IN THE UTAH COURT OF APPEALS
450 S. State Street, Salt Lake City. Utah 84114
(801) 578-3900

MELINDA WATSON, Appellant, v. MICHAEL WATSON, Appellee.	**APPELLANT'S PRINCIPAL BRIEF** Case No. 20190290

APPEAL FROM FINAL ORDER REGARDING
DISMISSAL OF A PROTECTIVE ORDER

THE HONORABLE MICHAEL S. EDWARDS PRESIDING

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A LIST OF CURRENT AND FORMER PARTIES

1. APPELLANT, Melinda Watson, represented by Theodore R. Weckel, Jr.

2. APPELLEE, Michael Watson, represented by Robert Peterson.

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INTRODUCTION

Appellant, Melinda Watson, appeals a final order issued by the Second Judicial District Court, which dismissed a protective order issued by the Commissioner. Melinda should prevail because the judge misapplied Civil Rule 108 and she was denied a fair hearing.

ISSUES PRESENTED, STANDARDS OF REVIEW, AND PRESERVATION IN THE RECORD

I. Whether the judge erred in allowing a videotape and new emails to be introduced during the second part of an evidentiary hearing (which occurred thirty days after the first evidentiary hearing), when the evidence was never given to the other party prior to the second hearing, and the offering party had not moved to introduce the

evidence prior to the second hearing. The standard of review for a question of law is de novo. *Hogle v. Zinetics Med., Inc.*, 2002 UT 121, 63 P.3d 80. Melinda preserved this objection by citing to Rule 108 and indicating that these surprise exhibits violated the rule and due process. R. 160-61, R. 556, l. 17-24, R. 557, l. 14-25, R. 558, l. 1-6, R. 564, l. 21-25.

II. Assuming the wrongful evidence is excluded, whether the protective order should be reinstated? The proper interpretation of a statute is a question of law, and the review is for correctness. *Baird v. Baird*, 2014 UT 2008, 322 P.3d 728, 733. The issue was preserved because the Court considered and ruled on the statutory requirements for stalking. R. 581, l. 21-25; R. 582, l. 1-10.

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The District Court granted Melinda's petition for an ex-parte protective order on November 15, 2018. After a hearing held on December 5, 2018, before Commissioner Morgan, he entered a detailed, written, recommended ruling and entered the protective order on December 17, 2018. Michael filed an untimely appeal on December 31, 2018. Utah Code § 78B-7-107(f). Preliminarily, the

judge ruled as a policy matter that whether Michael had filed an objection in a timely manner was inconsequential because (to the effect) judges are supposed to try cases. R. 150. The evidentiary hearing proceeded, and Judge Edwards conducted it on two days rather than one due to Michael's lawyer showing up very late on the day of the first hearing. Michael's lawyer had scheduled two matters on the same day and could not arrive at the time appointed by Judge Edwards in this matter. The first day of the evidentiary hearing was held on February 28, 2019. There was only enough time for Melinda to present her evidence. Thirty days later at a second evidentiary hearing held on March 28, 2019, Michael presented his evidence. However, without moving to introduce new evidence, Michael introduced evidence of a videotape, a text, and emails, which had never been presented to the Commissioner, nor ever served on Melinda's counsel. Over Melinda's objection, the undisclosed evidence was the dispositive evidence in the judge's decision to dismiss the protective order. R. 585, l. 21-25; R. 586, l. 1-21.

2. STATEMENT OF THE FACTS

A. TESTIMONIAL EVIDENCE

Melinda was involved in a car accident, was severely injured, suffered traumatic brain injury, wears wrist braces, and has been advised not to lift objects over five pounds. R. 158, l. 11-16; R. 159, l. 21-25, R. 160, l. 1-7. Due to her

injury, Melinda is unable to defend herself by hitting someone back, pushing someone away, or removing someone's arms from her presence. R. 159, l. 18-19; R. 160, l. 12 - R. 162, l. 3-8. In a special master's order, he ordered the parties to remain in their residences during transfers, and Michael failed to do so. R. 165, l. 15-23. In fact on one occasion, Michael left his residence, videotaped Melinda, and walked a few feet away from her vehicle. R. 167, l. 16-21. Melinda was frightened. R. 167, l. 24. Michael's body language was menacing. R. 167, l. 24-25; R. 168, l. 1-6. Melinda had the parties' 16-year-old daughter with her in her vehicle. R. 168, l. 14-18. On other occasions during exchanges, Michael would record or photograph Melinda and/or the children. R. 155-56; R. 169, l. 1-6. Michael also blocked the driveway preventing Melinda from leaving repeatedly during exchanges. R. 169, l. 13; R. 191, l. 16-25; R. 192, l. 1-7. Michael also would follow Melinda around a soccer field where she was coaching and photograph her and interrogate her. R. 169, l. 21-25, R. 170, l. 1-2. Other parents at the soccer practice would approach Melinda to check on her safety, and she felt frightened. R. 171, l. 15-20. These stalking episodes would last between 10 - 15 minutes. R. 171, l. 23, Ex. 2. Michael also would attend her ten-year old son's soccer games and approach and record Melinda. R. 172, l. 15-17. Melinda was frightened because Michael would yell at her, record her, and accuse her of

stealing things. R. 173, l. 5-13. Melinda had told Michael to stop stalking her about 6-12 times, but he ignored her requests. R. 174, l. 24-25, R. 175, l. 1-2. Melinda told Michael that his behaviors frightened her. R. 175, l. 9. The divorce decree also contained a restraining order for the parties not to harass each other. R. 176, l. 1-2. Melinda testified that Michael had placed her in fear previously when he slammed his fists on her vehicle's roof. Melinda called the police and presented a police report as evidence to corroborate her statement. R. 178, l. 12-25; R. 179, l. 1-15. Melinda argued that because the police report had been presented to the Commissioner and not objected to, the Court could take judicial notice of it. R. 180, l. 3-9. The judge denied consideration of any police report that had been presented to the Commissioner. R. 1180, l. 18. Michael had also assaulted Melinda by shoving her so forcefully that she fell backwards. R. 182, l. 5-12. Michael had also screamed at her, called her a "fucking bitch," punched objects close to her, screamed at and frightened the parties' teen-aged daughter. R. 184. l. 11-25, p. 54-55. On another occasion when Melinda merely greeted the parties' young son at an event and gave him a hug, Michael called the police and shoved her. R. 157, l. 24-25, R. 188-89, l. 1-8. A police report had been presented to the Commissioner and Melinda used it to cross-examine Michael. However, the Court would not allow the report substantively. At a children's extracurricular

activity Michael approached Melinda in a threatening manner to the point where she hid from him in a closet. R. 190, l. 10-25, R. 191, l. 1-15. A police report was also used in the manner specified. Michael also participated in voyeurism by taking photos of women's butts, photographing Melinda naked (without her consent), and then downloading Melinda's photo to his computer. R. 194, l. 3-25, R. 195-97, R. 198, l. 1-12.

