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Bryner v. Bryner : Brief of Appellee

Utah Court of Appeals

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Roger Bryner; Pro Se.

Emily Broadhead-Smoak; Thomas J. Burns; Cohne, Rappaport & Segal; Attorneys for Appellee .

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JURISDICTION

This court has jurisdiction over this matter pursuant to Utah Code sections 78-2a3(2)(h), (j) (2004).

ISSUES PRESENTED FOR REVIEW

ISSUE 1. Did the trial court properly dismiss Appellant Roger Bryner’s petition for a civil stalking injunction?

Standard of Review: This court reviews a trial court’s legal conclusions for correctness and its factual findings for clear error. *See Covey v. Covey*, 2003 UT App 380, ¶ 17, 80 P.3d 553. To the extent that the issues presented in this case involve a mixed question of law and fact, such as determining whether “a given set of facts come within the reach of a given rule of law,” this court reviews legal questions for correctness while granting the trial court discretion in its application of the law to the given set of facts. *Id.*

ISSUE 2. Did the trial court act properly in the face of Roger Bryner’s motion to recuse?

Standard of Review: Determining whether a trial court acted properly in the face of a motion to recuse presents a question of law that this court reviews for correctness. *See Barnard v. Murphy*, 852 P.2d 1023, 1024 (Utah Ct. App. 1993) (*Barnard I*); *see also State v. Alanzo*, 973 P.2d 975, 979 (Utah 1998); *In re M.L.*, 965 P.2d 551, 556 (Utah Ct. App. 1998).

SUMMARY OF THE ARGUMENTS

Although Appellant Roger Bryner (“Bryner”) argues that the trial court erred in the way that it addressed his Petition for a Civil Stalking Injunction, and erred in dismissing his petition and dissolving his ex-parte injunction against Appellee Svetlana Bryner (“Lana”), his arguments should be rejected. To successfully seek a civil stalking injunction, a party is required to present sufficient evidence to prove that the opposing party engaged in a course of conduct that would have caused a reasonable person to suffer emotional distress. Furthermore, under this court’s interpretation of the civil stalking injunction statute, conduct that would cause a reasonable person mere anxiety or frustration is insufficient to support an injunctions, but instead the conduct must be somehow threatening in nature.

Here, Bryner failed to present the trial court with any evidence that would suggest that Lana had engaged in a course of conduct directed at him, let alone that her conduct would have caused a reasonable person to suffer emotional distress that would be sufficient to satisfy the requirements under the statute. Instead, the only evidence presented that supported any of Bryner’s allegations was introduced by Lana, and her testimony supported just one of Bryner’s allegations. This one allegation certainly does not rise to the level of a “course of conduct,” and although the conduct may not have been optimal, it also was insufficient to support a conclusion that it alone would have caused a reasonable person to suffer emotional distress.

Moreover, even if the trial court had accepted all of Bryner's allegations as true, taken as a whole the allegations would not produce emotional distress as defined by this court. Instead, the conduct Bryner alleged merely highlighted the fact that the parties were engaged in a protracted and unpleasant custody litigation. *See Salt Lake City v. Lopez*, 935 P.2d 1259, 1264 (Utah Ct. App. 1997) (holding that "[l]imited contact during legitimate innocent encounters such as picking up children [or attempting to engage in court ordered telephone contact], without conduct directed at causing physical harm or emotional distress to an intended person, does not fall under that [stalking] statute's purview"). Simply stated, Bryner failed to allege sufficient grounds to support his petition for a civil stalking injunction and he failed to produce evidence to support virtually all of his allegations. In the absence of proper allegations, or evidence that Lana had engaged in threatening conduct, the trial court properly dismissed Bryner's complaint and dissolved the ex-parte protective order that had been in place pending the hearing.

