2d 816, 819 (Utah 1991); see also State v. MacGuire, 2004 UT 4, ¶ 8, 84 P.3d 1171.

Preservation for Appeal:

This issue was raised in Respondent's Request for Hearing (R at 28) but was not subsequently briefed or argued at Hearing. Appellant in his brief acknowledges that he did not "present or argue the issue." (Appellant's Brief at 6). No effort was made to preserve the issue for appeal. Failure to cite where in the record the issues alleged on appeal were preserved for appeal as required by Rule of Appellate Procedure 24(a)(5)(A) warrants the affirmance of the trial court's decision. State v. Lucero, 2002 UT APP 135, 47 P.3d 107.

DETERMINATIVE STATUTE

Utah Code Annotated §76-5-106.5 (2001) is the applicable Civil Stalking Injunction statute. It is set out in full in Addendum "A".

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from the entry of a Civil Stalking Injunction. The Trial Court found that on three or more occasions, Mr. Mzik engaged in conduct that was threatening, intimidating and offensive to Mrs. Abernathy and

others, and were intended to and did result in physical and emotional harm to her.

Course of Proceedings:

1. On May 27, 2005, J.J. Abernathy filed a Petition for a Civil Stalking Injunction against Jon Mzik in the Fifth Judicial District Court in and for Washington County, State of Utah. An Ex Parte Civil Stalking Injunction was issued that same day.

2. On June 3, 2005, a Request for Hearing was filed on behalf of John Mzik, Kellie Mzik, and Kathryn Mzik. (R. at 26-30). An Amended Request for Hearing was filed on June 9, 2006. (R. at 103-116).

3. The Mziks filed an Extraordinary Writ and Writ of Mandamus and Prohibition to the Utah Court of Appeals seeking to recuse Judge Ludlow from the case. Those Motions were summarily dismissed by the Court of Appeals on June 29, 2005 and July 27, 2005. (R. at 194).

4. Following a scheduled Hearing, on June 22, 2005, the parties represented to the Court that they had agreed to the terms of a Injunction and on July 5, 2005 an Interim Civil stalking Injunction was issued by Hon. Eric Ludlow against John Mzik, Kellie Mzik and Kathryn Mzik. (R. At 182-186). The prior Ex Parte Injunctions were dissolved at that time.

5. On August 12, 2006 the Mziks filed a Motion to set Aside the Interim Civil Stalking Injunction alleging misconduct by their former attorney. (R. At 197-206). A Substitution of Counsel was also filed. (R. at 195). A Response to the Motion to set

Aside Civil Stalking Injunction was filed by Mrs. Abernathy on August 15, 2005. (R. at 220-222). A Supplemental Response was also filed on August 23, 2005. (R. at 213-222).

6. The Motion to Set Aside was scheduled for Hearing on September 27, 2005 before the Hon. James L. Shumate. (R. at 227). The Motion to Strike was denied, but the matter was scheduled for an Evidentiary Hearing on October 4, 2005. (R. at 229).

7. Following a Hearing at which the parties were sworn and gave testimony and were cross-examined (R. at 266) the Court entered a Minute Order finding that "... there is evidence to have a stalking injunction placed against this [John Mzik] respondent." (R. at 230-31).

8. On October 27, 2005 the Fifth Judicial District Court in Washington County entered a Civil Stalking Injunction Order. (R. at 233-243).

9. On November 28, 2005, Mr. Mzik filed a Notice of Appeal with the Utah Court of Appeals. (R. at 252-53). (It should be noted that Appellant has subsequently acknowledged that he filed this appeal in the wrong Court, and that it should be transferred instead to the Utah Supreme Court).

10. The District Court Docket entry reflects that the Notice of Appeal was filed on Monday, November 28, 2005, but the required filing fees were not paid until two days latter on November 30, 2005.

11. On November 28, 2005, Mr. Mzik filed Objections to the Findings of Fact

and Conclusions of Law with the trial court. (R. at 245-47). He did not assert the issues on appeal in his Objections to the Trial Court.

12. Mr. Mzik's Brief listed the issues for appeal as follows:

(1) Did the Trial Court properly interpret "emotional Distress" in its (sic) findings that the Respondent engaged in a course of conduct that would cause a reasonable person to suffer emotion distress?

(2) Whether the Civil Stalking Junction is unconstitutional by being overly broad so as to limit a person's right to free speech and criticism?

13. In the Statement of Grounds section of his Brief, Mr. Mzik claims that both issues were preserved for appeal because "The trial court never allowed opening arguments, nor closing arguments in order to present and argue the issues." (Respondent's Brief at 5-6). No citation to the record to support this claim was provided.

Statement of Facts:

1. This Appeal concerns the entry of a Civil Stalking Injunction in which the District Court found that on three separate occasions, the Appellant, John Mizik, had engaged in conduct against J. J. Abernathy, a high school teacher of his daughter, that would, as the District Court found, "Cause a reasonable man or woman to experience fear for his or her emotional health, and thus satisfy the burden of proof for a Civil stalking Injunction."

2. Mr. Mzik suffers from a self-described "mental disorder," has "brain

damage" and suffers from "Gulf War Syndrome" (Finding of Fact No. 3, Tr. at 138-39).

3. The dispute in this case arose out of the fact that Appellant's daughter Kathryn Mizik, had been caught by Mrs. Abernathy, her Advanced Placement English Teacher, cheating on a test which resulted in an initial grade of "I" or "Incomplete", although latter recorded as an "A-". (Finding of Fact No. 4 and 5, Tr. at 10-11).

4. On December 31, 2004 Mr. Mzik engaged in a telephone conversation with Mrs. Abernathy that was "acrimonious, accusatory... including raised voices by Respondent [Mr. Mzik]." (Finding of Fact No. 6, Tr. at 11-19).

5. That telephone call was "very upsetting to Mrs. Abernathy and she testified that Mr. Mzik and his wife threatened legal action if their daughter's grade wasn't changed to an "A". (Finding of Fact No. 7, Tr. at 15).