During cross-examination, Melinda was asked why she had not sought a protective order earlier. Melinda testified that she had consulted with a victim's advocate earlier. However, she was not certain as to whether she could have obtained a protective order because she did not have a bruise. R. 206, l. 14-25, p. R. 207, l. 1-2. Michael's attorney hypothesized, over Melinda's counsel's objection as to relevance and Utah R. Evid. 404(b), that Melinda was seeking a protective order in retaliation for sanctions that had been imposed upon her earlier by retired Judge Allphin (when Melinda had been represented by counsel through the Utah State Bar's Modest Means program, who had no prior family law experience). R. 209, l. 3-13; R. 210-15, l. 1-5. Melinda filed her request for a protective order approximately two months after Michael had filed his petition to modify the divorce decree. R. 210, l. 21-25. Melinda testified that she participates in a Tai-Chi class with other women. R. 216, l. 23-25, R. 217, l. 1-2.

Melinda testified that she participated in the jogging portion of her children's Taekwondo class. R. 217, R. 219, l. 22. Both parties did not honor the special master's directive to exchange the children from their residences on occasion. R. 219, l. 14-19. Melinda testified that she was frightened when Michael videotaped her when he left his residence and approached her vehicle due to Michael's history of domestic violence, because of her vulnerable physical condition, and because he had struck her car violently before. R. 223, l. 22-25; R. 225, l. 19-25; R. 229, l. 17-22; R. 230, l. 1-10, 17-21. She also testified that Michael became so angry after his military deployment overseas that he would shake with anger, that he was on medication, and that he had been diagnosed with anxiety. R. 224, l. 1-7. Michael's counsel asked Melinda whether Michael had asked Melinda to violate the special master's directive by doing child exchanges at a location other than the parties' residences. R. 231, l. 14-25. She responded that she did so because Michael refused to meet at the parties' residences. R. 231, l. 16. Opposing counsel speculated that Melinda was feigning to look confused during his cross-examination. R. 239, l. 10-11. Melinda testified that the parties' 16-year-old daughter is also frightened of Michael. R. 240, l. 11; p. 110, l. 1. Melinda honked her horn for Michael to answer the door during the exchange at his residence because it was cold outside, and her 16-year-old daughter did not have a coat on.

R. 241, l. 4-7. She testified that after Michael began videotaping her, her daughter videotaped Michael while as a passenger in Melinda's vehicle. R. 242, l. 13-14. Melinda testified that Michael's videotaping of her in her vehicle was "creepy as hell." R. 243, l. 9. Michael was chasing Melinda around the soccer field during his parent-time. R. 245, l. 4-7. Michael was yelling at Melinda and photographing her during the chasing time. R. 245, l. 24-25. The divorce decree allows the parties to be together at the children's extracurricular activities and to be supportive of them. R. 248, l. 11-19. Michael is a six-foot man, and Melinda was terrified when he stalked her at the soccer practices because he was yelling at her and recording her while she was trying to coach young girls. R. 248, l. 22-25, p. 118, l. 1-4. On one occasion with the soccer team, Melinda had to call the police because Michael was following her around and the parents were all staring. R. 249, l. 7-12. Michael never attended the children's activities unless they were scheduled during his parent-time. R. 249, l. 21-23. The special master's order required the parties to communicate during exchanges by text or email. R. 253-54. Melinda provided consistent testimony about Michael's blocking of her vehicle. R. 258-59.

During redirect examination, Melinda testified as follows. Melinda's first attorney was hired through the Utah State Bar's modest means program. R. 261, l.

19-25; p. 131. This attorney: (1) admitted to Melinda during the evidentiary hearing before Judge Allphin that he did not know what he was doing; (R. 262, l. 4-8); (2) despite Melinda relating to her attorney that she was being stalked, he never advised her of her right to obtain a protective order (R. 261, l. 21-25, p. 131, l. 1-3); and, (3) told Melinda that he did not realize the hearing before Judge Allphin was an evidentiary hearing (R. 262, l. 17-18). It was her attorney's first family law case, and family law was not his field of practice. R. 262, l. 25, p. 132, l. 2-3. Melinda's modest means attorney offered limited evidence during the hearing. R. 263, l. 4. Judge Allphin never made a ruling on the issuance of a protective order. R. 262, l. 9-13. Melinda did not file a protective order because the police "brushed her off" when she asked about, and the victim's advocate advised that without marks on her body, she could lose and inflame the abuser. R. 263, l. 13-19. The first time Melinda met with Mr. Weckel, he advised her that she had a basis to obtain a protective order. R. 264, l. 21-23. Prior to that she had no idea that she could successfully obtain a protective order. R. 265, l. 1. After Michael's military deployment, he started getting aggressive. R. 265, l. 20-25. Melinda also testified that she did not petition for a protective order earlier because she was trying to preserve the parties' marriage and had to protect the children when Michael became increasingly violent. R. 267, l. 22-25, R. 268, l. 1-

7. Melinda does not do some of the Tai Chi motions when she attends those classes and wears her hand braces when she participates. R. 268, l. 5-10. Melinda doesn't do about 75% of the Taekwondo workout with her children, does not do punching, and only participated in this activity to be with her children. R. 268, l. 16-25; p. R. 269, l. 1-13.