Further, the trial court acted properly in the face of Bryner's motion to recuse Judge Lindberg. As fully explained by this court, once the trial court is presented with a motion to recuse, it has only two acceptable courses of action. First, the court can deem the motion well-grounded and reassign the case. Second, if the court instead concludes that the grounds offered in the motion are not legally sufficient, it is required to refer the matter to another judge for review. The matter is then stayed until the judge to whom the matter is referred makes a determination concerning the motion, and if that judge concurs

with the trial court, the trial court is then authorized to proceed with the case. Judge Lindberg followed this procedure. After the case was transferred to Judge Lindberg, as a result of Lana's Motion, Bryner notified the court that he had previously filed a motion to recuse Judge Lindberg in the parties' domestic case, and that he was renewing that motion in this case through incorporation by reference. Upon learning of Bryner's motion, Judge Lindberg evaluated the legal sufficiency of Bryner's claims, and after she concluded that the grounds Bryner asserted in the motion were insufficient to warrant recusal, she referred the matter to the Associate Presiding Judge of the Third District Court, the Honorable Robert Hilder, for further review. She also stayed any further action on the case pending Judge Hilder's decision. Only after Judge Hilder informed the court that he too found the grounds offered in the motion legally insufficient to warrant recusal did the trial court permit itself to carry on with the scheduled evidentiary hearing. Such conduct comports precisely with the requirements set under rule 63 of the Utah Rules of Civil Procedure, and as articulated that Utah's appellate courts, and Bryner's arguments concerning his motion to recuse should be summarily rejected.

Finally, to the extent that the trial court committed any errors in this case, the errors had no impact on its outcome. Specifically, to be entitled to a civil stalking injunction, Bryner was required to prove that Lana had engaged in a course of conduct, directed at him, that would have led a reasonable person in his position to suffer the legal definition of emotional distress. *See Ellison v. Stam*, 2006 UT App 150, ¶ 30, 136 P.3d

1242 (quoting *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 70 (Utah 1998)) (defining emotional distress as the condition of being “unable to adequately cope with the mental stress engendered by the circumstances of the case”).

Taken as a whole, the Byner’s allegations were facially insufficient to satisfy this burden. Bryner made no effort to allege that Lana had ever engaged in threatening behavior, but instead, he alleged that she had engaged in conduct that would have, at most, caused a reasonable person to suffer some degree of anxiety or annoyance, which, as this court has clearly stated, is insufficient to warrant the imposition of a civil stalking injunction. Consequently, even if the court had committed the errors that Bryner claims on appeal, these errors had no impact on the outcome of this case; therefore, the alleged errors are harmless as a matter of law.

DETERMINATIVE CONSTITUTIONAL OR STATUTORY PROVISIONS

There are no constitutional provisions that are determinative on this appeal. However, as reflected in *Ellison v. Stam*, 2006 UT App 150, 136 P.3d 1242, both section 77-3a-101 (2004) and section 76-5-106.5 of the Utah Code are implicated in the instant appeal.

STATEMENT OF THE CASE

I. Procedural History of Nature of the Action:

The parties to this matter are involved in a protracted and costly domestic litigation, which has involved a number of controversies over its life, but which presently is focused on matters relating to the custody of the parties' two minor children. This case merely reflects another attempt on Bryner's part to influence the outcome of the domestic matter, and the trial court not only recognized Bryner's tactic, it also recognized that his petition for a civil stalking injunction was legally insufficient, and the court therefore dismissed Bryner's Petition.

Bryner filed this, his second petition for a civil Stalking injunction against Lana, on February 27, 2006, and he amended his petition on February 28, 2006. (R. 1-110, 115-21).¹ On March 7, 2006, Bryner was granted an temporary ex-parte civil stalking injunction. (R. 233-36). In response, on March 7, 2006 Lana requested a hearing to contest Bryner's petition and allegations. (R. 251-52). Lana also moved for this case to either be transferred to Judge Lindberg or consolidated with the domestic case because Lana believed that as the judge presiding over the domestic matter, Judge Lindberg was in a better position to evaluate Bryner's claims (R. 253-56). Although Bryner contested

¹ Although Bryner filed a document entitled amended petition for civil stalking injunction, even a cursory review of that document reveals that it is better described as a civil complaint inappropriate to the mechanisms that the legislature has put in place to protect those who are legitimately suffering the impact of a stalker.