6. On January 3, 2005, Mr. Mzik and his wife met with Mrs. Abernathy and the High School Principal in his office for approximately three hours regrading their daughter's grade in the AP English Class. (Finding of Fact No. 10, Tr. at 19). During that meeting Mr. Mzik " raised his voice several times during this meeting, and at one point became so upset that he stood up, walked around Principal Fackrell's desk, grabbed a sheet of paper off of his desk, tore it out of whatever it was being held in, crumpled it and threw it. (Finding of Fact No. 13, Tr. 65-69). Principal Fackrell further described Mr. Mzik as being "argumentative," "combative"

and that hostility was directed towards Mrs. Abernathy. (Tr. at 77).

7. Principal Fackrell characterized Mr. Mzik and his wife's comments as being "accusatory, uncomplimentary and quarrelsome, rating the environment as being an "8" on a scale of "0" to 10". (Finding of Fact No. 14, Tr. at 65-69). Mr. Mzik did not deny that incident occurred, but testified that he "could not recall it happening." (Finding of Fact No. 15, Tr. at 112-13, 141).

8. Mrs. Abernathy testified that Mr. Mzik repeatedly threatened legal action if his daughter's grade was not changed and that she "felt threatened by Respondent and his wife." (Finding of Fact No. 18 and 19, Tr. at 12). Mr. Mzik later filed a Grade Disparity/Discrimination Complaint on the basis of religion and a Notification of Alleged Educator Misconduct, both of which were found to lack substantive evidence to support the claim. No appeal was taken from those decisions by Mr. Mzik. (Finding of Fact No. 47 and 48).

9. The trial court found that this meeting at the Principal's office and Respondent's conduct therein constituted a "hostile circumstance" for the purpose of meeting the burden of proof for a Civil stalking Injunction and further that the incident was a physically threatening and violent action that was intended to impose emotional harm on Mrs. Abernathy. (Finding of Fact No. 20).

10. On January 10, 2005, Mr. Mzik, while delivering a grievance letter which could have been easily done by certified mail, tried to deliver the letter personally to Mrs. Abernathy and in the course of doing so "thrust a tape recorder in Petitioner's

[Mrs. Abernathy's] face." (Finding of Fact No. 24, Tr. at 24-27). Mr. Mzik also attempted to thrust the tape recorder in the face of school office personnel, another teacher, the Principal as well as the Police Officer who was called to curtail his behavior. (Finding of Fact No. 25, Tr. at 28-29). Mr. Mzik referred to his tape recorder at trial as his "weapon." (Finding of Fact No. 32, Tr. At 114).

11. Following these two incidents on school property, the school district issued an Order which barred Mr. Mzik from school premises due to his combative, threatening and hostile actions. (Tr. at 36 and 73).

12. The trial court found that the efforts to record statements by Mrs. Abernathy and others was done without their prior consent, intentionally in an offensive, accusatory, confrontational and threatening manner, which caused Mrs. Abernathy to fear for her personal safety and had the effect of imposing emotional harm on her. (Finding of Fact No. 27).

13. The trial court found that incident was sufficient to meet the burden of proof as a second act sufficient to cause a reasonable man or woman to experience fear for his or her physical safety and was intended to impose emotional harm on Mrs. Abernathy. (Finding of Fact No. 33).

14. On May 26, 2005 the Snow Canyon High School graduation was held and Mr. Mzik's daughter was one of the senior students to receive her graduation diploma that day. (Finding of Fact No. 34, Tr. at 39). Additional security was arranged for the graduation because of the concern that Mr. Mzik would provoke an

unpleasant or public display during the graduation, which might prove to be embarrassing, confrontational or threatening, physically, emotionally or both to Mrs. Abernathy. (Finding of Fact No. 35).

15. Mr. Mzik left his seat during the ceremonies and sought out Mrs. Abernathy and her husband and after approaching within one foot of them, in a loud, accusatory and intimidating manner stated "You are the most disgusting excuse for a teacher." (Finding of Fact No. 40, Tr. at 42, 127).

16. Mr. Mzik, at that time provoked a physical altercation with Mrs. Abernathy's husband which caused Mrs. Abernathy to fear emotionally and physically to the degree that she sought medical attention the same day at the IHC Medical Clinic in St. George, Utah where she was diagnosed as having elevated blood pressure readings and trauma. (Finding of Fact No. 45, Tr. at 43, 49-51).

17. Mr. Mzik again could not explain or was not willing to explain his behavior, (Finding of Fact No. 39, Tr. at 129) but in his Brief concedes that his actions on this occasion did satisfy the requirements for finding "emotional distress." (Appellant's Brief at 17).

18. On October 28, 2005 the Fifth Judicial District Court in Washington County entered a Civil Stalking Injunction which in relevant part enjoined Mr. Mzik, as follows:

6. That the Respondent is enjoined from going within 50 yards of the Petitioner while attending private performances, practices or events of any kind associated with the Southwest Symphony where

Petitioner regularly performs as a member of the orchestra.

7. That Respondent is enjoined from going within 50 yards of the following-described areas of the Dixie Regional Medical Center located at 1380 East Medical Center Drive, St. George, Utah, or alternative location should Petitioner's volunteer services be needed at some other venue, subject, however, to Petitioner's providing Respondent and their counsel written notice at least seven (7) days before the change occurs; between the hours of 6:00 p.m. and 10:00 p.m. on Tuesdays any area where Petitioner performs volunteer counselor services for family and friends of individuals who suffer from mental illness. However, the provisions of this CIVIL STALKING INJUNCTION shall not prohibit Respondent from seeking emergency or urgent medical care at the Dixie Regional Medical Center.

8. That the Respondent is enjoined from contacting the Petitioner or any member of her immediate family, directly or indirectly, though any form of communication including written, oral, visual or electronic means, subject to occasions where Respondent happens to knowingly be in the vicinity where Petitioner or any member of her immediate family is, in which case, Respondent shall immediately extricate himself from contact with Petitioner and/or members of her immediate family.