Michael testified as follow during his direct examination. After Melinda's traumatic brain injury, Michael observed that Melinda could do minor household tasks. R. 308, l. 8-11. In public, Michael has only observed Melinda not wearing her wrist braces a couple of times. R. 309, l. 8-10. Michael had asked the special master to direct the parties to exchange their children at a police station because Melinda was causing stress to his sister during the exchanges. R. 310, l. 18-20. Melinda argued with a police officer for over an hour that she was able to conduct exchanges at Michael's residence. R. 312, l. 18-20. Melinda emailed Michael and told him that she was going to do the exchanges at his residence and that she would "play his games." R. 313, l. 14-22. Melinda would arrive at Michael's house 10-15 minutes earlier generally for exchanges. R. 317, l. 18. Melinda never left her vehicle to knock on Michael's door for exchanges. R. 318, l. 5-6. Melinda told Michael not to videotape her. R. 318, l. 13-18. Michael admitted that he videotaped Melinda during the exchange which occurred on October 31

(where Michael left his residence to videotape Melinda in her car). R. 318, l. 22-25. Melinda arrived about 15 minutes early on that occasion, honked her horn, and texted Michael that she was at his residence. R. 319, l. 18-25. Rather than responding to Melinda's text, Michael ignored them. R. 320, l. 1-8. Honking of a car horn is against Michael's HOA policy. R. 320, l. 16-25. Michael had asked Melinda to not honk previously, but she has kept doing it. R. 321, l. 1-4. Michael showed a videotape to the Court which he had taken during the exchange over Melinda's objection (because the evidence had not been presented to the Commissioner, and Melinda had no prior notice of the videotape). The videotape indicated that Melinda was not ringing Michael's doorbell; it was the party's 16-year-old daughter while Melinda remained in her car. R. 329, l. 16-23. Rather than answering the door, Michael put a piece of cotton near the doorbell to mute the sound because it had become annoying to him and his young son who was waiting to be picked up. R. 330, l. 1-10. When Michael finally opened the door, his 16-year-old daughter confronted him about videotaping her. R. 334, l. 6-15. Ostensibly due to her annoyance with her father, the 16-year-old daughter flipped her father the bird as she walked away from the door. R. 335, l. 10-11. Michael admitted that his behavior had made his daughter angry. R. 335, l. 13-14. Michael videotaped Melinda and his daughter because Melinda had parked in a

location which could not be seen by Michael's recording video cameras that he had installed at his residence, and he wanted to record her. R. 338, l. 1-3. Michael left his residence to record Melinda and went up to Melinda's car to video her because he was afraid Melinda might make false allegations about him as she had done in the past. R. 338, l. 10-12. While Michael was videotaping Melinda, she took a photo of him doing that. R. 339, l. 15-17. Melinda then started videotaping Michael and gave her camera to her daughter to continue as she backed her car out of a neighbor's driveway. R. 339, l. 21-22. Michael admits that he left his residence in violation of the special master's order to videotape Melinda. R. 342. It is impossible to view Melinda's face or body language in Michael's exhibits 2 and 3 (videotape of incident). Michael indicated that Melinda "ran off" with the parties' son during soccer practice during his parent-time. R. 349, l. 3-4. Michael admitted that he brought his phone with him when he went to the soccer practice in case he needed it to protect himself against a false accusation made by Melinda. R. 349, l. 13-18. Michael denied all of Melinda's stalking allegations. R. 350, l. 8-25. Regarding Melinda's photo of Michael at soccer practice, Michael did not intend to threaten Melinda by standing close to her with his camera. R. 352, l. 23-25. Michael was standing close to Melinda because it was 10 minutes after parent-time, and he was supposed to pick up his son. R. 352, l. 16-19. Michael

admitted that Melinda had asked him to stop photographing her and/or videotaping her a couple of times, but she never expressed that she was afraid of him. R. 353, l. 8-21. Initially Michael testified that there was not a restraining order in the divorce decree; then upon further questioning by his lawyer, he admitted that there was a restraint not to harass each other. R. 354, l. 14-25, R. 359, l. 1-6. Despite leaving his residence to videotape Melinda during an exchange, Michael testified that he never has done anything that could be construed as harassing her. R. 359, l. 7-9. Michael denied slamming the roof to Melinda's car. R. 356-57. However, Michael did admit that the police asked him to leave the residence during that incident. R. 357, l. 23-25. Although not remembering Melinda's allegation regarding pushing her, Michael denied ever laying his hands on her. R. 358, l. 13-25; R. 359, l. 1-7. Michael denied ever shoving one of his daughters into a bannister. R. 361, l. 20-25. Michael admitted that he has a strained relationship with the daughter who Melinda alleges he shoved into a banister (R. 365, l. 9-18), and that daughter testified against him on behalf of Melinda in the hearing before Judge Allphin. R. 362, l. 1-6. The daughter also brought up the incident to him. R. 366, l. 23-25. Michael admits that this incident with his daughter was detrimental to their relationship, but he alleges that she has gotten over it. R. 366, l. 6-9. Michael denied that he had

surveilled Melinda at soccer practices except one time. R. 367, l. 8-13. Michael testified that he took the video because Melinda was taking their son's clothes with her. R. 367, l. 15-25. Michael admitted that at the dance festival incident, Melinda gave her son a hug. R. 374, l. 24. Part of the record was the police report regarding the incident that he had provided the Commissioner. Michael then stated that Melinda started to walk off with his son, so he called the police. R. 374, l. 18. Michael denied ever touching Melinda during the dance incident. R. 374, l. 20-24. Regarding the Taekwondo incident, Michael admitted that Melinda was authorized to be at the activity. R. 377, l. 22-23. Michael denied making any intimidating gestures toward Melinda while at Taekwondo. R. 378. Michael admitted that he parked in front of his driveway (which blocked Melinda's car). However, he excused this behavior because his garbage can's placement prevented him from parking anywhere else convenient. R. 380, l. 24-25. Michael said he would have been willing to move his car if Melinda had asked him to do so. R. 382, l. 23-24. Michael denied photographing woman's butts. R. 382, l. 15-19. He then said he didn't remember doing it. R. 383, l. 7. Michael testified that he could not remember if Melinda had called him about taking a naked photo of her. R. 384, l. 3. Despite complaining that Melinda had scheduled soccer during his parent-time, he admitted that he attended all of the soccer games and practices