the motion for consolidation or transfer (R. 259-62), the trial court granted Lana's motion and reassigned Bryner's petition, which placed Judge Lindberg in the position of hearing the petition. (R. 378-79). Bryner then filed several motions in this case, including a motion seeking sanctions pursuant to rule 11 of the Utah Rules of Civil Procedure (R. 263-65), a motion for partial summary judgment (R. 266-347), a motion for default or partial default (R. 402-03), and a request for admissions (R. 475-79). Bryner also moved to recuse Judge Lindberg, relying by reference on a motion to recuse that he had filed in the domestic matter. (R. 528-29). Judge Lindberg, upon learning of Bryner's motion to recuse, evaluated his motion, found that the grounds were "legally insufficient" to warrant recusal, and referred the motion to the Associate Presiding Judge of the Third District Court, Judge Robert Hilder. (R. 596). After reviewing the motion, Judge Hilder also concluded that Bryner had presented insufficient grounds to warrant Judge Lindberg's recusal and he informed Judge Lindberg of his decision and that he would be issuing an order sometime later. (R. 597, 628). Judge Lindberg then conducted a hearing on Bryner's Petition for a Civil Stalking Injunction on April 11, 2006, wherein the parties were permitted to introduce evidence and testimony. (R. 627-41; R. 743).² Following the hearing, the trial court concluded that Bryner's allegations were insufficient to support the imposition of either a permanent injunction, or the continuation of the ex parte injunction

² The transcript of the hearing is noted as R. 743. Any reference to the transcript in Lana's brief will note the record number and the relevant page, i.e., R. 743, 15.

imposed following Bryner's filing of the petition. (R. 633-634). The court therefore dismissed the petition, and lifted the ex parte injunction. (R. 639). Bryner first appealed the ruling to the Utah Supreme court; however, that court transferred Bryner's appeal to this court on May 3, 2006. (R. 648-49).

II. Statement of Relevant Facts

The parties to this case were involved in a long term relationship, which produced two children, but since the birth of the children, the relationship has foundered and the parties are involved in a protracted domestic litigation. (R. 7: Bryner's Petition for Ex Parte Stalking Injunction). The parties, ostensibly, share custody of the children and have been granted telephone visitation privileges with the children when they are in the other's custody. (*See generally*, R. 743).³ Bryner filed his first petition for civil stalking injunction against Lana on September 19, 2005. (R. 444). At some point prior to November 10, 2005, the parties stipulated to the dismissal of that petition (R. 743, 25), and the trial court officially dismissed the petition on January 4, 2006 (R. 743, 26). The terms of the ex parte civil injunction issued pursuant to the September 19, 2005 petition included certain contact limitations applicable to Lana, but it contained no limitations on her right to contact the children by telephone when they were in Bryner's custody. (R.

³ The details of the parties' custody arrangement do not specifically appear in the record of this case; however, there is no dispute that since the inception of the domestic matter the parties have shared custody of the children, and that included in the arrangement are telephone visitation privileges.

743, 46; 629). Thus, while the children were with Bryner on January 3, 2006, Lana attempted to exercise her telephonic visitation right, only to have Bryner's repeatedly lift the receiver and the replace it in the cradle, ending the call and denying Lana the opportunity to speak with the children. (R. 629; 743, 10-11).

On February 27, after the first petition had been put to rest, Bryner filed another petition for a civil stalking injunction against Lana, alleging that she had engaged in stalking behavior through the use of the telephone and e-mail, contact with his employers, possession of an embarrassing photograph, use of the internet in a fashion upsetting to Bryner, and for a variety of other reasons connected to the parties' ongoing custody dispute. (R. 1-13). As a result, Bryner obtained another ex parte civil stalking injunction against Lana, which again restricted her access to her children. (R. 3).⁴ Lana requested a hearing to dispute Bryner's allegations and to dissolve the temporary injunction. (R. 251-52). The trial court scheduled a hearing for April 11, 2006, but prior to the hearing, Bryner submitted a motion seeking Judge Lindberg's recusal, which merely incorporated by reference a motion that Bryner had filed in the domestic case. (R. 627-28). The trial

