

2010 WL 6518143 (Me.) (Appellate Brief)  
Supreme Judicial Court of Maine.

Elizabeth E. LYMAN, Plaintiff/Appellee,

v.

Luke D. HUBER, Defendant/Appellant.

No. CUM-09-559.

May 7, 2010.

On Appeal from the Superior Court (Cumberland County)

**Brief for Appellee**

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## \*1 STATEMENT OF FACTS AND PROCEDURAL HISTORY

### 1) Introduction

As she lay on the couch in 2004, unable to do anything for herself because of a broken ankle, Ms. Lyman hoped that the man she lived with, who was supposed to love her and spend the rest of her life with her, would at least take care of the house. (App. 63, pp. 71-73; 64, p. 74.)<sup>1</sup> She wasn't hoping for much: to bring food in so that she could eat; to take out the trash; to make a path through his belongings so that she could get from one room to another on her crutches without falling. (App. 63, p. 72) When he did not, she started to think more clearly about their relationship and to see the truth: she was a victim of domestic abuse and she had to do something to change her circumstances. (App. 33; 64, p. 74, 75; 133, p. 105).

From Ms. Lyman's perspective, Mr. Huber had “violated me in every possible way.” (App. 92, pp. 188, 189) She was scared to death, and had no idea what would happen to her. (*Id.*) She had lost all faith in her ability to “function on the outside.” (*Id.*)

### 2) Statement of Facts

Prior to the relationship with Mr. Huber, she was living a well-adjusted life in Portland, Maine, with friends, a social life, success and was teaching riding and art--her passions--and was happy. (App. 50, pp. 20, 21; 51, p. 22) She had an art degree from Bennington College and had trained with the finest of equestrian teachers in the country. (*Id.*) One witness who had known Ms. Lyman since 1988, described what Ms. Lyman was like before the relationship with Mr. Huber took its toll: confident, outgoing and self-assured. (App. 113, p. 25; 116, p. 35)

\*2 Mr. Huber did not hit Ms. Lyman or beat her up physically, because he didn't have to. (App. 32, 33) He had other effective ways to dominate and control her and he used them to try to take away all that she lived for and cared about in life, except himself. (App. 31-33; 36-38) His tools were his wealth, anger and violence, intimidation, ridicule, sex, humiliation, blame and most cruelly, Ms. Lyman's own desire for a normal life with him. (*Id.*; App. 52, p. 29; 54-60; 85, p. 160; 113-141; 201-205, 207)

In 1994, Ms. Lyman wanted to realize her dream of a full-time career with horses and art by buying a home with a stable that came up for sale in Cape Elizabeth, Maine. (App. 51-52) It was a unique opportunity. (*Id.*) Ms. Lyman and Mr. Huber had been involved for about two years, but it was a long-distance relationship and he had not shown interest in the kind of commitment she wanted. (App. 51, p. 24, 25) Ms. Lyman made plans to buy the home with financial help from her family, but when she told Mr. Huber about it, she was surprised that he offered to buy it for her. (App. 31; 52, p. 29; 145, p. 152, 153) Mr. Huber knew that Ms. Lyman's brother and father had offered to help her purchase the house, but he wanted to use this opportunity

to “continue our relationship in a more serious manner.” (App. 145, p. 153) Mr. Huber paid for the property, title was put into joint names, and they began living together in November, 1994. (App. 31, 34; 53, p. 30-32; 209)

At first, everything was wonderful. (App. 31; 53, p. 31)) Ms. Lyman was employed outside the home, but kept her three horses at their property to begin developing her dream of a horse business. (App. 50, p. 21; 52, p. 26) Mr. Huber lived part-time at the Cape Elizabeth house, and Ms. Lyman was there to take care of the house and details of their life together when he was gone. (App. 31; 166, p. 234, 235) He \*3 owned a home and had business dealings in Saratoga, New York, until 2002, when he consolidated his life in Cape Elizabeth. (*Id.*)

Soon after they had moved in and the open house for friends and family was over, Mr. Huber's behaviors towards Ms. Lyman changed. (App. 32; 54, p. 34) Repairs to the home stopped. (*Id.*) Mr. Huber began a pattern of reprimands, intimidation and bullying over small details, such as whether Ms. Lyman could move his mail from the dinner table so that it would be clear to serve the food she had prepared. (*Id.*) When something displeased him, such as Ms. Lyman asking to change the time they were planning to go out to dinner, he would launch into violent tirades that included loud yelling, screaming, swearing, banging, slamming things, stomping and kicking the walls. (App. 31, 55 p. 37; 115, p. 30) These tirades continued and escalated in intensity and frequency over time. (App. 55, p. 38) Mr. Huber referenced Ms. Lyman and/or her activities during his tirades, for example, by screaming, “... why would you want to get a place like this” and “fucking bitch.” (App. 54, p. 35; 55, p. 38) The timing of the tirades and their direct reference to her caused Ms. Lyman to conclude that this behavior was her fault and that if she adjusted her behavior and that of others who came to their house, she could make him stop. (App. 33; 54, pp. 35-37; 85, p. 160)

Mr. Huber's behavior scared Ms. Lyman and curbed her to a set of rules that she followed and imposed on others. (App. 59, p. 55; 71, p. 103) Among the rules were never to touch anything that was his, never to sit in his chair, to never to turn off the running water even if he left it on and went into another room, to cancel all activities so that she was totally available to him when he was there, to keep the yard scrupulously clean of any evidence of horse activities, and not to ask for anything, except what was \*4 absolutely necessary. (App. 54, p. 37; 55, pp. 38, 39) She feared crossing him in any way. (App. 55, p. 39; 59, p. 57)