SUMMARY OF ARGUMENT

Mr. Mzik failed to preserve the issues he asserts on appeal before the Trial Court. Failure to preserve the issues for appeal is fatal and the appeal must be dismissed. In addition, Mr. Mzik failed to marshal the evidence in support of the trial court's decision, and such failure also warrants dismissal of the appeal. The Civil Injunction was never so broad as to impose on free speech rights, nor did it fail to properly interpret and apply the term "emotional distress" as used in the Civil Stalking Injunction statute. (Utah Code Ann. §76-5-106.5 (2001)).

ARGUMENT

I

APPELLANT'S BRIEF IS PROCEDURALLY, TECHNICALLY AND SUBSTANTIVELY DEFECTIVE AND SHOULD BE STRICKEN, THE APPEAL DISMISSED AND THE JUDGMENT AND ORDER OF THE TRIAL COURT SUSTAINED.

Appellant's Brief is procedurally, technically and substantively defective and should be stricken and not considered on appeal. Appellant violates most of the Rules governing the form of Briefs. (Rules 24, 26, 27 and Form 8 of the Utah Rules of Appellate Procedure). The Brief starts with numbering on the cover page rather than the first page of his argument; the Table of Authorities does not have any citations to cases, let alone parallel citations as required by Rule; the page numbers for cited cases are in several respects incorrect, and in least one instance, the referenced case is not even cited correctly.¹ The relevant statutes and cases although cited are not set out in full or attached.

Appellant's Brief raises constitutionality challenges to the Civil Stalking Injunction statute (Utah Code Annotated §76-5-106.5 (2001)) but fails to adequately develop them, as argued below. Furthermore, Mz. Mizik has failed to preserve his claimed issues for appeal or marshal the evidence in support of the Trial Court's decision.

¹State v. Lopez cited by Appellant on page 13 of his Brief appears to actually be Salt Lake City v. Lopez, 935 P.2d 1259 (Ut. Ct. App. 1997). No citation for this case, or any case is provided in Appellant's Table of Authorities.

A. Appellant's Failed to Preserve the Issues on Appeal below.

It is well established that a party must raised issues below or they will not be heard for the first time on appeal. Interiors Contracting v. Smith, Halander, 881 P.2d 929 (Utah App. 1994). To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799,801-02 (Utah App. 1987). "Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal." Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah App. 1989).

This rule is "stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial." Id. (quoting Bogacki v. Board of Supervisors, 5 Cal.3d 771, 489 P.2d 537, 543-44, 97 Cal.Rptr. 657, 663-64 (1971), cert. denied, 405 U.S. 1030, 92 S.Ct. 1301, 31 L.Ed.2d 488 (1972)).

No where in the record does it reflect that Respondent/Appellant preserved his issues for appeal. Mr. Mzik's claim in his Brief that "[T]he trial court never allowed opening arguments, nor closing arguments in order to present and argue the issues," is unpersuasive as there is no indication in the record that he ever requested opening or closing arguments. Nor does it appear even remotely possible that the issues identified by Mr. Mzik could have been presented in opening

statements or closing arguments, even if they had been allowed.

Although neither party requested closing arguments, at the conclusion of testimony the Court had the following exchange with Mr. Mzik's Counsel:

THE COURT: Mr. Braithwaite, any finding that you want the Court to look at or specific modifications in what my order should be?

MR. BRAITHWAITE: Just with regards to the scope of the order. The 50 yards would also apply to the school. Mr. Mzik has kids that go to the school.

THE COURT: And I figured that the 50 yards is adequate in order to keep that so that the Mziks can go reasonably to the school.

However, I have to tell you that I do not have the school district as a party before me. If the school district wishes to take some action regarding the Mziks, that's not before me. Only Mrs. Abernathy is before me. So I cannot impact the school district. They are not a part to this litigation, Counsel.

The protective zone, the 50 yards that I contemplated would allow the Abernathy – Mr. And Mrs. Abernathy to be secure and still allow the Mziks to look after the education of their other daughters.

MR. BRAITHWAITE: So it would be like 50 yards from Mrs. Abernathy within the school?

THE COURT: Yes, Counsel.

MR. BRAITHWAITE: Would that be more accurate?

THE COURT: That is what I am thinking about.

MR. BRAITHWAITE: Thank you, your Honor.

(R. at 266, pg. 144-45).

In addition, a copy of the proposed Findings of Fact, Conclusions of Law and

Order in re: Civil stalking Injunction were provided for Mr. Mzik's review and approval prior to being entered by the Court. Although Mr. Mzik's Counsel refused to "approve them as to form", the Court nevertheless, approved, signed and entered the Order on October 27, 2005.

Mr. Mzik subsequently filed written objections to the Findings (R. at 245-47). Respondent did not assert the issues he now raises on appeal in those objections. Although a Hearing was held on those objections, Respondent has not provided a transcript, although the Court Record shows that they were denied. (R. at 260).

A party is not allowed to raise issues for the first time on appeal and Mr. Mzik's failure to preserve his asserted issues for appeal is fatal to his appeal.

B. Appellant Failed to Marshal the Evidence in Support of the Trial Court's Decision.

An Appellant has a duty to marshal the evidence in support of the trial court's decision and show that it is insufficient. Gilmor v. Wright, 850 P.2d 431, 433 (Utah 1993). It is well-established that a party challenging a Trial Court's Findings of Fact has the burden of establishing that those Findings are not supported by the evidence and thus, are clearly erroneous. See, Utah R. Civ. P. 52(a); Cambelt International Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987). Although Mr. Mzik couches his issues in legal terms, his Brief clearly reflects that he is also challenging the trial court's Findings as well.

In order to successfully challenge a Trial Court's findings of fact on appeal, an Appellant must list all the evidence supporting the Findings and then demonstrate

that the evidence is inadequate to sustain the Findings, when viewed in a light most favorable to the Court's decision below. Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998).

Utah's Courts have stated that the marshaling process is not unlike being the devil's advocate. An Appellant may not merely present selected evidence favorable to his or her position without presenting any of the evidence supporting the lower Court's Findings. See, Whitewar v. Labor Commission, 973 P.2d 982 (Utah App., 1998).