⁴ Bryner filed an "Amended Petition for Civil Stalking Injunction" the very next day. (R. 115-21). However, the amended petition is better described as an actual civil complaint, rather than a petition for a civil stalking injunction, in that it contains causes of action that Bryner should have brought in a separate action. (R. 115-21). The trial court, in its amended order, explained that Bryner's attempt to inject other causes of action into these proceedings was improper and "reflect[ed] a misunderstanding of stalking injunctions." (R. 635-36). The court thus struck Bryner's motions for summary judgment, for sanctions under rule 11 of the Utah Rules of Civil Procedure, and his request for the entry of a default judgment in his favor. (R. 635-36).

court reviewed the motion and evaluated the grounds that Bryner offered, only to find them insufficient to warrant recusal. (R. 569; 628; 743, 3). The court then referred the motion to the Associate Presiding Judge of the Third District Court, the Honorable Robert Hilder, for additional review and a final determination. (R. 569; 628; 743, 3-4). The trial court stayed any further activity in this case pending Judge Hilder's determination. (R. 569; 628; 743, 3). Judge Hilder quickly reviewed the matter and informed the trial court that he concurred with its decision concerning recusal and that he would issue an order, but that the court was free to pursue further proceedings in this case. (R. 628). Subsequently, on April 11, 2006, the trial court held a hearing on Bryner's petition, during which the court heard testimony from both Lana and Bryner. (R. 743). After considering both parties' testimony, the court determined that Bryner had failed to present the court with any evidence in support of most of the allegations in his petition, and the court then dismissed his petition and dissolved the ex parte injunction that had been entered against Lana. (R. 633-34). The court also entered an order directing both parties to follow the rules of civility. (R. 634-35). Bryner subsequently appealed.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S PETITION FOR A CIVIL STALKING INJUNCTION AGAINST LANA

The trial court properly dismissed Bryner's Petition for a Civil Stalking Injunction against Lana, and the court supported its decision with sufficient factual findings. To

qualify for injunctive relief under Utah’s Civil Stalking Statute, Bryner was required to demonstrate to the court that Lana had engaged in a “course of conduct” that was intended to cause Bryner “emotional distress.” *Ellison v. Stam*, 2006 UT App 150, ¶¶ 19-21, 136 P.3d 1242 (discussing Utah Code sections 77-3a-101 and 76-5-106.5). “‘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.” *Salt Lake City v. Lopez*, 935 P.2d 1259, 1263 (Utah Ct. App. 1997) (quoting Utah Code Ann. § 76-5-106.5 (1995)). Emotional distress “‘results from conduct that is “outrageous and intolerable in that it offends the generally accepted standards of decency and morality.’”” *Stam*, 2006 UT App 150 at ¶ 29. The emotional distress requirement is not satisfied by conduct that causes “mere anxiety or annoyance,” *Lopez*, 935 P.2d at 1264, but instead “‘the emotional distress suffered must be severe; it must be such that a reasonable [person,] normally constituted, would be unable to cope with the mental stress *engendered by the circumstances of the case,*’” *Stam*, 2006 UT App 150 at ¶ 30 (alterations and emphasis in original) (quoting *Harnicher v. Univ. of Utah Med. Ctr.*, 962 P.2d 67, 70 (Utah 1998)). Moreover, “[t]he [stalking] statute is narrowly drafted to restrict only threatening behavior, with limited infringement to free association and movement.” *Lopez*, 935 P.2d at 1264.