Unfortunately, her compliance did not work, but instead caused the demands to grow, and his violent behavior to increase. (App. 55, p. 38) His accumulated piles of papers, boxes, newspapers, periodicals, crates and trash covered floor to ceiling in every room and it became increasingly impossible for Ms. Lyman to make sure no one touched them. (App. 32; 33; 37; 55, p. 40; 57, 58; 59, p. 55; 201-205; 207). Mr. Huber kept her on hold as to when he might be showing up from New York, and after she had cancelled her plans and prepared dinner, he would not show up. (App. 58, pp. 50, 51) When he did show up, she was not allowed to talk to her friends and clients on the telephone, if he was present. (App. 55, p.38)

Their intimacy came under assault from Mr. Huber. He ridiculed her body, recoiled from her touch and he claimed sex was “dirty,” even though he knew that she wanted to have children. (App. 32; 51, p. 24; 56, p. 42) Mr. Huber stayed up late into the night and then, without fail, would pull the bed covers off Ms. Lyman as she lay naked and sleeping to examine her and the bed with a flashlight. (App. 32; 56, p. 42-44) Ms. Lyman asked him to stop, but he would not, even though he knew she “hated” it. (App. 178, p. 38)

Mr. Huber was selective in exhibiting his violent behaviors. Ms. Lyman had never seen his tirades until she had foregone other options for buying the house and they had moved in together. (App. 75, P. 120) He never had tirades in front of his family. (App. 110, pp. 11, 12) Mr. Huber's friends and business associates did not witness violent behaviors. (App. 187, p. 77; 188, p. 81; 190, p.88) He controlled his violent \*5 tendencies for his own interests, but not for Ms. Lyman's. For instance, there was no report of violence on overnight trips with family and friends to places as far away as Panama. (App. 145, p. 151; 151, p. 177; 152, p. 178)

Mr. Huber did, however, use his behavior to drive away Ms. Lyman's family, friends and clients. (App. 33, 113-141) They were shocked, frightened and alarmed by Mr. Huber's violence, by what they saw happening to Ms. Lyman and by what was going on at the property. (App. 115, p. 30; 116, p. 35-37; 118, p. 44; 123, pp. 63-65; 126, p. 74, 75; 127, p. 81) They witnessed his tirades

and other outrageous behavior, and were afraid for themselves and for Ms. Lyman. (*Id.*) One witness set up a call schedule with her husband in order to insure her safety when she went on the property. (App. 123, p. 63) She feared there would be “harm to the horses... to someone else.” (*Id.*) They saw Ms. Lyman becoming withdrawn, defensive and isolated. (App. 116, p. 35, 36; 141, p. 135) Her sister Mary stopped visiting her entirely because of Mr. Huber and attempted to plan a family “intervention” with their brothers to get him out of the home. (App. 137, p. 120, 121; 139, p. 126; 141, p. 135)

When Ms. Lyman lost her day job in 1997, Mr. Huber demeaned and humiliated her over her **financial** dependence even though he had agreed to support her. (191, 92; 165, p. 231; 55, pp. 39-41). When she asked for money for such basics as groceries or personal care items that she needed, he would say, “... do you think you deserve it? ... why don't you take back returnable bottles...” (App. 55, p. 40, 41) When Ms. Lyman would begin to believe that Mr. Huber did not love or care about her, he would do something very nice for her that involved spending a lot of money. (App. 59, p. 57) One time he took her to Boston, where they stayed in a fine hotel, dined out and Mr. Huber bought a \*6 boat that cost more than the value of the house they were living in. (*Id.*; 60, pp. 58, 59; 206, 208). Another time, he said he would buy a car for her. (App. 59, p. 57)

Ms. Lyman had conflicted emotions regarding the perpetrator of her abuse and she was reluctant to end the relationship. (App. 92, pp. 188, 189) She both feared that he would stay and feared that he would leave. (*Id.*) She did not see a way that her life could go forward without her relationship with him and she was “paralyzed.” (App. 55, p. 39; 63, p. 70, 71)

She tried to get Mr. Huber to go with her to counseling, but he would not cooperate. (App. 64) She next decided to separate herself from the day-to-day trauma and perhaps get the strength to make some sort of change. (*Id.*) In the Winter of 2005, she arranged to go to Arizona for horsemanship training and was gone for six weeks. (App. 58, p. 50; 64, p. 75) When she returned, she again made arrangements for counseling with Mr. Huber, but he did not go to the appointment. (App. 64, p. 76) She then confronted him and said that the relationship was over and that he should move out. (App. 64, p. 77) Mr. Huber did not object, and indicated that he would move into a house he had in Falmouth in October, 2005. (*Id.*)

By the end of October, 2005, Mr. Huber had not moved out and nothing had changed. So, Ms. Lyman tried to get Mr. Huber to move some of his piles of things around in the house to make room for herself. (*Id.*) When Mr. Huber did not move his things, Ms. Lyman started to move them. (App. 65, pp. 78, 79) Mr. Huber stopped her by threatening to go into the horse barn and start moving her things around if she did not stop. (*Id.*, App. 160, pp. 212-215) This was a direct threat to the safety of her horses and \*7 others. (App. 57, p. 49) Ms. Lyman resumed her compliance with the rule to never touch his things. (App. 58, p. 50)

In the Winter of 2006, with her separation from Mr. Huber stalled, Ms. Lyman went to Arizona a second time for horsemanship training. (App. 65, p. 80) On her return after six weeks, Mr. Huber had done nothing to further their plans to separate, had filled in what little space she had made for herself with more of his things and Mr. Huber's abusive behaviors escalated and took a new twist. (*Id.*; 65, p. 80)