during his parent-time. R. 388, l. 17-25. Based upon a previously undisclosed email (objected to by Melinda), Michael alleged that Melinda would sit close to him during soccer games, with their 16-year-old daughter sitting in between them. R. 389, l. 12-19. Michael's exhibit 4 notified Michael that she was going to sit close to him at a soccer game "for the sake of the kids." R. 392, l. 15-25; R. 393, l. 1-6. Melinda did not appear to be concerned about proximity when she sat close to him at soccer games. R. 393, l. 21-23. Melinda alerted the Court that Civil Rule 108 prohibited the introduction of new evidence unless there had been a substantial change in circumstances. R. 299, l. 21-25; R. 300, l. 1-8, R. 302, l. 15-25; R. 304, l. 1-3. The Court then overruled a specific objection and allowed the new evidence. R. 391, l. 6-25. Melinda did not object to Michael's exhibit 4 because the Court had already stated its basis for allowing his first three exhibits.

Michael testified on cross-examination as follows. Melinda requested that she come to his residence for exchanges because the special master had ordered her to do so. R. 400, l. 6-7. The special master order required that the parties remain in their residences during exchanges. R. 401, l. 9-13. Michael let the doorbell ring for 12-15 minutes during the videotaping exchange on October 31 despite his son asking him if he was going to answer the door. R. 402, l. 2-16. Michael did not know if Melinda had asked her daughter to continuously ring the

doorbell. R. 402, l. 17-21. Although Michael testified that Melinda was honking her horn incessantly, the video evidence he presented (which Michael admitted that the video picked up the horn honking), indicated that Melinda only honked the horn twice during a 12-15 minute period. R. 402, l. 22-25, R. 403, l. 1-12. Michael testified that he did not know whether Melinda was afraid of him or not as she sat in her car waiting for her son to come to her vehicle during the exchange on October 31. R. 404, l. 22. Michael admitted that he intentionally did not follow the special master's order to remain in his residence during exchanges. R. 405, l. 4-10. Michael admitted that he surveilled Melinda with a video camera during this exchange. R. 405, l. 11-15. Michael admitted that his daughter told him not to videotape her during the exchange. R. 405, l. 16-18. Michael admitted that he ignored his daughter's request to stop videotaping her and continued to do so. Tr. R. 406, l. 20-23. Michael testified that Melinda condones her daughter's behavior without any stated foundation of knowledge. R. 406, l. 24-25, R. 407, l. 1-22. Michael admitted that despite Melinda having the right to be at the Taekwondo class, he immediately called the police on her. R. 411, l. 20-25. Michael admitted that in the hearing before Judge Allphin Melinda had stated that she was afraid of Michael. R. 412, l. 11-19. Michael admitted that Melinda had emailed him and said that she would sit close to him at their son's soccer games if

he did not videotape her. R. 415, l. 12-25, R. 416, l. 1-6. Michael testified that he couldn't remember if Melinda had asked to sit close to him because of the sake of the children. R. 418, l. 1-6. Michael admitted that Melinda did not enter his residence without permission (where he had been renting), but that the children would let her into the house. R. 418, l. 13-16, 24-25; R. 419, l. 1-6. When confronted with a police report (which had been excluded substantively by the judge) whereby Michael told the investigating officer that he had beat the roof of Melinda's car, Michael would not admit that he told the policeman that. R. 422, l. 18-25, R. 423-434, l. 1-18. Michael didn't know why the police officer did not state in a police report that he had not told the officer that Melinda had taken their son from him at the dance recital despite calling 911. R. 434, l. 19-25, R. 435-48, l. 1-14.

On redirect, Michael testified as follows. He did not answer the doorbell because it was not the precise time for Melinda to pick up their son. R. 450, l. 10-13.

In rebuttal, Melinda testified as follows. Melinda asked to sit next to Michael at the soccer games to reduce conflict in the best interest of the children. R. 450, l. 17-25, R. 455, l. 1-6. Melinda stated in her police reports that she was afraid of Michael. R. 455, l. 18-22. Upon Michael's return from military

deployment, he became much more violent and aggressive. R. 458, l. 16-23. Melinda did not instruct her daughter to ring the doorbell incessantly; her daughter left the car because she was excited to see her brother. Melinda called to her to come back to the car. Melinda texted Michael to answer the door because their daughter was not wearing a coat, it was cold, and she was shivering. Michael ignored the texts. R. 459, l. 15-25, R. 460, l. 1. Melinda honked her horn to alert her daughter to get back in the car. R. 460, l. 5. Melinda was not honking her horn incessantly. R. 460, l. 10-13. Melinda was frightened of Michael during exchanges, but she also was frightened not to follow the court's orders (R. 464, l. 1-10). Melinda did not walk off with her son at the dance recital. The child sought her out because he had been left alone when Michael left to call the police, and Melinda left not wanting to create a problem. R. 467, l. 7-15. Melinda testified that on one occasion Michael came to her house during an exchange, started yelling, entered her house unlawfully, and threw things out of his car on to Melinda's lawn (R. 473, l. 17-25, R. 474, l. 1-24). On another occasion, Michael called the police during an exchange and started yelling at her parents about custodial interference and entered her home unlawfully – which frightened her. R. 478, l. 21-25, R. 479-80, l. 1-25. Regarding Michael's allegation that she had entered his residence unlawfully, she denied that due to Michael's threat that he