Here, after receiving Bryner's petition, Lana requested an evidentiary hearing, and "to avoid having [his] injunction revoked," Bryner was required to "demonstrate by a preponderance of the evidence that [Lana's] conduct satisfie[d] the elements of section 76-5-105.5." *Stam*, 2006 UT App 150 at ¶ 20. However, as found by the trial court, Bryner failed to meet this burden. During the hearing, Bryner was afforded time to submit his testimony and any evidence that would support his allegations. He spent the majority of his time examining Lana, (R. 743, 25-38), and during the time that he testified he failed to produce any evidence to support even the most innocent of his allegations (R. 743, 39-44). The trial court found, after permitting both parties the opportunity to introduce testimony and evidence, that Bryner failed to show either that Lana had engaged in a "course of conduct" against Bryner, or that the conduct Lana was found to have undertaken was sufficient to produce in a reasonable person emotional distress. The court specifically found that Lana had an ongoing right to telephonic visitation with the children, and that any incident of repeated calls to Bryner's home during their visitation was the product of Bryner's conduct, not Lana's. (R. 629). The court further found that Bryner had introduced no evidence to contradict Lana's testimony that Bryner had triggered the repeat calls, (R. 629; 743, 10-11). The court then found that Bryner had introduced no evidence to support his allegations that Lana had instigated several unwanted contacts with his employers or that the contacts that Lana had made caused any emotional distress. (R. 631; 743, 12-13). Instead, the court found that Lana had

contacted Bryner's employer either at his request, or to return property of the employer that she found at her home. (R. 631; 743, 12-14). The court made similar findings concerning Bryner's allegations that Lana was stalking him at the children's school and that Lana had stalked him on a local Russian language website. Specifically, the court found that Bryner had failed to produce evidence that would support his stalking allegations related to the children's school, (R. 632; 743, 39-41), and that Lana's postings to the Russian language website did not involve or refer to Bryner (R. 632; 743, 14-16). Finally, the court found that although Lana has a friend in the employ of the "KGB," a foreign intelligence service, Bryner's assertions that the relationship caused him emotional distress was incredible and unsupported by any evidence. (R. 633; 743, 20). The court did find that Lana had maintained possession of a photograph embarrassing to Bryner and that she had published the photo to a custody evaluator, but the court also found that this act on Lana's part was "isolated" and that it did not alone rise to a "course of conduct." (R. 630).

Taken as a whole, the evidence presented in this case supports the trial court's findings. Bryner presented the court with no evidence to support virtually any of his allegations, and he made no effort to demonstrate that under the circumstances of this case, a reasonable person would have been threatened by Lana's alleged conduct. Instead, Bryner alleged, without evidence, that Lana had undertaken a number of acts, which, taken as a whole, had they been true, may have been sufficient to cause anxiety or

annoyance, but this is not the conduct targeted under the statute. But, as found by the trial court, Bryner failed to support most of his individual allegations, and the court found that the sole allegation that had evidentiary support—provided by Lana’s admission—was insufficient to rise to the level of a “course of conduct,” let alone sufficient to cause “emotional distress” in a reasonable person. Because Bryner submitted no evidence to support his allegations, the trial court’s findings are accurate, and in the absence of any evidence that Lana had engaged in a “course of conduct” directed at Bryner, the court had no choice but to find the Petition to be legally insufficient to warrant the imposition of an injunction against Lana.

Consequently, this court should affirm the trial court’s dismissal of Bryner’s petition and dissolution of the ex-parte injunction against Lana.⁵

⁵ Bryner argues, without authority, that the trial court erred in denying him the opportunity to bring an Intentional Infliction of Emotional Distress claim in his petition for a civil stalking injunction, and in denying his attempts to argue either for the grant of summary judgment in this case, or for the entry of a default judgment. However, not only does Bryner’s argument violate the principles of rule 24 of the Utah Rules of Appellate Procedure, *see Water & Energy Sys. Tech., Inc. v. Keil*, 2002 UT 32, ¶ 20, 48 P.3d 888 (stating “appealing parties must clearly define the issues presented on appeal with pertinent authority cited” (quotations, citations, and alterations omitted)), his argument also fails to recognize that the plain language of section 77-3a-101 clearly limits the scope and application of the civil stalking statute. Simply stated, section 77-3a-101 does not include the possibility that a petitioner will use the petition as a vehicle for bringing other civil causes of action or that the broad rules of civil procedure will apply. *See Carter v. Univ. Of Utah Med. Ctr.*, 2006 UT 78, ¶¶ 8-9, 150 P.3d 467 (describing the only acceptable model for interpreting statutory language, which begins by analyzing the plain language of the statute in an attempt to ensure that the true intent of the legislature is carried out by the courts). Instead, the legislature has precisely defined the procedures and remedies available under the statute, and the trial court properly limited Bryner’s