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inventory Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Marshaling the evidence on an appeal is a process fundamentally different from that of presenting their claims at the Hearing. As the Utah Supreme Court explained in Chen v. Stewart, 2004 UT 82, 100 P.3d 1177 (Utah, 2004), in a recent, extensive attempt to reiterate the requirements of marshaling:

Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position [citing cases]. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact [citing cases]. Furthermore, appellants cannot shift the burden of marshaling by falsely claiming that there is no evidence in support of the trial court's

findings. Id. at 1195.

The Court went on to emphasize that, "If the marshaling requirement is not met, the appellate court has grounds to affirm the court's findings on that basis alone" and "we assume that the evidence supports the trial court's findings." Id. at 1196. See also, Merriam v. Industrial Commission, 812 P.2d 447, 450 (Utah Ct. App. 1991); Featherstone v. Industrial Commission, 877 P.2d 1251, 1254 (Utah Ct. App. 1994).

In this case, the trial court made 48 specific Findings of Fact to support the imposition of the Civil Stalking Injunction. (See, Findings of Fact, Conclusions of Law and Order in re: Civil stalking Injunction, attached hereto as Addenda "B" and found at R. at 233-243).

Mr. Mzik makes almost no attempt to marshal the evidence and cited at best 26 so called "statements of fact," most of which are argumentative and do not refer to the trial court's findings. Mr. Mzik omits significant Findings of Fact found by trial court as well as substantial supporting facts which Mrs. Abernathy cited in the Statement of Facts above.

Few of those significant facts found in the trial court's Findings and the Record appears in Mrs. Mzik's Statement of Facts. The omissions are striking and it can hardly be said that any real attempt to marshal the evidence was made by him. Indeed, although Mr. Mzik acknowledges his duty to marshal the evidence, his Brief devotes only two sentences in his entire brief to "marshaling the evidence." (See,

Appellant's Brief at 15). That scant effort blatantly shows the failure to marshal.

In Interiors Contracting v. Smith, Halander, 881 P.2d 929 (Utah App. 1994), the Court elaborated on the burden to marshal the evidence.

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very finds the appellant resists. West Valley v. Majestic Inv. Co., 818 P.2d 1311, 1315. Coonrad's briefs merely re-emphasize evidence it deems supportive of its position, while ignoring evidence supportive of the trial court's findings. This effort thus fails at the threshold level of putting before us the evidence upon which the trial court's findings rest. Id. at 933.

II

THE TRIAL COURT PROPERTY INTERPRETED AND APPLIED THE TERM "EMOTIONAL DISTRESS" AS IT IS USED IN THE UTAH CIVIL STALKING INJUNCTION STATUE (UTAH CODE ANN. §76-5-106.5).

Mr. Mzik never develops a cogent argument on this point. Although he focuses entirely on the "emotional distress" aspect, totally ignoring that the applicable statute, Utah Code Annotated §76-5-106.5 (2001) defines stalking as:

(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.

The Statute specially includes the element of "fearing bodily injury to himself or a member of his immediate family." (Utah Code Annotated, §76-5-106.5 (2)(a)(i) (2001)). The Court in its Conclusion of Law specially concluded:

1. That the actions and statements made by the Respondent on January 3, 2005, January 10, 2005 and May 26, 2005 were threatening, intimidating and offensive to the Petitioner and others, and were intended to and did result in physical and emotional harm to Petitioner.

The following instances from the Record are telling:

On December 31, 2004 Mr. Mzik engaged in a telephone conversation with Ms. Abernathy that was "acrimonious, accusatory... including raised voices by Respondent." (Finding of Fact No. 6, Tr. at 11-19). That telephone call was "very upsetting to Petitioner and she testified that Respondent and his wife threatened legal action if their daughter's grade wasn't changed to an "A". (Finding of Fact No. 7, Tr. at 15). Although not specifically found to be a predicate act for purposes of Civil Stalking Injunction, it well could have been.

On January 3, 2005, Mr. Mzik and his wife met with Petitioner and the High School Principal in his office for approximately three hours regarding their daughter's grade in the AP English Class. (Finding of Fact No. 10, Tr. at 19). During that

meeting Mr. Mzik “raised his voice several times during this meeting, and at one point became so upset that he stood up, walked around Principal Fackrell’s desk, grabbed a sheet of paper off of his desk, tore it out of whatever it was being held in, crumpled it and threw it. (Finding of Fact No. 13, Tr. 65-69). Principal Fackrell further described Mr. Mzik as being “argumentative,” “combative” and that hostility was directed towards Petitioner. (Tr. at 77).

Principal Fackrell described the incident as “accusatory, uncomplimentary and quarrelsome, rating the environment as being an “8” on a scale of “0” to 10”. (Finding of Fact No. 14, Tr. at 65-69). Mr. Mzik did not deny that incident occurred as Principal Fackrell described it, but perhaps due to his “mental disorder” and “brain disorder” testified that he “could not recall it happening.” (Finding of Fact No. 15, Tr. at 112-13, 141). The Court characterized the incident as “physically threatening and violent.” (R. at 266).

Following these two incidents on school property, the school district had Mr. Mzik “trespassed” and barred from school premises due to his combative, threatening and hostile actions. (Tr. at 36 and 73).

The trial court found that Mr. Mzik’s conduct at the January 3, 2005 meeting at the Principal’s office (which he doesn’t even remember) was a “hostile circumstance,” and a “physically threatening and violent action that was intended to impose harm on Mrs. Abernathy and thus was sufficient to constitute:

“... the first act sufficient to cause a reasonable man or woman to

experience fear for his or her physical and/or emotional health; and thus this incident constituted a "hostile circumstance" for purposes of meeting the burden of proof for a Civil Stalking Injunction." (Finding of Fact No.20).

The trial court next found that Mr. Mzik's efforts on January 10, 2005 to record statements by Mrs. Abernathy and others was done without their prior consent, intentionally in an offensive, accusatory, confrontational and threatening manner, which caused Mrs. Abernathy to fear for her personal safety and had the effect of imposing emotional harm on her. (Finding of Fact No. 27). Mr. Mzik characterized his recording device as his "weapon" (Finding of Fact No. 32, Tr. at 114). The trial court found that the incident was sufficient to meet the burden of proof as a second act sufficient to cause a reasonable man or woman to experience fear for his or her physical safety and was intended to impose emotional harm on Petitioner. (Finding of Fact No. 33).