would seek a restraining order against him. R. 482, l. 1-6. Michael videotaped her at the soccer events. R. 483, l. 1-18; R. 484, l. 6-13, R. 485, l. 10-17. Melinda told Michael to stop recording her because it was frightening her and the children. R. 486, l. 8-21, R. 487, l. 16-24; R. 488, l. 4-16. Various parents came up to Melinda during soccer practices and expressed their concerns about Michael. R. 489, l. 11-19. Her Modest Means attorney recommended that she not testify in the Judge Allphin hearing so she didn't. R. 490, l. 1-5. Melinda went to a victim's advocate's office to try and get help. R. 492, l. 13-18. During the soccer photo incident when Michael called the police due to his claim of custodial interference, the officer told her to contact the victim's advocate's office and to get a protective order. R. 494, l. 6-10; R. 495, l. 9-21. The evidence was relevant to prove Melinda's state of mind of fear. R. 495, l. 1-4. Michael lied about not beating the roof of the car, and the children were present when he did that. R. 499, l. 17-25. Michael lied about not shoving her down. R. 501, l. 22-25, R. 502, l. 1-4. Regarding the shoving incident of the parties' daughter into the bannister, Melinda saw a bruise on her daughter and described it with particularity. R. 503, l. 25, p. 210, l. 1-4. She also heard Michael swearing and yelling at their daughter during this incident. R. 506, l. 2-4. Regarding the Taekwondo incident, Michael came directly at her and she was frightened. R. 506, l. 9-16. When Melinda came out of

the closet, Michael was there with his camera aiming it at the door to the closet, ostensibly photographing her. R. 506, l. 22-24, R. 508, l. 10-18. She had been inside the close for about 10-15 minutes. R. 508, l. 4-8. During this incident, Melinda was mostly annoyed. R. 508, l. 25, R. 509, l. 1. Michael's assertion that he could not park his car anywhere else but his driveway during exchanges was bogus due to the availability of space on the street. R. 510, l. 7-24. Regarding Michael photographing her when Melinda was naked, Melinda discovered those photos on her computer. She complained to Michael about it, and he admitted to her that he had done that. R. 511, l. 10-25.

Upon re-cross examination, Melinda testified as follows. Melinda agreed to do exchanges at a police station because Michael kept threatening her unless she did so. R. 516, l. 22-25. The children told Melinda that they did not want to do the exchanges at the police station. R. 516, l. 25. Michael told Melinda that he videotaped her at the soccer events. R. 518, l. 13-15.

B. MATERIAL DOCUMENTARY EVIDENCE.

The Court sustained Michael's objection to Melinda's introduction of three police reports -- which corroborated her testimony about Michael's violence due to an authentication challenge. R. 80, l. 18. These documents had been submitted to the issuing judge and the Commissioner as exhibits with the petition for a

protective order. Melinda made an offer of proof that since Michael had not objected to the police report when she had submitted them to the Commissioner, he had waived his objection. R. 179, l. 19-25; R. 180-81, l. 1-22. Because of the Court's ruling, Melinda did not try to introduce two other police reports as evidence which were part of the court record by way of the commissioner's hearing, although she testified that she had given the police reports to the commissioner at the hearing. R. 96, l. 1-3; R. 98, l. 20-24. Judge Edwards ruled that whether Melinda had submitted the police reports to the Commissioner was irrelevant. R. 99, l. 4-6.

Judge Edwards allowed Michael to introduce new, video, text, and email evidence at the second hearing – which was never disclosed to Melinda prior to the second hearing. This was prejudicial because, not being on notice of this surprise evidence, Melinda did not provide emails which could have supported her position or rebutted Michael's assertions. Melinda brought up the unfairness of the Court's allowance of this evidence during her closing argument and throughout the hearing. R. 528, l. 15-25, R. 529, l. 1.

However, prior to the presentation of Michael's evidence, Michael admitted that Judge Edwards should consider all evidence presented before the Commissioner. R. 138, l. 3-4. This was an inconsistent position under the

principle of equitable estoppel. Melinda further advised the Court that Rule 108 and the *Day* case (discussed infra) only had to do with getting an independent ruling, rather than limiting the kind or amount of evidence presented at a Rule 108 hearing. R. 139, l. 15-25, R. 140, l. 1-4.

C. CLOSING ARGUMENT

During closing argument Melinda, citing to Rule 108, argued that it was unfair for Michael to surprise her with new email and video recording evidence in a second, evidentiary hearing that occurred 30 days after the first hearing. Tr. P. 234, l. 15-25. Melinda had objected to this evidence earlier on. R. 160-61. During his closing argument, Michael exploited the fact that Melinda did not have new, rebuttal documentary evidence to rebut his new evidence. R. 634, l. 10-17; R. 537, l. 2-3; R. 540, l. 1-20, R. 541, l. 1-16, R. 547, l. 13-18, 21. Michael also took an inconsistent position by saying because Melinda had not raised the trespassing issue before the Commissioner, he could not do so before the judge – a second equitable estoppel claim. R. 553, l. 25 (when he himself had offered new evidence during the second hearing). During closing argument, Michael alluded to a private conversation that the judge had with counsel after the first hearing which is not part of the record. R. 555, l. 9-16. During her closing argument, Melinda moved to allow an email on her phone to be introduced as rebuttal

evidence to Michael's new, email evidence, which had surprised her. R. 556, l. 17-24, R. 557, l. 14-25, R. 558, l. 1-6, R. 564, l. 21-25. The judge denied Melinda's motion. R. 558, l. 8-14.

C. THE DISTRICT COURT'S FINDINGS

The Court used a form to enter its ruling, and did not make specific, written findings, nor ask counsel to prepare written findings of fact. R. 124-25. However, it did state its oral findings on the record as follows. The Court found that: (1) the parties were cohabitants, R. 569, p. 5; (2) no abuse occurred, R. 569, l. 21-24; (3) no assault occurred, R. 570, l. 25; (4) no harassment occurred, R. 571, l. 12; (5) no electronic harassment occurred, R. 571, l. 15; (6) voyeurism does not apply because married persons do not have an expectation of privacy with each other, R. 574, l. 5-20; (7) no trespass occurred, R. 576, l. 18; (8) no child abuse occurred, R. 578, l. 23; (9) no threat of violence occurred, R. 579, l. 3; (10) both parties violated court rules, R. 580, l. 15; (11) both parties are in the habit of collecting evidence against each other, R. 580, l. 21; (12) Michael did not engage in a course of conduct that would cause a reasonable person to fear, relying on the videos that Michael presented in the second hearing, R. 583, l. 1-5, 8; (13) subjectively, Melinda did not fear Michael when she went to pick up her children from his residence because she did it frequently, R. 583, l. 22-25, 584, l. 1-5; (14) even