On a Saturday morning in Spring of 2006, at her usual time for giving riding lessons, Mr. Huber brought a woman to their house to join him in the hot tub. (App. 65, pp. 80, 81) Ms. Lyman was very upset and cancelled her lessons for the day. (*Id.*) Shortly after that, she learned that his abuse had escalated to involve third parties. She learned from sources other than Mr. Huber that there was a Protection from Harassment suit pending against him brought by his construction clients. (App. 92, pp. 186, 187) Ms. Lyman was greatly alarmed by Mr. Huber's new behaviors and saw them as a warning that the situation could turn lethal. She believed that her life and the lives of her horses were in immediate danger. (App. 66, p. 84, 85). She testified, “I knew that I needed to leave the premises immediately, that I did not dare discuss it with Luke for fear of retaliation... I made arrangements, emergency arrangements to get myself and my animals out of the property without his knowledge...” (*Id.*) Ms. Lyman kept her whereabouts a secret. (*Id.*)

Ms. Lyman depended on the charity of friends and acquaintances to take her in. (App. 66, p. 85; 67) She could not keep the horses that she had carefully bred and trained for her business. (*Id.*; App. 112, p. 20) She gave away her “foundation mare”

and \*8 another horse that had been insured for \$15,000. She “sold” one horse valued at between \$7,000-\$8,000 to a friend for \$2,500. (*Id.*)

Ms. Lyman went west with her remaining horses, living in Arizona and Texas, sometimes in a bunk house and sometimes in a travel trailer that she bought for \$3,500. (App. 67, 68) She lost the 85 clients she had built up in her business in Maine. (*Id.*) She had grossed \$30,000 the year before she was forced to leave the property, but had been able to make only \$20,000 and \$21,000 in the two years after leaving. (App. 68)

### 3) Procedural History

Ms. Lyman filed an eight-count complaint against Mr. Huber, dated June 13, 2006, in the Superior Court, Cumberland County. (App. 11-22). Mr. Huber filed his answer, affirmative defenses and a two-count counterclaim for Declaratory Judgment and Unpaid Loans. (App. 23-29) Mr. Huber dismissed the counterclaim for Unpaid Loans on the first morning of trial May 14, 2008. (App. 6) The count for Declaratory Judgment was not referenced in the court's Decision and Judgment, but was in substance dealt with under the “Equitable Partition” section of the Decision and Judgment. (App. 34; 39)

Under “Equitable Partition” in the Decision and Judgment, Ms. Lyman was given the choice to buy Mr. Huber's share of the house or the house would be put up for sale. (App. 39) Ms. Lyman chose not to buy out Mr. Huber, and the court stated in its Post-Judgment Decision and Order, dated October 15, 2009, that the house was to be publicly listed for sale and the proceeds divided according to the Decision and Judgment (App. 43)

\*9 Ms. Lyman did not appeal any part of the Court's Decision and Judgment or the Post-judgment Decision and Judgment of the court. (App. 8; 9) Mr. Huber filed a Notice of Appeal on November 6, 2009.

Ms. Lyman otherwise concurs with the procedural history as contained in Appellant's brief at pages 2 and 3.

### 4) Issues Present For Review

Appellant does not disagree with the version of Appellant's “Issues Presented for Review” as stated in Appellant's brief, page 4.

## STANDARD OF REVIEW ON APPEAL

The standard of review for issues of law is *de novo* and for issues of fact it is “clear error.” *Bernier v. Merrill Air Engineers*, 2001 ME 17, ¶7, 770 A.2d 97, 101 (Me. 2001) A factual finding will be set aside as clearly erroneous only if there is no competent evidence in the record to support it, even if the evidence might support alternative findings of fact. *Id.*, *York Hospital, et al., v. Department of Health and Human Services, et al.*, 2008 ME 165, ¶16, 959 A.2d 67, 71 (Me. 2008)(cite omitted). All factual findings are accorded substantial deference and overturned only if clearly erroneous. (*Id.*)

The burden is on the moving party to show that the adverse verdict is clearly and manifestly wrong. *Guardianship of Maryanne Hughes*, 1998 ME 186 ¶20, 715 A. 2d 919, 924, 925 (Me. 1998). Appellant has the burden to identify the precise nature of the claimed error and support such claims with citations to the record. *Key Equipment Finance, Inc. v. Hawkins*, 2009 ME 117, ¶21, 985 A.2d 1139, 1145 (Me. 2009). The \*10 weight of the evidence and credibility of witnesses is within the exclusive province of the factfinder. *Guardianship of Hughes*, 1998 ME at ¶21, 715 A.2d at 925.

If the Law Court determines that an appeal is frivolous or instituted primarily for the purpose of delay, it may award to the opposing parties or their counsel treble costs and reasonable expenses, including attorney fees caused by such action. M.R.App.P. 13(f). Sanctions have been awarded in cases where the moving party failed to provide legal authority for its position, provided only cursory discussion of the issues in its brief and failed to file an appendix. *Labonte v. Thurlow*, 2009 Me 68, ¶7,

974 A.2d 914, 915 (Me. 2009). Sanctions were awarded when a party made unfounded accusations and used “childish vitriol.” *Key Equipment Finance, Inc. v. Hawkins*, 2009 Me at ¶23, 985 A.2d at 1146. Sanctions have been awarded where only a portion of the appeal was found to be frivolous. *Edwards v. Campbell Jr.*, 2008 ME 173, ¶11, 960 A.2d 324, 327 (Me. 2008) (Campbell's argument regarding subject matter jurisdiction presented a colorable issue of law, but challenge of the sufficiency of the evidence without providing a transcript on the issue of visitation was consistent with his long history of intentional interference with Edwards's right of visitation, was without merit and frivolous.)