On May 26, 2005 at the Snow Canyon High School graduation Mr. Mzik left his seat during the ceremonies and sought out Mrs. Abernathy and her husband and after approaching within one foot of them, in a loud, accusatory and intimidating manner, stated "You are the most disgusting excuse for a teacher." (Finding of Fact No. 40, Tr. at 42, 127).

Mr. Mzik then provoked a physical altercation with Ms. Abernathy's husband. The incident caused her to fear emotionally and physically to the degree that she sought medical attention the same day at the IHC Medical Clinic in St. George, Utah

where she was diagnosed as having elevated blood pressure readings and trauma. (Finding of Fact No. 45, Tr. at 43, 49-51).

Mr. Mzik again could not explain or was not willing to explain his behavior, (Finding of Fact No. 39, Tr. at 129), but in his Brief concedes that his actions on this occasion did satisfy the requirements for finding "emotional distress." (Appellant's Brief at 17).

Appellant's arguments on this point are rambling and unfocused. Rather than a mere two instances of "fear of bodily injury or emotional distress" as required by the Statute, the record reflects that there were certainly three and perhaps even four instances, some of which Mr. Mzik admits he can not deny or explain because he has no memory of their occurring. Under any standard, Mrs. Abernathy clearly met her burden of proof that Mr. Mzik was intentionally and knowingly engaging in a course of stalking conduct directed at Ms. Abernathy.

Although the Mr. Mzik in his Brief stated this issue is also whether a "public employee should have a higher standard (Appellant's Brief at 13), he provided absolutely no argument, case citation or legal analysis to support that bald assertion. Accordingly there is nothing for Mrs. Abernathy to address and that issue should not be considered on appeal. Kaiserman Associates, Inc. Francis Towns, 977 P.2d 462 (1998).

"[T]his court is not a depository in which the appealing party may dump the burden of argument and research." State v. Thomas, 961 P.2d 299, 305 (Utah 1998)

(quotations and citations omitted). "[R]ule 24(a)(9) [of the Utah Rules of Appellate Procedure] requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *Id.* It is well established that Utah appellate courts will not consider claims that are inadequately briefed. See, e.g., State v. Lucero, 2002 UT App 135, ¶ 8, 446, 47 P.3d 107; State v. Marquez, 2002 UT App 127, ¶ 12, 54 P.3d 637.

III

THE CIVIL STALKING INJUNCTION ISSUED IN THIS CASE WAS NOT UNCONSTITUTIONALLY OVERLY BROAD SO AS TO LIMIT A PERSON'S RIGHT TO FREE SPEECH AND CRITICISM.

The Appellant's argument here is specifically limited to "free speech and criticism". In support of this claim he only cites the Utah Constitution, Article 1 §1 and cases stating the proper standard of review for constitutional challenges. Mrs. Abernathy does not dispute that both the United States and Utah Constitutions guarantee the right to free speech, nor that a challenge to the constitutionality of a statute presents a question of law.

A constitutional challenge to a statute presents a question of law, which is reviewed for correctness. When presented with such a challenge, this Court presumes the statute is valid and any reasonable doubt is found in favor of constitutionality. State v. Morrison, 2001 UT 73, 31 P.3d 547.

Mr. Mzik does not adequately develop and assert a constitutional challenge to which can reasonable be required to respond. The entire argument as presented

by Mr. Mzik is devoid of legal analysis or case support. Although Mr. Mzik cites to specific testimony given by Mrs. Abernathy before the trial court, none of the referenced testimony in any way supports the challenge to "free speech and criticism." Constitutional issues are avoided if a case can be decided on other grounds. West v. Thomas Newspapers, 872 P.2d 999 (Utah 1994).

The only claim of a violation of free speech occurs when Appellant alleges that "Mr. Mzik did nothing to abuse his right of free speech in crumpling up a piece of paper and throwing it not toward the Petitioner and in personally serving a letter of grievance with a microphone." (Respondent's Brief at 18).

There is no analysis of that claim that Mr. Mzik was engaging in "free speech" by those actions. Rather, they appear to be assaults. The trial court characterized it as hostile (Finding of Fact No. 20). Although Mr. Mzik claims in his Brief that the crumpled paper was not thrown at Mrs. Abernathy, that allegation is not supported by the record, (Finding of Fact No. 13, Tr. 65-69) and Mr. Mzik testified that he could not even remember the event occurring, while the trial court suggested that he may merely be "choosing not to remember" . (Finding of Fact No. 15)

Mr. Mzik claims that he only "personally served a letter of grievance with a microphone" is flatly contradicted by the record that shows that such actions were also an assault in that Mr. Mzik also attempted to thrust the tape recorder in the face of school office personal, another teacher, the Principal as well as the Police Officer who was called to curtail his behavior. (Finding of Fact No. 25, Tr. at 28-29). Mr.

Mzik specifically referred to his tape recorder as his "weapon" (Finding of Fact No. 32, Tr. at 114) which more than anything else was how he was using it and what he intended of its use.

In fact, the local school district independently found that this was not an exercise of free speech, but rather that Mr. Mzik's extreme and outrageous actions warranted barring him from school premises due to his combative, threatening and hostile actions. (Tr. at 36 and 73).

The prohibition on contact and the imposition of a reasonable buffer zone between the parties had no relation to the Appellant's free speech rights, as he continued to assert complaints to the School Board, the Courts and governmental entities. (Finding of Fact No. 47 and 48).

The Record clearly shows that Mr. Mzik could not explain or was not willing to explain his behavior, (Finding of Fact No. 39, Tr. at 129) and his Brief even concedes the point that his actions on this occasion did satisfy the requirements for finding "emotional distress." (Appellant's Brief at 17).