though Michael violated the special master's order to remain in his residence, because Michael videotaped Melinda in close proximity to his residence, and because Melinda slowly backed away with her vehicle (despite wearing braces to her hands), she was not frightened, R. 584, 1-25; (15) a reasonable person would not have been frightened, R. 585, l. 1; (16) Melinda did not have a vulnerability due to her traumatic brain injury, R. 585, l. 16; (17) the Court found dispositive that the new email evidence Michael had presented in the second hearing proved that Melinda was not afraid of him. R. 585, l. 21-25, R. 586, l. 6, R. 588, l. 12-19; (18) there was some evidence that Melinda was vulnerable. R. 522, l. 19-22.

D. DISPOSITION

The judge vacated the protective order.

SUMMARY OF ARGUMENT

Melinda was denied a fair hearing when Judge Edwards bifurcated the evidentiary hearing under Civil Rule 108 into two hearings. During the second hearing, Michael presented new, prejudicial evidence by way of a videotape, a text, and emails which indicated that Melinda was not afraid of him and had asked to sit next to him at their children's soccer practice if he would not surveil her. Although Rule 108(c) allows the Court with discretion to consider new evidence, the Court did not find that there had been a substantial change in circumstances

since the hearing before the commissioner, over Melinda's objections. Secondly, this civil rule cannot circumvent due process by allowing new evidence to be presented without adequate notice. The evidentiary hearing was hijacked by Michael's successful attempt to introduce evidence by trickery. For these reasons the verdict should be vacated, and the protective order reinstated as a matter of law and policy.

Secondly, because the District Court relied exclusively on the new evidence to find that Michael's actions did not cause emotional distress under the individualized objective standard, there is no basis to support the Court's finding and dismissal of the protective order if that evidence is disallowed.

ARGUMENT

I. VIOLATION OF CIVIL RULE 108 AND DUE PROCESS REQUIRES STRIKING PREVIOUSLY UNDISCLOSED MATERIAL EVIDENCE AND VACATING THE VERDICT.

Civil Rule 108(c) allows a judge to consider evidence which had not been presented to a commissioner during a Civil Rule 101 hearing, but only if there has been a substantial change in circumstances. Despite Melinda's repeated objections to the introduction of new evidence, and claiming surprise and unfairness throughout the second, evidentiary hearing, the judge allowed Michael to introduce materially prejudicial and previously undisclosed evidence and made

no finding that there had been a substantial change in circumstances. Michael introduced new email, text, and videotape evidence, which also had never been presented to the Commissioner. Therefore, it is clear that the judge erred in allowing Michael's emails, texts, and videotape to be introduced during the second, evidentiary hearing because he never ruled that there had been a substantial change in circumstances. The judge may have considered the evidence dispositive because it tended to show that Melinda subjectively was not afraid of Michael, and that a reasonable person may not have been afraid of him. The Court used that evidence to make that finding. R. 585, l. 21-25, R. 586, l. 1-15, R. 588, l. 12-19.

In *Day v. Barnes*, 2018 UT App. 143, 427 P.3d 1272, the Court of appeals stated that a civil rule should be interpreted based upon its plain language. *Id.* at 1275, P15. *Day* also stands for the proposition that in the context of a Rule 108 objection, the judge must make independent findings on both the evidence and the law, and that the rule should be read as a whole. *Id.* at 1276, P19. *Day* goes on to say that Rule 108(b) requires a party to identify exactly what part of the proceeding a party is objecting to. *Id.* This language implies that the non-objecting party must have fair notice as to what evidence or legal principle was misapplied by the commissioner so that she can prepare for the evidentiary hearing

and/or oral argument if the judge orders either. Here, Michael's written objection neither mentioned the evidence which he introduced at the second hearing, nor did it state how such evidence should apply to the law. Consequently, the second evidentiary hearing was effectively a trial by ambush and was fundamentally unfair. Due process is a second legal principal by which the undisclosed evidence should be stricken, and the verdict overturned.

Nevertheless, once errors have been identified on appeal, Melinda has the additional burden to prove that the errors were not harmless. *Horrell v. Utah Farm Bureau Ins. Co.,* 909 P.2d 1279, 1282 (UT App. 1996). An error is not harmless if but for the error, the probability of a different outcome is sufficiently high so that it undermines the appellate court's confidence in the outcome. *Id.* Here, the judge relied heavily on the videotape, text, and email evidence that had been introduced during the second part of the evidentiary hearing. R. 583-86. Indeed, this new evidence was *the* dispositive factor for the judge's ruling. R. 585, l. 21-25, R. 586, l. 1-15, R. 588, l. 12-19. That is, the judge found that Melinda was subjectively not afraid of Michael, because, among other things, and according to Michael's email, she was not afraid to sit close to him with the parties' children at another child's soccer matches. The judge also found that such evidence indicated that a reasonable person would not have been afraid. R. 586, l.

16-21. Therefore, the undisclosed, new evidence was without a doubt materially prejudicial.