II. THE TRIAL COURT ACTED PROPERLY FOLLOWING APPELLANT'S MOTION TO RECUSE

The trial court properly addressed Bryner's Motion to Recuse and its treatment of the motion was without error. "According to Rule 63(b), once a party or counsel files an affidavit charging that the judge harbors prejudice or bias toward the party or counsel, the judge has two courses of action." *Barnard v. Murphy*, 882 P.2d 679, 682 (Utah Ct. App. 1994) (*Barnard II*). "First, if the point made in the affidavit is well taken, the judge can simply recuse himself and transfer responsibility for the case to another judge." *Id.*; see also *In re ML*, 965 P.2d 55, 556 (Utah Ct. App. 1998);⁶ *Poulsen v. Frear*, 946 P.2d 738,

petition to the review permitted under section 77-3a-101. See *Lopez*, 935 P.2d at 1264 (describing Utah stalking statutes as "narrowly drafted to restrict only threatening behavior"). Consequently, this court should reject Bryner's arguments in this regard and summarily affirm the trial court's determination.

⁶ Language this court cited in *In re M.L.* may be especially salient in this case, given its history. In *In re M.L.*, this court stated

"Family problems are complex but intricately intertwined so that the best treatment so far as the parties are concerned, . . . as well as the most consistent and efficient approach from a judicial point of view, is for the same judge to remain involved with the family along the continuum of the particular case."

In re M.L., 965 P.2d 551, 557 (Utah Ct. App. 1998) (emphasis in original) (quoting *In re Quick*, 559 A.2d 42, 46 (Pa. Super. 1989)). Although *In re M.L.* dealt with the termination of parental rights, see *id.* at 553, the language has clear application to cases such as the instant case, where the parties are engaged in a protracted custody dispute and the best interests of the children are at stake. Here, although it is clear that Bryner disapproves of certain decisions that Judge Lindberg has made in the domestic matter, he has not alleged any facts that would suggest that her behavior toward him was "extreme" or that it reflected a "deep-seated antagonism" toward him. *Id.* at 556 (citation omitted). Absent some evidence of such behavior on Judge Lindberg's part, and

741 (Utah Ct. App. 1997). If, however, the trial court determines that the affidavit contains insufficient grounds to support recusal, the court is required to refer the affidavit to “another judge to determine whether there is insufficient rationale in the affidavit to prompt recusal.” *Barnard II*, 882 P.2d at 682. Moreover, “[d]isqualification under Rule 63(b) is warranted ‘only, when it appeared that, apart from [the judge’s] analysis of the issues of fact or law, he had such a bias in favor of one party or prejudice against the other that he could not fairly or impartially determine the issues.’” *Frear*, 946 P.2d at 742 (quoting *Orderville Irrigation Co. v. Glendale Irrigation Co.*, 17 Utah 2d 282, 409 P.2d 616, 621 (1965)).

In the instant case, Bryner, relying on rule 10(c) of the Utah Rules of Civil Procedure, filed his motion to recuse Judge Lindberg on April 6, 2006, (R. 522-24), several weeks after the judge to whom this case had been initially assigned transferred the case to Judge Lindberg, (R. 378). The trial court then, upon learning of Bryner’s motion, immediately evaluated the motion’s legal sufficiency and concluded that Bryner had presented the court with insufficient grounds to support his petition. (R. 596: *see also* R. 628; 743, 3-4). The court then referred the matter to the Associate Presiding Judge of the Third District Courts, Utah, the Honorable Robert Hilder, (R. 596, 628; 743, 3-4), who expedited his review of the motion and concluded that Bryner’s motion was legally

some argument concerning such behavior, Bryner’s argument should be summarily rejected.

insufficient to require Judge Lindberg to recuse herself from this case. (R. 628; 743, 3-4). Judge Hilder informed the court of his decision and directed the trial court to proceed with the scheduled hearing.