## ARGUMENT

### **I. Appellant Has Not Met the Burden to Show That the Decision and Judgment of the Superior Court Was Clearly and Manifestly Wrong on the Issues of Intentional Infliction of Emotional Distress.**

#### ***A. Evidence recited in Appellant's brief was sufficient to support the court's Decision and Judgment on the severity of the emotional distress suffered by Ms. Lyman.***

Appellant asserts that the evidence of Ms. Lyman's emotional distress was, “... insufficient to rise to the level of ‘severe.’” (Appellant brief p. 9). Appellant states:

\*11 “Ms. Lyman testified that early in their relationship she felt “bad” and “sick” when she heard Mr. Huber having a tirade in the shower (App. at 35); Although Ms. Lyman testified that she became “paralyzed... [and] gave up having friends,” (*Id.* at 54) she did understand that she could leave the relationship at any time. (*Id.* at 91) Recalling Mr. Huber's conduct during their relationship was a “very uncomfortable and painful” process. (*Id.* at 64) When she thinks about his conduct, Ms. Lyman cries, shakes, and cannot breathe. (*Id.* at 64) She never sought treatment from any mental health professional, however. (*Id.* at 64) In its Decision and Judgment, the Superior Court pointed to testimony by friends and family that Ms. Lyman as “guarded, jumpy and withdrawn,” shaken,” and “tense, afraid and on edge.” (*Id.* at 36)”

Appellant brief, p. 9

Even these facts cited by Appellant are strong enough to show that Ms. Lyman's suffering was sufficiently severe to support the claim of intentional infliction of emotional distress. *Latremore v. Latremore*, 584 A.2d 262, 633 (Me. 1990) (Credible evidence of severe emotional suffering was sufficient to uphold the jury's verdict where plaintiff's physical symptoms included nervousness, shaking and a worsening speech impediment”) Appellant does not show why these facts are not sufficient, except to state that they are “understandable in a broken romantic relationship or in a relationship where one of the parties suffers from illness or compulsions.” (Appellant brief, p. 9)

Appellant's only legal citation to support his conclusion is to the case of *Schelling v. Lindell*, 2008 ME 59, 942 A. 2d 1226 (Me 2008) (Emotional injury suffered from publication of a letter to the editor was insufficient to support compensation in an anti-SLAPP statute case). Appellant quotes from *Schelling* that, “distress, irritation and emotional upset may in fact, be a regular result of *public pronouncements*.” (Appellant brief p. 10, citing *Schelling*, 2008 ME at ¶26, 942 A.2d at 1233) (*emphasis added*) Public pronouncements have nothing to do with the issues in the case before the court. Mr. Huber's statements and actions took place in private and were particularly directed at Ms. Lyman over the course of their fifteen-year relationship. There is no privilege in Maine \*12 law that makes tortious behavior not intentional or reckless because the parties are in a romantic relationship. *Henriksen v. Camerson*, 622 A.2d 1135, 1139 (Me. 1993) (Intentional or reckless infliction of emotional distress is not privileged or non-tortious because the parties are or were married.)

Appellant points out that Ms. Lyman did not get counseling or treatment. (Appellant brief p. 9). This court has held repeatedly that it is not a requirement that a Plaintiffs suffering be corroborated by expert testimony or the act of obtaining mental health services. *Latremore*, 584 A.2d 262-263.

In its Decision and Judgment, the court stated that severe emotional distress "... may at times be inferred from the defendant's conduct and objective symptomatology is not an absolute prerequisite for recovery of damages..." citing *Latremore*, 584 A.2d at 633. The court further stated, "The severity of emotional distress that a person suffers is a factual issue. *Id.* at 631. Its manifestation can vary substantially from person to person." (App. 37)

Appellant has not provided any facts to show that the Decision and Order is clearly or manifestly wrong. The Superior Court decision was based on competent evidence and the Decision and Order should be affirmed.

***B. Evidence shows that Mr. Hnber's pattern of cruelty and intimidation over a prolonged period of time was intentional.***

Appellant has not met the burden to show that the Decision and Order of the Superior Court was clearly and manifestly wrong on the issue of intent. Appellant alleged that, "the Superior Court never analyzed whether Mr. Huber's conduct was intentional or reckless, ... likely because no reasonable view of the evidence presented at trial could lead to that conclusion." (Appellant brief at p. 6)

\*13 The only evidence used by Appellant to support this accusation is that Mr. Huber testified that he had "compulsions" towards certain behaviors. (Appellant brief at p. 7). It is not clear whether Appellant is arguing that his abusive and violent behaviors were "compulsive" or that his "compulsions" caused or somehow excused his otherwise abusive and violent behaviors. Appellant cites to no legal authority to substantiate this assertion. Indeed, Mr. Huber blocked all inquiry into whether he had a medical condition. (App. 176, p.30).

The Court explicitly and implicitly rejected the claim that Mr. Huber's behavior was involuntary to the point that it should be excused. (App. 36-38) The Court said, "Huber's behavior toward Lyman constituted a pattern of cruelty and intimidation over a prolonged period so that the court can only conclude that it is extreme and outrageous." (*Id.* at 38) Appellant may have wanted the Court to make a different decision, but that does not meet the standard necessary to mount a Law Court appeal. *York Hospital, et al.*, 2008 ME at ¶ 16, 959 A.2d at 71 (Me 2008)(Factual findings will be set aside as clearly erroneous only if there is no competent evidence in the record to support it, even if the evidence might support alternative findings of fact.)