This Court should not consider Appellant's constitutional challenge because it is inadequately developed. There is no case authority or legal analysis for Mrs. Abernathy to respond to. She should not be required to guess as to the factual and legal underpinnings of Mr. Mzik's argument and refute them in advance of them being actually argued. He should not be allowed to advance this argument with legal analysis or case authority beyond that in his initial brief, which was non-existent,

especially in a Reply Brief or at oral argument. To allow such a tactic would allow an Appellant to sandbag an Appellee who would have inadequate notice and virtually no opportunity to adequately respond to an Appellant's argument.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

The Civil Stalking Injunction was properly entered in this matter. This Court should dismiss the appeal and remand this case to the District Court for an award of costs and attorney's fees.

DATED this nd 2nd day of October, 2006.

DABNEY & DABNEY, p.c.



Virginius Dabney
Counsel for Appellee, J.J. Abernathy

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2006, a copy of the foregoing BRIEF OF APPELLEE J.J. ABNERNATHY was hand-delivered and/or mailed, as follows:

UTAH COURT OF APPEALS
450 South State Street - 5TH Floor
P.O. Box 140230
Salt Lake City, Utah 84111-0230

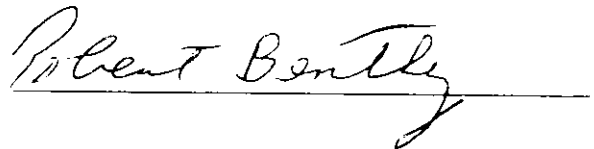
(1) original and (7) copies

Mr. Reed R. Braithwaite
ASCIONE, HEIDEMAN & McKAY
50 East 100 South, Suite 101
St. George, Utah 84770

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Addendum A

Utah Code Annotated, §76-5-106.5 (2001)

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.

Addendum B

Findings of Fact, Conclusions of Law and Order
in re: Civil Stalking Injunction
Fifth Judicial District Court
Hon. James I. Shumate, Presiding
October 27, 2005

FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

J. J. ABERNATHY,

Petitioner,

-VS-

JOHN MZIK,

Respondent.

*FINDINGS OF FACT, CONCLUSIONS
OF LAW and ORDER IN RE*

CIVIL STALKING
INJUNCTION

Case No. 050500870

Judge: Hon. James L. Shumate

BASED UPON the parties' and witness' testimony, documentation submitted at hearing, the parties' pleadings and representation of counsel, and good cause appearing therefore, the Court being fully advised in the premises, the following is hereby entered:

FINDINGS OF FACT

1. That Petitioner is a resident of Washington County, Utah and is employed as a teacher at Snow Canyon High School, and one of her students was Kathryn Mzik, the daughter of the Respondent.
2. That Respondent is a resident of Washington County, Utah and is employed as an instructor at Dixie State College in St. George, Utah, and is the father of the student, Kathryn Mzik.
3. That Respondent is receiving Veterans Benefits for a 100% armed services disability described as a "seizure disorder" in his medical records but which he described as a "mental disorder" in his testimony.
4. That the dispute in this case arose out of an investigation by the Petitioner into papers of her students in her Advanced Placement English Literature and Composition Class [hereinafter referred to as "AP English Class"], which while she was reviewing them, appeared to be the result of academic dishonesty by several students, something which is

1 strictly prohibited in Petitioner's AP English Class; and after investigation, including
2 telephone calls and personal visits by Principal Fackrell with several students which
3 eventually proved out to be the case.

4 5. That Respondent's daughter, Kathryn Mzik, was one of those students, and
5 on December 30, 2004, her "A-" (92%) grade was submitted as an "I" (Incomplete), and on
6 January 4, 2005, was finally recorded as an "A-".

7 6. That on December 31, 2004 Respondent and his wife participated in a
8 telephone conversation regarding their daughter's grade in Petitioner's AP English class,
9 which became a heated conversation with acrimonious, accusatory statements and
10 questions, including raised voices by Respondent and his wife.

11 7. That this telephone call was very upsetting to the Petitioner and she testified
12 that Respondent and his wife threatened legal action if their daughter's grade wasn't
13 changed to an "A".

14 8. That Respondent's wife said to the Petitioner that Petitioner was
15 unprofessional and reminded her several times that they had engaged an attorney, and
16 were going to subpoena all of the documentation on grades in Petitioner's AP English
17 Class.

18 9. That although there was some level of hostility present during this telephone
19 call, there was not enough to satisfy the burden of proof for a Civil Stalking Injunction.

20 10. That on January 3, 2005, Respondent and his wife met with Petitioner and
21 Snow Canyon High School Principal, Mr. Brent Fackrell, in his office for approximately three
22 (3) hours, again, regarding Respondent's daughter's grade in Petitioner's AP English Class.

23 11. That during that meeting, voices of Respondent and his wife were raised and
24 concerns by them expressed about their daughter's grade; and Respondent's wife testified
25 that she became so upset that she pounded her fist on the principal's desk several times
26 during that meeting.

27 12. That Respondent's wife also testified that during that meeting, she accused
28 Petitioner of being mentally unstable.

13. That Respondent raised his voice several times during this meeting, and at one point became so upset that he stood up, walked around principal Fackrell's desk, grabbed a sheet of paper off of his desk, tore it out of whatever it was being held in, crumpled it and threw it.

14. That Principal Fackrell's description of this incident was most telling, and was given in very distinct terms; and that he characterized the Respondent and his wife's comments as being accusatory, uncomplimentary and quarrelsome, rating the environment as being an "8" on a scale of "0" to "10".

15. That Respondent did not deny that the incident occurred, instead testifying that he could not recall it happening. In any event, Respondent either did not remember or chose not to remember, and Principal Fackrell's testimony of the event is considered to be more credible than Respondent's.

16. That Principal Fackrell was the most credible witness concerning this incident because he was the one with the least involvement, was retired and had the least motivation to shade the truth one way or the other.

17. That the meeting became so intense, due to the Respondent and his wife's combined and unrelenting pressure to force Petitioner to change their daughter's grade, that Petitioner by the time the meeting was over concluded that Respondent and his wife, in her words, "... were out to get me."

18. That Petitioner testified that Respondent and his wife again threatened legal action if their daughter's grade wasn't changed to an "A". She also stated that Respondent and his wife repeatedly questioned her abilities as a teacher.

19. That Petitioner testified that she felt threatened by Respondent and his wife, and thought that they would do anything to discredit her integrity.