The trial court followed the required procedure exactly as outlined in rule 63 of the Utah Rules of Civil Procedure, and Bryner has made no effort to articulate any harm that he may have suffered as a result of the trial court's decisions.⁷ Once the court received notice of the motion, it considered the motion, and after rejecting it as insufficient, the court directed it to another judge for a final decision. The court stayed any further consideration of matters pending in this case until the judge to whom the matter was

⁷ Bryner appears to argue that the trial court was required to wait for Judge Hilder to enter a written order dismissing Bryner's motion prior to proceeding with the hearing on his petition for a civil stalking injunction. However, although he points to rule 63(b)(2) of the Utah Rules of Civil Procedure, he fails to point this court to any authority that would support his position. The trial court in this case clearly satisfied the requirement set forth in the language Bryner highlights, in that the trial court considered his motion, found it lacking, and referred it to another judge as required under the plain language of the rule. *See* Utah R. Civ. P. 63(b)(2). Only after the trial court had received word that the judge to whom she referred the motion had concluded that it was legally insufficient did the trial court proceed with this matter. To the extent that the trial court's actions were premature, no harm was done to Bryner, in that he had clearly failed to present the court with sufficient reason to support recusal; thus, any error on the trial court's part was harmless. *See Poulsen v. Frear*, 946 P.2d 738, 741-42 (Utah Ct. App. 1997) (holding that the trial court's "improper comments in his certifying order were harmless error" because the appellant's affidavit to recuse the trial court judge was "insufficient as a matter of law"). Further, Bryner also appears to complain of the transfer order entered by Judge Dever, the judge initially assigned this case, and that Judge Dever failed to address Bryner's objection to the transfer. However, Judge Dever transferred the case in response to Lana's motion, and in doing so, he inferentially denied Bryner's objection.

referred reached his decision. This clearly satisfies the requirements of rule 63.

Consequently, this court should conclude that the trial court acted properly in response to Bryner's motion to recuse, and reject Bryner's challenge to the court's decision and subsequent proceedings.

III. ANY ERROR ON THE PART OF THE TRIAL COURT WAS HARMLESS

Assuming that the trial court committed some error in the proceedings underlying this appeal, none of those possible errors impacted the outcome; therefore, any errors that did occur are harmless. "Harmless error is defined . . . as an error that is sufficiently inconsequential that [this court] conclude[s] there is no reasonable likelihood that the error affected the outcome of the proceedings." *Covey v. Covey*, 2003 UT App 380, ¶ 21, 80 P.3d 553 (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796 (Utah 1991)); see also *Turville v. J & J Props., L.C.*, 2006 UT App 305, ¶ 38, 145 P.3d 1146 (stating "if, upon review of the record, there is clear evidence to support the trial court's ultimate conclusion," these failures are harmless error and the trial court's ruling may be affirmed" (citations omitted)). "[A]n error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine [this court's] confidence in the" trial court's decision. *Covey*, 2003 UT App 380 at ¶ 21 (quoting *Steffenson v. Smith's Mgmt. Corp.*, 820 P.2d 482, 489 (Utah Ct. App. 1991)).

Here, Bryner sought a civil stalking injunction against Lana. He asserted and alleged a number of acts on her part, including repeated phone calls, contact with his

employer, possession and distribution of an embarrassing photograph, and, on one occasion, that Lana made an obscene gesture toward him when they were exchanging custody of the children. As previously discussed, to prevail on his petition, Bryner is required to show that Lana engaged in a course of conduct directed toward him and that her conduct was sufficient to cause “a reasonable [person,] normally constituted [to] be unable to adequately cope with the mental stress *engendered be the circumstances of the case.*” *Ellison v. Stam*, 2006 UT 150, ¶ 30, 136 P.3d 1242 (citation omitted). “The statute is narrowly drafted to restrict only threatening behavior, with only limited infringement on the right to free association,” *Salt Lake City v. Lopez*, 935 P.2d 1259, 1264 (Utah Ct. App. 1997), and it affirmatively does not apply to normal conduct related to visitation in a contested domestic situation, *see id.* or to conduct that, taken as a whole, may cause a reasonable person to suffer anxiety or annoyance.