The Decision and Order stated the following to support the conclusion that Mr. Huber's actions were intentional:

"Shortly after the open house the renovations stopped, and the relationship started to change. Luke began acting strangely and became very assertive and authoritative. He commanded Libby not to touch his things or to move the mail. When he was taking his morning should (shower sic) he would regularly yell, scream, and swear. He would stomp and kick walls. Luke's bizarre behavior continued over time and escalated. He became more demanding of her time, and there were more tirades and complaints of her use of the telephone. Luke screamed about a small piece of horse manure in the driveway. He became obsessive about taking showers and he constantly washing his hands. His personal belongings were spread out all over the house to the point that there \*14 were paths to get from one room to another. He inspected his bed and sheets with a flashlight before getting in." (Appendix p. 32)

Luke's actions had a substantial emotional impact on Libby... he was very commanding and intimidating to the point that she was afraid of him and "afraid of his anger." Libby became socially paralyzed, and she withdrew from her friends. In order to avoid his wrath, she would ask him how he wanted things done so that he would not get mad." (*Id.* at 32, 33)

"Luke insisted that Libby "be available" when he was home. She had to clear her schedule, cancel lesson and appointments, and not have any social engagements. Libby was afraid to not be available... when Libby's mother put a sweater on some of this (his sic) things he (Luke) got very upset and offered no apology." (*Id.* at 33)

“Libby realized that the only way out was to leave, but she could not. Every so often he would “do something nice.” They went boat shopping in Boston, stayed in a fancy hotel with fine dining... she felt it was strange that he would buy a large expensive pleasure boat, but not spend money to repair the house.” (*Id.* at 33)

“In February of 2004, Libby broke her ankle. Luke took her to a doctor and left her mere. She had to call a friend to take her to the hospital. She received no help from him even though she could not help herself while she recuperated.” (*Id.* at 33)

“... the court has found that plaintiff was driven from the property and forced to give up her horse business and that she never had the opportunity to built it into an ongoing enterprise. The defendant's egregious conduct was the sole cause of her leaving...” (*Id.* at 35, 36)

...shortly after the purchase of the home, Huber began to create and enforce irrational rules and would respond with violent outbursts designed to control and intimidate her when she did not comply.... She was forced to live in unreasonable conditions. Visitors to the property witnessed Huber's behavior and support her allegations, including the effect of Huber's behavior on her.... Huber **exploited** her **financial** vulnerability.” (*Id.* at 36, 37)

“Huber's behavior toward Lyman constituted a pattern of cruelty and intimidation over a prolonged period so that the court can only conclude that it is extreme and outrageous.” (*Id.* at 38)

The Appellant provided no evidence from the record to show that the court's factual findings were clearly wrong or that the legal conclusion was erroneous. He did not explain why these facts do not show that Mr. Huber subjectively knew that his conduct could cause harm to another. *Curtis v. Porter*; 2001 ME 158, ¶12, 784 A.2d 18, 23 (Me. 2001). He does not explain why his behavior was not reckless. Although Appellant contends that the judge should have accepted other evidence as the truth, this does not present grounds for a Law Court appeal. \*15 *Key Equipment Finance, Inc.*, 2009 ME at ¶21, 985 A.2d at 1145. (Appeals are generally founded upon claims of error committed by the tribunal below. Consequently, counsel must identify the precise nature of the claimed error and support such claims with citations to the record.)

Appellant's challenge that the court “never analyzed whether Mr. Huber's conduct was intentional or reckless..., likely because no reasonable view of the evidence presented at trial could lead to that conclusion” is troubling, because Appellant implies that the Court, knowing that there was insufficient evidence to show intent, wanted to find in favor of plaintiff anyway. (Appellant brief p. 6) This accusation is unfounded. It shows a lack of respect and deference to the trial court. *Key Equipment Finance, Inc.*, 2009 ME at ¶ 12, 985 A. 2d at 1146 (Me. 2009)(Unfounded accusations and “childish vitriol” were sufficient to impose sanctions under the frivolous appeal standard).

***C. The record contains numerous facts, in addition to those recited by the Court, that support Appellant's liability for intentional infliction of emotional distress.***

In his brief, Appellant claims that he could not be liable because testimony at trial showed his actions were not directed at Ms. Lyman and that he did not know that his behavior was creating a risk of harm to her. The trial transcript is replete with evidence that shows that Mr. Huber knew exactly what he was doing, and that his actions were directly calculated to impact and control Ms. Lyman and the use of their commonly owned property.

Mr. Huber stated that his anger was “usually” directed his own unhappiness. (App. 153, p. 184). In fact, the evidence showed that his more violent behaviors were directed at Ms. Lyman. (App. 54, p. 55; 55, p. 38) She, her horse customers and her Mends were victims of Mr. Huber's abusive and violent behaviors. (App. at 58, p. 52; \*16 115, p. 30; 122, p. 61; 134, p. 107; 138, p. 123). Mr. Huber never exhibited abusive or violent behaviors in front of his friends and family. (App. at 187, p. 77; 188, p. 81; 190, p. 88) Further, Ms. Lyman was not subject to his abuse and violence until she had given up her options to acquire the house without Mr. Huber's participation. (App. 75, p. 120) Mr. Huber was able to travel extensively with family and friends with no evidence of abuse or violence. (App. 145, p. 151; 151, p. 177; 152, p. 178)

On cross examination, Ms. Lyman stated that Mr. Huber wanted her to give up her horse business. (App. 88, p. 173) It is not a far reach to conclude that Mr. Huber was trying to drive Ms. Lyman's customers and friends away for that purpose alone.