Melinda attempted to save the day by scrambling to present new evidence during her closing argument. She hurriedly scanned her phone during the second hearing, and discovered a single, rebuttal email after she had just finished testifying in rebuttal. R. 556, l. 17-25; R. 558, l. 1-6. R. 556, l. 17-24, R. 557, l. 14-25, R. 558, l. 1-6, R. 564, l. 21-25. However, when Melinda tried to present this single piece of rebuttal evidence to the judge, her motion to do so was denied as out of time. R. 558, l. 8-14. Thus, Melinda had notified the court that such rebuttal evidence existed. Indeed, Melinda had testified during her rebuttal testimony that such rebuttal evidence existed because she stated that there were other emails and texts which rebutted Michael's testimony. R. 453, l. 24-25; R. 454-455, l. 1-12. Those emails and texts could have corroborated her testimony that in a public place, with a promise that Michael would not photograph, record, or surveil her, a reasonable person's fear of stalking would be significantly mitigated – particularly in the context of a mother who had a motivation to try and protect her children from undue stress in a high conflict divorce context. R. 515; R. 518, l. 14. As stated, Melinda testified during the course of the second hearing about other emails sent by Michael to her which could have impeached his

testimony about not surveilling Melinda and/or about the extent to which he did surveil her, and/or how such surveillance impacted a reasonable person. R. 485, l. 10-11; R. 486, l. 14-21. Furthermore, past stalking events which induced fear would have no bearing on the more recent proposal of Melinda to sit close to Michael publicly at a soccer match with her children if he promised not to continue to surveil her. Thus, this additional email and text evidence, other evidence yet to be thought about and/or produced by Melinda in rebuttal and providing counsel with sufficient time to assess and plan his arguments regarding the undisclosed evidence could have been dispositive to the judge's ruling. Fundamental fairness certainly required such an opportunity. Melinda advised the Court repeatedly about the unfair prejudice she was experiencing by introducing this evidence at the hearing. R. 472, l. 14, R. 528, l. 20-23. The Court's error was exacerbated by Michael who referred to the undisclosed emails during his closing argument as dispositive evidence, R. 541, l. 11, and then argued that because the emails were in existence prior to the second hearing, and because Melinda had knowledge of the emails generally, springing them upon her during the second hearing was not prejudicial to her. R. 557, l. 9. Indeed, it is clear that the judge bought Michael's argument because he used Michael's identical reasoning in dismissing Melinda's cogent, stalking claim. R. 585, l. 21-25; R. 586, l. 1-21.

Therefore, Civil Rule 108 requires that the undisclosed evidence be stricken, and the verdict overturned. See elaboration of this point *infra*.

Secondly, from a policy perspective, Civil Rule 108 should state that if a party wishes to introduce new evidence which had not been presented before the commissioner, that party needs to provide notice of his intent to introduce such evidence by filing a motion with the court to allow the evidence, and that the movant has the burden of proof to show that there has been a substantial change in circumstances. Civil Rule 108 does not state any procedure for how such evidence should be introduced to the judge. Without clarity, there is always a chance that a party may surreptitiously introduce new evidence before the judge as an afterthought, further clogging the appellate court's docket on appeal as here, and rendering the Commissioner hearing virtually meaningless.

Additionally, since there is a choice between overturning the verdict outright or remanding the case so that Melinda may present rebuttal evidence, policy, legal, and equitable considerations require the former option. That is, when a party introduces late filed evidence in the civil context, the proper remedy as a matter of law generally is to strike the evidence. *See Pratt v. Nelson*, 2005 UT App. 541, 127 P.3d 1256. Furthermore, from an equitable perspective, doing otherwise would be the equivalent to rewarding Michael's afterthought approach,

and placing a burden on Melinda with having to respond to the undisclosed evidence.

Additionally, like the losing party in *Pratt*, Michael himself created the problem which he now faces. That is, he had thirty days between the first and second hearings – plenty of time to file a motion with the court, or to simply provide Melinda with a copy of his new exhibits. He did neither. Therefore, there are legal, equitable, and policy reasons to simply overturn the verdict.

As a consolation prize, the case should be remanded to the judge to at least afford Melinda the opportunity to present rebuttal evidence.

II. THERE IS NO EVIDENCE TO SUPPORT A FINDING THAT MICHAEL DID NOT CAUSE MELINDA EMOTIONAL DISTRESS UNDER AN INDIVIDUALIZED OBJECTIVE STANDARD.

In *Baird v. Baird*, 2014 UT 08, 322 P.3d 728, 735, this Court stated that a Court must consider a victim's vulnerabilities under the emotional distress prong of Utah's protective order statute. It also held that a victim must prove that the victimizer caused a significant amount of psychological suffering in his course of conduct to find that the protective order should be issued under the emotional distress prong of the statute. *Id.* at 738.

Here, the Court made two findings related to fear and emotional distress

under the individualized objective standard articulated in *Baird* which indicate that the Court's ruling is clearly erroneous. First, the Court concluded that Michael's course of conduct amounted to stalking generally. R. 581, l. 21-25; R. 582, l. 1-10. The Court then inferred that because Melinda slowly backed out of Michael's driveway while he came close to her car to videotape her in violation of the special master's order during a parent-time exchange, Melinda, under the individualized objective standard set forth in *Baird* was not afraid to be in Michael's presence. R. 584, l. 5-13; R 587, l. 12-22. However, Melinda testified that she went to Michael's residence as required by court order to pick up her children. A parent should not be denied a protective order simply because she is trying to enjoy a fundamental liberty interest. The Court also failed to consider how Melinda's traumatic brain injury and hand braces may have prevented her from fleeing the scene quickly. For example, it is clear that the Court failed to consider how Michael's disobedience of the special master's order to remain in his residence impacted a stalked, disabled individual – particularly when the victim thought it important to obey the court order as Melinda did, and how it would create fear when Michael did not obey the order. R. 460, l. 8; R. 522, l. 21. Also, despite finding some evidence that Melinda was vulnerable, the Court failed to connect that vulnerability with the evidence. R. 522, l. 18-22.

Additionally, and perhaps more importantly, the only evidence that the Court used under the emotional distress prong of the protective order statute was the undisclosed emails indicating that Melinda would "play Michael's games," and sit close to him at public soccer matches if he would not stalk her. R. 585, l. 21-25; R. 586, l. 1-21. If this Court throws that evidence out, then there is no evidence to support the Court's finding on the emotional distress prong of the statute. This seems particularly appropriate because when Melinda asked for clarification as to the Court's ruling after it had entered its findings, the Court, in citing to *Baird*, omitted the part of that opinion which states that a Court *must* consider the particular vulnerabilities of the victim. R. 587, l. 12-22. Therefore, since the Court found that stalking occurred, the protective order should be reinstated on the remaining evidence and findings, even in the light most favorable to Michael on the emotional distress prong and if the new evidence is stricken.