Here, even accepting as true all of the errors that Bryner alleges the trial court committed, the outcome would not have changed. Bryner made no allegation that Lana ever engaged in threatening conduct, and the allegations that he did assert suggest nothing that would support a conclusion that a normal, reasonable person would have been reduced to a state where they could no longer cope with the mental stress of the circumstance. Instead, although it appears that Bryner is annoyed with Lana, his allegations merely highlight that Bryner is engaged in a protracted and ongoing custodial dispute with Lana that makes him unhappy. This dispute, while not optimal, should not

be unexpected given the circumstances of the case; circumstances that the trial court fully knows, and which the court took into account in addressing Bryner's petition, as required under the statute, and articulated by *Stam*. See *Stam*, 2006 UT App 150 at ¶ 29 (noting that "the consideration of whether a defendant has acted outrageously must be undertaken in light of all of the facts and circumstances of the particular case"). When viewed in light of the ongoing domestic litigation, and the parties' contested custodial arrangement, there can be no question that Bryner's allegations, even when accepted without challenge, do not rise to the level of stalking. No reasonable person would have felt threatened by the alleged conduct, let alone reduced to condition wherein that reasonable person would have been unable to cope, as required under the statute. In the absence of allegations that would satisfy the requirement that Lana conduct create emotional distress as defined by the court's of this state, Bryner petition fails on its face.

Consequently, given the circumstances of this case, any error committed by the trial court in these proceedings, if any occurred, had no affect on the outcome, and accordingly, any errors were harmless as a matter of law.

CONCLUSION

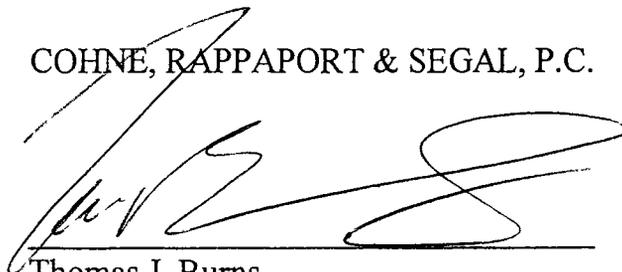
The trial court did not err in dismissing Bryner's Petition for a Civil Stalking Injunction. Bryner failed to produce any evidence to support most of his allegations in the petition, and in the absence of evidence, Bryner could not show that Lana had engaged in a course of conduct that led him to suffer emotional distress. Further, the trial

court's treatment of Bryner's Motion to Recuse followed the required procedures. The trial court evaluated Bryner's motion, and after finding that it failed to assert sufficient grounds to warrant recusal, the trial court referred it to another judge for a final determination and waited for that determination before addressing any of the matters that were pending before the court when the motion was filed. Finally, to the extent that the trial court committed any errors in this case, those errors were harmless, in that there was no reasonable possibility that they affected the outcome.

Accordingly, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 20 day of February, 2007.

COHNE, RAPPAPORT & SEGAL, P.C.

A handwritten signature in black ink, appearing to read 'Thomas J. Burns', is written over a horizontal line. The signature is stylized and cursive.

Thomas J. Burns

Attorneys for Petitioner/Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of February, 2007, I caused a true and correct copy of the foregoing to be mailed via U.S. Mail, First Class postage prepaid, to the following:

Roger Bryner
1042 East Fort Union Blvd. #330
Midvale, Utah 84047
Appearing as Attorney Pro Se

A handwritten signature in black ink, appearing to read 'R. Bryner', with a large, stylized flourish at the end.