When Ms. Lyman tried to make room for herself in the house, Mr. Huber told her that if she didn't stop, he would go into the barn and start moving things around there. (App. 57, p. 49) This was a direct threat to Ms. Lyman, the safety in the barn and consequently her horses and other people. (*Id.*; 212, 214, 215) Mr. Huber admitted that he threatened to move things in the barn, and stated "... that got her attention a little bit" so that he "... wouldn't have to try to do that (move his things)." (App. at 160, p. 212, 213) In his testimony, Mr. Huber admitted that, "I actually tried to control things that I needed for myself." (App. 154, p. 186)

Mr. Huber's conduct was intentional and threatening to Ms. Lyman and, as the Court found, instituted for the purpose of maintaining his control and getting his way. (App. at 36-38)

Appellant claimed he cannot be held responsible, because he did not know his behavior's harmed Libby. That assertion is contradicted by his own testimony. Mr. Huber admitted that when he pulled up the bed sheet every night and inspected Ms. \*17 Lyman with a flashlight that, "... she obviously hated it..." (App. 178, p. 38) In other testimony, he admitted Ms. Lyman made an appointment to go to counseling, but he thought it was just some kind of a relationship test and didn't go. (App. 159, p. 206) Ms. Lyman testified that Mr. Huber's anger was directed at her. (App. 54, 55) Several years after they moved in together, she told him his behaviors were impacting her and that she "... could not last in a long-term relationship" with him unless he made efforts to control it. (App. 191, p. 90)

Testimony of witnesses Nicole Irvin, Elizabeth Stehle-Giroux, Nancy Hunsberger, Colleen Graves, and Mary Lyman corroborated that a reasonable person in Mr. Huber's shoes should know that his outrageous behavior was injurious to Ms. Lyman. (App. at 113-141) Mr. Huber admitted to most of the behaviors described by witnesses, but appeared to believe he had a right to them. (App. at 152-155; Appellant brief p. 7)

Mr. Huber's testimony was equivocal and at times contradictory. He said his outbursts were "mostly" verbal (App. 152, p. 181), but then he described kicking in a piece of trim on the wall. (App. at 175, p. 26) He described his behaviors as "...directed at myself" (App. at 153, p. 182), but then he admitted, "I am not always aware of what I am doing." (*Id.*) He said that stress causes his behaviors to get worse (App. at 152, p. 179), but then he denied that his violence could have an effect on Ms. Lyman, even when he alleged that her activities triggered his stress. (App. at 152, pp. 179-181; 154, p. 186)

Photographs of inside the home showed that Mr. Huber's belongings took up the space from floor to the ceiling, with only narrow isles for walking. (App. 201-205, 207). When questioned by the judge, Mr. Huber said the items in the pictures were his. (App. \*18 186, p. 71) Witnesses testified that the home looked like the pictures and worse. (App. 117, 118, p. 42; 125, p. 73; 127, 128; 137, pp. 119, 120) Despite clear evidence to the contrary, Mr. Huber claimed the pictures and witness testimony were "not accurate" and a fabrication because it was "a pretty normal looking house." (App. 171, p. 12) Ms. Lyman testified that the condition of the home was "devastating" to her (App. 56, p. 45)

Mr. Huber's enforcement of "rules" in the home made it difficult for anyone but him to be present in the home. (App. 131, p. 97; 132, p. 98) One poignant example was the testimony of Ms. Lyman's sister, Mary Lyman, who stopped visiting when her son burst into tears after being subjected to the rules and conditions in the home. (App. 137, pp. 119-122.) Ms. Lyman was required to enforce Mr. Huber's rules or suffer the violent consequences. (App. 54, p. 37; 59, p. 55; 71, p. 102, 103; 128, p. 82)

Appellant's discussion of the testimony is cursory, and does not give any kind of accurate picture of what was said at the trial. The facts and circumstances fully support the decision in favor of Appellee and should be affirmed. [Latremore, 584 A. 2d at 633](#), [Curtis v. Porter, 2001 ME 158, ¶12, 784 A.2d 18, 23 \(Me. 2001\)](#)(A person acts recklessly if he knows or should know that

his conduct creates an unreasonable risk of harm to another person and the unreasonableness of his actions exceeds negligence.) Appellee further requests that sanctions be imposed on Appellant for filing a meritless appeal.

Appellee requests that sanctions pursuant to [M.R.App.P. 13\(f\)](#), in the form of treble costs and attorney's fees, be considered and awarded by this court against Appellant if warranted.

## **\*19 II. The Court's Award of Damages for Lost Business Opportunity or Earning Capacity is Fully Supported in Law and Fact.**

### ***A. The Court did not award "lost profits" as claimed by Appellant.***

The Court found that Ms. Lyman suffered damages to her horse business because of Appellant's egregious conduct and that the root of her claim was the same intentional actions by defendant that supported her emotional distress claim. (App. 35, 36) The Court described Ms. Lyman's damages as, "... similar to a loss of business opportunity or earning capacity." *Id.* Appellant asserted in this appeal and previously in his Motion for Reconsideration and to Alter or Amend the Judgment that an award of "lost profits" was made by the court. On its face, the Decision and Judgment did not say, "lost profits," but awarded damages for "lost business opportunity or earning capacity." (App. at 36). In the Post-judgment Decision and Order, the Court clarified that "lost profits" were not awarded, but that "lost business opportunity or earning capacity" that resulted *solely* from the "defendant's egregious conduct. (App. 43, 44)