20. That this incident was the first act sufficient to cause a reasonable man or woman to experience fear for his or her physical and/or emotional health; and that this incident constituted a "hostile circumstance" for purposes of meeting the burden of proof for a Civil Stalking Injunction.

1 21. That this incident was a physically threatening and violent action, was
2 intended to impose emotional harm on Petitioner, and was sufficient to meet the burden of
3 proof for a Civil Stalking Injunction.

4 22. That on January 10, 2005, Respondent, in a misguided attempt to deliver a
5 grievance letter which could have been easily done by certified mail, took his tape recorder
6 along to Snow Canyon High School and tried to deliver the letter personally to Petitioner

7 23. That in doing so, Respondent chose a confrontational method rather than the
8 cold, "U.S. Mail delivers it" method of communicating a grievance under the Washington
9 County School Board Rules.

10 24. That in doing so, Respondent thrust the tape recorder in Petitioner's face, but
11 she declined to accept the attempted service of the letter upon her or respond to
12 Respondent's physical presence, and asked the office staff to call the police. She further
13 testified that she felt that her privacy and work environment had been "invaded."

14 25. That Respondent also attempted to get Snow Canyon High School office staff
15 and another teacher, Robert Lancaster, as well as Principal Brent Fackrell when he entered
16 the Snow Canyon High School office, and even later thrust the tape recorder at Police
17 Officer Craig Hugie, in an effort to record statements on his tape recorder.

18 26. That Principal Fackrell, Officer Hugie and Respondent met in Principal
19 Fackrell's private office, and Respondent said on two occasions while in Principal Fackrell's
20 office that he was going to go to Court if his daughter's grade was not changed.

21 27. That these efforts to record statements by Petitioner and others was done
22 without their prior knowledge or consent, and was intentionally done in an offensive,
23 accusatory, confrontational and threatening manner, which caused Petitioner and others to
24 fear for their personal privacy and safety. It also had the effect of imposing emotional harm
25 on them as well.

26 28. That Respondent testified that he had been a Claims Adjuster for an
27 insurance company many years before, and used a tape recorder to record witness'
28 statements and others in his job. He further indicated that he found it helpful to record

statements and that he was familiar with how to use one.

29. That Respondent could have confirmed delivery of the letter by registered/return receipt requested mail, but chose instead to use his tape recorder to do so, which was significantly different and more personal than delivery by mail would have been.

30. That Respondent failed to meaningfully address or offer any reasonable explanation of why he felt it was necessary for him to confront Principal Fackrell, Snow Canyon High School office staff, Teacher Robert Lancaster and Police Officer Hugie, in addition to the Petitioner, with his tape recorder.

31. That Respondent chose to tape record the delivery of the letter and confront others at the Snow Canyon High School offices was clearly more confrontational and intimidating than other means available to him. These actions by Respondent verbally provoked the incident.

32. That most telling was Respondent's reference in his testimony to his tape recorder as his "weapon", a term which rather accurately described how he viewed his use of his tape recorder at the time of the incident.

33. That this incident was the second act sufficient to cause a reasonable man or woman to experience fear for his or her physical safety and was intended to impose emotional harm on Petitioner, and was sufficient to meet the burden of proof for a Civil Stalking Injunction.

34. That on May 26, 2005, Snow Canyon High School graduation was held at the Dixie State College Burns Arena, and Respondent's daughter, Kathryn Mzik, was one of the Senior students who was to receive her graduation diploma that day.

35. That because of concern by Principal Fackrell of Snow Canyon High School and, Max Rose, Superintendent of the Washington County School District, Petitioner was told not to lead the teachers onto the graduation podium or sit on the podium with the other teachers, and was given permission - if she so chose - not to attend graduation ceremonies at all, because of concern that Respondent would provoke, if given the chance, an unpleasant or public display during the graduation, which might prove to be embarrassing.

1 confrontational or threatening, physically, emotionally or both, in such a way as to detract
2 from the program and ceremony.

3 36. That additional security had been arranged for the graduation because of this
4 concern.

5 37. That Petitioner agreed not to lead the teachers onto the podium or sit on the
6 podium with her fellow teachers, but, because a number of her students were graduating
7 that day, decided to attend but chose a seat that was as far away as possible from the
8 podium so she and her husband would not be readily observed or easy to locate.

9 38. That at approximately 6:00 p.m. that evening, Respondent left his seat when
10 his daughter received her diploma and sought out Petitioner and her husband, by locating
11 them on the back row of the Burns Arena in seats that were between 200 and 300 feet from
12 the graduation podium.

13 39. That Respondent upon spotting Petitioner and her husband, still went up to
14 them, and for reasons that he could not explain or was not willing to explain, verbally
15 provoked a hostile confrontation with Petitioner and her husband.

16 40. That Respondent moved toward Petitioner and when he was within one foot of
17 her said in a loud, accusatory and intimidating manner, "You are the most disgusting excuse
18 for a teacher." These actions and statements by the Respondent provoked the subsequent
19 actions and statements by Petitioner and her husband, all of which were justifiable in light of
20 Respondent's stalking behavior.

21 41. That shortly before Respondent confronted Petitioner and her husband,
22 Petitioner's husband testified that he observed Respondent's eyes darting as if he was
23 clearly looking for someone.

24 42. That the Respondent's actions and statement were the third time Respondent
25 threatened, intimidated and reasonably caused a fear of potential harm to Petitioner.

26 43. That Petitioner's husband told Respondent to get away from his wife, and
27 when Respondent continued to move toward them, responded physically in order to insure
28 a separation between him and his wife, the Petitioner, and Respondent, by pushing him

1 away with open hands and in a way to protect his wife. Although it was not a particularly
2 gentle push, it was sufficient to push Respondent back a couple of feet. Thereafter,
3 Petitioner's husband made a fist with both hands in a way to protect his wife and make it
4 clear that he was willing to defend his wife if it was necessary.

5 44. That Respondent, once he had regained his balance, moved slightly forward
6 and asked Petitioner's husband, "Do you want to attack me?" and "Hey buddy, do you want
7 to go to jail?" Petitioner's husband, in response, said "Leave my wife alone;" and told him to
8 "Get away from us."