CONCLUSION

Civil Rule 108 and fundamental fairness require that the order in this case be vacated. The protective order should be reinstated. Alternatively, the case should be remanded so that Melinda may have a fair opportunity to present rebuttal evidence to the new evidence presented by Michael in the second evidentiary hearing.

Dated this 29th day of July, 2019. /s/ Theodore R. Weckel

CERTIFICATE OF SERVICE

I certify that I served a copy of this principal brief upon Robert Peterson on July 29, 2019, by email at: rob@hplawslc.com.

/s/ Theodore R. Weckel

CERTIFICATE OF COMPLIANCE

Pursuant to Utah R. App. P. 24(f)(1), I certify that this brief contains approximately 7,993 words under Word software.

/s/ Theodore R. Weckel

ADDENDUM

Addendum A — Utah R. Civ. P. 108.

Addendum B — Ruling by District Court

Dated this 29th day of July, 2019. /s/ Theodore R. Weckel

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CERTIFICATE OF COMPLAINCE

Pursuant to Utah R. App. P. 21(g) and 24(a)(11)(B) there is no private information contained in the brief.

/s/ Theodore R. Weckel

ADDENDUM

Addendum A — Utah R. Civ. P. 108.

Addendum B — Ruling by District Court

ADDENDUM A

Utah Court Rules

Utah Rules of Civil Procedure

Part XII. Family Law

As amended through June 11, 2019

Rule 108. Objection to Court Commissioner's Recommendation

(a) A recommendation of a court commissioner is the order of the court until modified by the court. A party may file a written objection to the recommendation within 14 days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, within 14 days after the minute entry of the recommendation is served. A judge's counter-signature on the commissioner's recommendation does not affect the review of an objection.

(b) The objection must identify succinctly and with particularity the findings of fact, the conclusions of law, or the part of the recommendation to which the objection is made and state the relief sought. The memorandum in support of the objection must explain succinctly and with particularity why the findings, conclusions, or recommendation are incorrect. The time for filing, length and content of memoranda, affidavits, and request to submit for decision are as stated for motions in Rule 7.

(c) If there has been a substantial change of circumstances since the commissioner's recommendation, the judge may, in the interests of judicial economy, consider new evidence. Otherwise, any evidence, whether by proffer, testimony or exhibit, not presented to the commissioner shall not be presented to the judge.

(d)(1) The judge may hold a hearing on any objection.

(d)(2) If the hearing before the commissioner was held under Utah Code Title 62A, Chapter 15, Part 6, Utah State Hospital and Other Mental Health Facilities, Utah Code Title 78B, Chapter 7, Protective Orders, or on an order to show cause for the enforcement of a judgment, any party has the right, upon request, to present testimony and other evidence on genuine issues of material fact.

(d)(3) If the hearing before the commissioner was in a domestic relations matter other than a cohabitant abuse protective order, any party has the right, upon request:

(d)(3)(to present testimony and other evidence on genuine issues of material fact relevant to custody; and

A)

(d)(to a hearing at which the judge may require testimony or proffers of
3)(testimony on genuine issues of material fact relevant to issues other than
B) custody.

(e) If a party does not request a hearing, the judge may hold a hearing or review the record of evidence, whether by proffer, testimony or exhibit, before the commissioner.

(f) The judge will make independent findings of fact and conclusions of law based on the evidence, whether by proffer, testimony or exhibit, presented to the judge, or, if there was no hearing before the judge, based on the evidence presented to the commissioner.

Cite as Utah. R. Civ. P. 108

ADDENDUM B

FILED
MAR 28 2019
Layton District Court

Order on Request to Dismiss or Vacate Protective Order

Case Number: 184701858
County: Davis

District: Second
State: Utah
Judge: Michael S. Edwards
Commissioner: T. R. Morgan

Petitioner *(protected person):*

Melinda (First Name) _____ (Middle) Watson (Last)

Other people who were protected by this order

Name and phone number of Petitioner's attorney *(if any)*:	Name	Age	Relationship to Petitioner
Theodore R. Weckel, Jr.			
801-535-4385			

Respondent *(Person petitioner was protected from):*

Michael (First Name) Gordon (Middle) Watson (Last)

409 N. 1322 E. (Street) Lehi (City) UT 84043 (State and Zip)

Findings:

[ ] **The indicated request to dismiss or vacate a protective order was filed. The court has reviewed it and makes the order that follows.**

[ ] *Petitioner's Request to Dismiss Protective Order* (Notice to Respondent? [ ] Yes [ ] No)
Respondent's Request to Vacate Temporary Protective Order (Notice to Petitioner? [ ] Yes [ ] No)
[ ] *Respondent's Request to Dismiss Protective Order (issued more than 2 years ago)*
(Notice to Petitioner? [ ] Yes [ ] No)
[ ] Other *(name)* _____

[ ] **The Court reviewed the request and other documents in the file,** OR

[X] **There was a hearing on** *(date)*: 3/28/19 & 3/28/19. The following people were present at the hearing:

[X] Petitioner [X] Petitioner's attorney *(name)*: Theodore R. Weckel, Jr.

[X] Respondent [X] Respondent's attorney *(name)*: Robert W. Peterson

Order: The court now

[ ] **DENIES the request.** This case is not dismissed. Any protective orders issues are still valid and enforceable.

[X] **GRANTS the request.** This case is dismissed. Any protective orders issued are no longer valid.
[ ] *Temporary Protective Order (Ex Parte Order)* issued on *(date):* _____
[X] *Protective Order* issued on *(date):* December 17, 2018

Commissioner's or Judge's signature may instead appear at the top of the first page of this document.

_____ Signature ▶ _____
Date

Commissioner _____

March 28, 2019 Signature ▶ _____
Date

Judge Michael S. Edwards

STATE OF UTAH
SECOND JUDICIAL DISTRICT
Davis County Department

By signing below, Petitioner acknowledges receiving a copy of this *Order on Request to Dismiss Protective Order.*

Petitioner's Signature: _____

By signing below, Respondent acknowledges receiving a copy of this *Order on Request to Dismiss Protective Order.*

Respondent's Signature: _____