Appellant recites no legal authority to support that "lost business opportunity or earning capacity" is the same as "lost profits." Ms. Lyman consistently supported her fanning activities with income from her horse business, as shown on tax returns introduced at trial by Appellant. (App. 222-234) Ms. Lyman's income was essential to building her business. (*Id.*) Although for tax purposes she may have shown no profit, Ms. Lyman's testimony shows that by maintaining and growing her farm operation, she was well on her way towards building a profitable business by 2006. (App. 68, pp. 91, 92)

**\*20** This court has held that lost business opportunity is a fair measure for damages in tort. In [Snow v. Villacci, 2000 ME 127, 754 A. 2d 360 \(Me 2000\)](#), it was found that an injured Plaintiff could be entitled to damages for "lost earning opportunity" when he was prevented from making progress in a professional training program as a result of injuries. A defendant could be liable to the Plaintiff for the current and prospective lost opportunity to increase his earnings. [Snow, 2000 ME at ¶3, 754 A.2d at 362.](#)

In [Snow](#), the court stated that recovery for lost earning opportunity was possible where: 1) the opportunity was real and not merely a hope-for prospect; 2) the opportunity was available not just to the public in general but to the plaintiff specifically; 3) the plaintiff was positioned to take advantage of the opportunity; 4) income from the opportunity was measurable and demonstrable, and; 5) the wrongdoer's negligence was a proximate cause of the plaintiffs inability to pursue the opportunity. [Snow, 2000 ME at ¶12, 754 A. 2nd at 365.](#)

In the Decision and Judgment, the Court found that Defendant's wrongful conduct caused Ms. Lyman losses because it: 1) interfered with Ms. Lyman's ongoing horse business so that she eventually had to close down the horse business, 2) caused her to lose 85 clients, 3) prevented her from building her business into an ongoing enterprise, and 4) caused a loss to her from a last minute "fire sale" of her horses. (App. at 34-36)

Appellant has not shown in any way that these findings of fact by the court are clearly erroneous. Ms. Lyman had been raising and training horses that were bred on the property for eventual sale. (App. 112, p. 20) When Ms. Lyman was forced off the property by Mr. Huber, she could not care for all of her horses, and had to give up three of her horses. (App. 67, 688) Ms. Lyman testified about the value of these horses. One **\*21** horse was her "foundation mare"; another horse was insured for \$15,000, and she was able to sell one of her horses that she valued between \$7,000 and \$8,000 to a friend for \$2,500. (*Id.*) The court awarded Ms. Lyman damages for the "fire sale" of these horses. (App. 36)

Ms. Lyman testified that she had been increasing her gross revenues from her business every year. She said that in the last full year on the property before she was ousted, her gross receipts were \$30,000, and that she had “a chance to do even better.” (App. 68, pp. 91, 92) Ms. Lyman testified that she accumulated 85 clients, prior to leaving the area because of Mr. Huber. (*Id.*) In the two years following her ouster, Ms. Lyman made only \$20,000 and \$21,000 respectively. (*Id.*)

Most importantly, Ms. Lyman was forced from and lost her property, that was uniquely suited for her horse business, because it had trails to Crescent Beach and Two Lights State Park in Cape Elizabeth, Maine. (App. 52, pp. 26, 27)

Ms. Lyman cannot be made whole without an award for the loss of business opportunity and earning capacity that resulted from Mr. Huber. *Snow*, 2000 ME at ¶ 11, 754 A. 2nd at 365. The Appellant had no grounds for bringing this portion of the appeal. The award of \$31,000 was substantiated by the evidence and correct as a matter of law.

**B. It was within the court's discretion to award damages under the title of “Ouster”.**

Ms. Lyman made a claim for Ouster as Count III in her complaint. Ouster is the wrongful dispossession of or exclusion of a party from real property, wherein the wrongdoer gains actual occupation of the premises. *Blacks Law Dictionary*, Fifth Edition, p. 992. Various jurisdictions recognize this claim, although it differs in meaning from state to state. *Morga v. Friedlander*, 140 Ariz. 206, 208, 680 P.2d 1267, 1269 (Az. 1984). In \*22 Maine, the word has been used in *Hibbard v. Robert G. Fromkin Woolen Corp.*, 156 Me 433, 435, 165 A. 2d 49, 51 (Me 1960), which case was cited in *Glover v. Graham*, 459 A.2d 1080, 1085 (1983). In Maine cases, ouster has been used as verb: “Needless to say, one may not hold adversely to oneself; in order to be adverse, the nature of the overt acts must leave, ‘no question as to the intention to oust the owner from possession and ownership.’” *Id.* quoting *Hibbard v. Robert C. Fromkin Woolen Corp.*, 156 Me. at 435, 165 A.2d at 51 (1960).