9 45. That the incident at the Burns Arena caused Petitioner to fear emotionally and
10 physically to a degree that she sought medical attention later that same day at the IHC
11 Medical Clinic in St George, Utah where she was diagnosed as having elevated blood
12 pressure readings and trauma.

13 46. That the incident was a physically threatening provocation intended to impose
14 physical as well as emotional harm to Petitioner and her husband, and was sufficient to
15 meet the burden of proof for a Civil Stalking Injunction.

16 47. That Respondent and his wife filed a Grade Disparity/Discrimination
17 Complaint on the basis of religion with the Washington County School District, which the
18 Superintendent found was without merit. Specifically, in his letter dated June 10, 2005,
19 Superintendent Max Rose wrote, "It is my judgment that no substantive evidence exists to
20 support the claim of religious discrimination." No timely appeal was taken from that
21 Decision.

22 48. That Respondent also filed a "Notification of Alleged Educator Misconduct"
23 on July 19, 2005 with the Utah with the Utah Professional Practices Act Commission which
24 after investigating the Complaint concluded that the Washington County School District had
25 "... handled the situation adequately and that no further licensing action was warranted."
26 No timely appeal was taken from that Decision.

27 CONCLUSIONS OF LAW

28 1. That the actions and statements made by the Respondent on January 3, 2005,

1 January 10, 2005 and May 26, 2005 were threateneing, intimidating and offensive to the
2 Petitioner and others, and were intended to and did result in physical and emotional harm to
3 Petitioner.

4 2. That these actions and statements by Respondent on all three occasions were
5 sufficient to meet the burden of proof for a Civil Stalking Injunction for the reason that each
6 constituted prohibited conduct found in the Utah Civil Stalking Injunction Statute.

7 3. That a Civil Stalking Injunction should be entered against Respondent.

8 ORDER

9 re

10 CIVIL STALKING INJUNCTION

11
12 BASED UPON the testimony of the parties, representations and argument of
13 counsel, and the Court's review the pleadings herein, and having determined that there is
14 reason to believe that an offense of Stalking has occurred, and that the Respondent is the
15 Stalker, and good cause appearing therefore, it is hereby

16 Ordered, as follows:

17 1. That the Respondent is enjoined from stalking the Petitioner or any member of
18 her immediate family, as more fully set forth herein.

19 2. That "Stalking" for the purposes of this Injunction is defined in Utah Code
20 Annotated, Section 77-3a-106.5, as follows: As used in this section:

21 (a) "Course of conduct" means repeatedly maintaining a visual or physical
22 proximity to a person or repeatedly conveying verbal or written threats or
23 threats implied by conduct or a combination thereof directed at or toward a
24 person.

25 (b) "Immediate family" means a spouse, parent, child, sibling, or any other person
26 who regularly resides in the household or who regularly resided in the
27 household within the prior six months.

28 (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 members 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.

3. That Respondent is enjoined from going within 50 yards of the Petitioner's home in Bloomington located at 3553 Sugar Leo Road, St. George, Utah.

4. That Respondent is enjoined from going within 50 yards of the Petitioner's regular places of worship, the LDS Bloomington Stake Center, located at 200 West Brigham Road, St. George, Utah; the LDS Chapel located at 3371 Mulberry Drive, St. George, Utah; and the LDS Chapel located at 3519 Manzanita Road, St. George, Road.

5. That Respondent is enjoined from going within 50 yards of Petitioner when she is at Snow Canyon High School located at 1385 North Lava Flow Drive, St. George, Utah

1 where Petitioner teaches.

2 6. That the Respondent is enjoined from going within 50 yards of the Petitioner
3 while attending private performances, practices or events of any kind associated with the
4 Southwest Symphony where Petitioner regularly performs as a member of the orchestra.

5 7. That Respondent is enjoined from going within 50 yards of the following-described
6 areas of the Dixie Regional Medical Center located at 1380 East Medical Center
7 Drive, St. George, Utah, or alternative location should Petitioner's volunteer services be
8 needed at some other venue, subject, however, to Petitioner's providing Respondent and
9 their counsel written notice at least seven (7) days before the change occurs; between the
10 hours of 6:00 p.m. and 10:00 p.m. on Tuesdays; any area where Petitioner performs
11 volunteer counselor services for family and friends of individuals who suffer from mental
12 illness. However, the provisions of this CIVIL STALKING INJUNCTION shall not prohibit
13 Respondent from seeking emergency or urgent medical care at the Dixie Regional Medical
14 Center.

15 8. That the Respondent is enjoined from contacting the Petitioner or any
16 member of her immediate family, directly or indirectly, through any form of communication
17 including written, oral, visual or electronic means; subject to occasions where Respondent
18 happens to knowingly be in the vicinity where Petitioner or any member of her immediate
19 family is, in which case, Respondent shall immediately extricate himself from contact with
20 Petitioner and/or members of her immediate family.

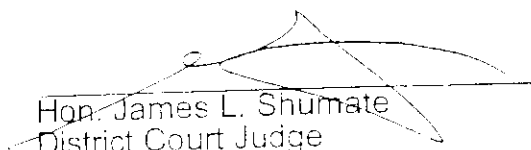
21 9. That Respondent is admonished that this is an official Court Order; that the Court
22 may find him in contempt if he disobeys any of the provisions of the Order; and that he may
23 be arrested and prosecuted for the crime of Stalking and any other crime he commits if he
24 disobeys any of the provisions of this Order.

25 10. That the provisions of all prior injunctions in Case No. 050500870 are vacated
26 and replaced by the provisions of this CIVIL STALKING INJUNCTION.

27 11. That the provisions of this CIVIL STALKING INJUNCTION shall remain in effect
28 for three years, or until further Order of the Court.

1 Dated this 27 day October, 2005.

2 FIFTH DISTRICT COURT

3
4 
5 Hon. James L. Shumate
6 District Court Judge

7 APPROVED AS TO FORM:

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9
10 Virginius Dabney
11 Counsel for Petitioner

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13 _____
14 Reed R Braithwaite
15 Counsel for Respondent
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