Appellant insists, despite the clear meaning of the discussion in the Decision and Judgment and the clarification in the Post-Judgment Decision and Judgment to the contrary, that the court was awarding damages for a new tort: Ouster. Appellant then discusses, “*arguendo*,” as if it had. (Appellant brief p. 11)

Appellant appears to rely primarily on the definition for “ouster” expressed in the case of *Northcutt v. McPherson*, 473 P.2d 357, 359-60 (N.M. 1970): “...to constitute ouster there must be some express, open and unequivocal denial of the right to possession of the cotenant,” although variants exist in other jurisdictions. See, also, *Young v. Young*, 37 Md.App. 211, 221, 376 A.2d 1151, 1158 (Md. 1977) (“Ouster has been defined as a notorious and unequivocal act by which one cotenant deprives another of the right to the common and equal possession and enjoyment of the property.”) See, also, *Hamilton v MacDonald*, 503 F.2d 1138, 1145, 1156 (9th Cir. 1974) (Overgrazing that resulted in a harsh and inhospitable area that yielded little over subsistence living was an ouster of the co-tenant, who was entitled to the value of the lost grazing opportunity); *Am. Jur. 2d*, “Cotenancy and Joint Ownership,” Section 49 (1964) (The measure of damages for Ouster is the full rental value of the property for the period of time of exclusion.); \*23 86 C.J.S., “Tenancy in Common,” Section 25, n. 49 (1955) (Actions of first cotenant in changing locks on law office complex, removing second cotenant's name from law office door, and interfering with lease rights of second cotenant constituted ouster.)”

Ms. Lyman's claim asserted that there was an ouster when Mr. Huber forced her from the property in April, 2006, and the court agreed with that. The court found that, “...the plaintiff was driven from the property and forced to give up her horse business and that she never had the opportunity to build it into an on-going enterprise. The defendant's egregious conduct was the sole cause of her leaving... [and] the underlying cause of her quick exit from the property was the defendant's conduct.” (App. at 35, 36).

Appellant states in his brief at page twelve that “There was no evidence presented at trial of an ‘express, open and unequivocal denial’ of Ms. Lyman's right to possession of the property by Mr. Huber.” (Appellant brief p. 12) Appellant did not identify clearly erroneous findings in the Decision and Judgment to establish the conclusion. Instead, Appellant merely asserts that Ms. Lyman left voluntarily. Again, although Appellant may wish that the Court had found otherwise, it did not. The facts previously cited and the following facts, among others, support the findings of the Court.

When Ms. Lyman returned to the home in 2006, Mr. Huber's behaviors escalated significantly. (App. 65, p. 79) In addition to his more frequent tirades, Mr. Huber brought a woman to their house to join him in the hot tub on a Saturday morning, the usual time for Libby to give riding lessons. (App. 65, pp. 80, 81). Ms. Lyman was very upset and cancelled her lessons. (*Id.*) She then learned from sources other than Mr. Huber that he had a Protection from Harassment ("PFH") case pending against him brought by some of his customers. (App. 92, pp. 186, 187) Mr. Huber's pattern of \*24 cruelty and intimidation over a long period of time together with these serious warnings justified Ms. Lyman's conclusion that she had to leave immediately because her life, and the lives of her horses, were in immediate danger. (App. 66, p. 84) She testified, "I knew that I needed to leave the premises immediately, that I did not dare discuss it with Luke for fear of retaliation... after I found out about it (PFH), ... I made arrangements, emergency arrangements to get myself and all of my animals out of the property without his knowledge of where I was going...I had to rely on the charity of my friends and business acquaintances... I had no money, I had no place to go... (App. at 66, 67). She kept her whereabouts a secret. (*Id.*)

Ms. Lyman's fear for herself was not speculative. She was being forced out of the house, not unlike a constructive eviction. Mr. Huber's conduct was intentional. The court was justified in finding that Ms. Lyman was ousted from the property.

The discussion in the Court's Decision and Judgment shows that Appellee's claim for Ouster was subsumed under the count for intentional infliction of emotional distress. (App. 35, 36) It is well within the Court's discretion to award damages for "Ouster" and the Decision and Judgment is not erroneous as a matter of law.<sup>2</sup>

If, however, this court determines that Ouster is not subsumed under the tort of intentional infliction of emotional distress, an additional measure of damages would be owed to Ms. Lyman for the rental value of the property. (App. 43, n. 1; *Am. Jur 2d*, "Cotenancy and Joint Ownership" Section 49 (1964). Ms. Lyman testified that when she was forced from the property in 2006, she had looked for rental properties that would accommodate herself and the horses. (App. 72, p. 106). She testified that the average \*25 monthly rent of such properties was \$2,050 per month. Compensation to Ms. Lyman for the period of time of her exclusion, as of the time of trial, was \$49,200. (*Id.*) Should this court determine that "ouster" was not subsumed under the tort of intentional infliction of emotional distress, Lyman should be awarded \$49,200 as damages in addition to the \$31,000 in damages awarded under intentional infliction of emotional distress for lost business and opportunity or earning capacity.

Alternatively, Appellee asserts that Mr. Huber's appeal is frivolous and instituted for the purpose to delay the sale of the house, of which he has had exclusive possession since 2006, while Ms. Lyman has remained essentially homeless. (App. 43; App. 67, 68) Appellee requests sanctions pursuant to [M.R.App.P. 13\(f\)](#).

## CONCLUSIOIN

The record fully supports the findings and conclusions of law by the Superior Court. The Judgment and Decision should be affirmed by this court. Appellant should bear the brunt of any expense to Appellee for any portions of this appeal that may be found by this court to be meritless, frivolous, instituted for the purpose of delay, or to further punish Ms. Lyman. *Edwards v. Campbell Jr.*, 2008 ME 173, ¶11, 960 A.2d 324, 327 (Me. 2008) Appellee requests that penalties, in the form of treble costs and attorney's fees, be awarded, with interests and costs as provided by law.

### Footnotes

- 1 Designations to the record are to the Appendix page as "App. \_\_\_\_." Where more than one transcript page appears on an Appendix page, reference is made to "App. \_\_\_\_, p. \_\_\_\_."
- 2 Alternatively, the listing of the damages amount under "Ouster" on the final page of the Decision and Judgment was not a substantive error, but more on the order of a clerical error. (App. 39)

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