

**IN THE COURT OF APPEALS OF IOWA**

No. 8-988 / 08-0774  
Filed January 22, 2009

**KRISTEN LEE ERICKSON,**  
Petitioner-Appellee,

**vs.**

**BERNIE JOEL SAKS,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson,  
Judge.

Bernie Saks appeals from the district court's determination that he  
committed domestic abuse assault. Kristen Erickson cross-appeals requesting  
appellate attorney fees. **AFFIRMED.**

Robert Day of Day & Hellmer, P.C., Dubuque, for appellant.

Jennifer Clemens-Conlon of Clemens, Walters, Conlon & Meyer, L.L.P.,  
Dubuque, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

Kristen Erickson and Bernie Saks were divorced on January 12, 2004. In the dissolution decree, the district court awarded the parties joint legal custody of their two daughters. The district court ordered that the parties' dog, Auggie, was "awarded to the children of the parties," but declined to make provisions regarding who should pay for Auggie's expenses.

On January 4, 2008, Saks sent Erickson an email informing her that he did not feel he should be solely responsible for Auggie's medical expenses, which he had been paying since their dissolution.<sup>1</sup> Saks's email stated that he would have the animal hospital review Auggie's expenses over the last four years and would inform Erickson "of [her] financial responsibility." He further stated, "Going forward I will tell them to bill whomever brings Auggie in for service."

When Erickson took the children and Auggie to Saks's house the next week, pursuant to the custody provisions of the dissolution decree, she told Saks that he "should have Auggie" because she could not afford to pay for Auggie's medical expenses.<sup>2</sup> Saks described this as a "tearful scene" that took place in front of the children.

When Saks returned the children to Erickson on January 10, 2008, he also brought Auggie. Erickson became angry when she saw that Saks intended to leave Auggie with her. When Saks attempted to leave Auggie on Erickson's front

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<sup>1</sup> Auggie necessitated extensive medical care.

<sup>2</sup> Saks asserts that though Erickson was not employed, she received a significant amount of assets pursuant to the dissolution decree that provided her with sufficient income to afford Auggie's medical expenses.

porch, Erickson returned Auggie to Saks's vehicle. The parties went back and forth, arguing in front of their nine-year-old daughter, who was just inside the front door, and their fourteen-year-old daughter, who was on the front sidewalk. Erickson told Saks that she would accept Auggie only if Saks provided her with a note to give to the veterinarian stating that he would pay for Auggie's medical expenses. Saks responded that the dissolution decree awarded Auggie to the children, and Auggie must go where the children went. When Saks placed Auggie on Erickson's front porch for the third time, Erickson followed Saks toward his vehicle to return Auggie. At this point, Saks's and Erickson's stories diverge.

Erickson claims that Saks "grabbed hold of both [her] arms, and then stepped into [her]." Erickson testified that she and Saks "had full body contact," and Saks was "forcefully holding [her] in place." She asserts that she then "announced very loudly and clearly, 'Get your hands off me now.'" She admits that Saks then dropped his hands. However, she testified that Saks continued to "press his body completely into" her, and as she stepped around him, she "was shoved very hard." Erickson alleges that she "flew into the landscaping" but remained standing. She then yelled, "Call the police," though neither child called the police.<sup>3</sup> Erickson then placed Auggie in Saks's car. Saks returned Auggie to the sidewalk and left.

On the other hand, Saks claims that as Erickson followed him to his vehicle, he turned around, put his hands up, and said, "Stop." He asserts that

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<sup>3</sup> The older child testified that she did not call the police because it did not look like Erickson was being hurt.

Erickson “kept walking forward” and “she walked into” him. He claims that Erickson then said, “Put your hands down,” and he complied. When Erickson proceeded forward and tried to step around Saks, she lost her footing and slipped into the landscaping.<sup>4</sup> Saks admits that Erickson yelled for her children to call the police.

Both children testified at trial after the district court judge requested testimony from at least one child, as they were the only witnesses. Saks objected to either child testifying.

We give little weight to the younger child’s testimony as she was nine, and her testimony differed substantially from the testimony of Saks, Erickson, and her older sister.<sup>5</sup> Additionally, Erickson indicated to Saks roughly one year earlier that the child’s “answers will predictably vary tremendously depending on who she is answering.”

The older child testified that Saks stopped Erickson by “saying stop and by holding her.” She also testified that Saks “grabbed [Erickson’s] elbows.” The child stated that Saks put his hands up to indicate to Erickson not to proceed. The child further testified that Erickson “was like starting to move forward and she was like stopped and like [Saks] would move back and she would move forward, like she didn’t walk into him.” She also stated that Saks “stopped [Erickson] and she stumbled backward” and, “I don’t think [Erickson] slipped.”

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<sup>4</sup> The record establishes that the sidewalk was icy at the time.

<sup>5</sup> The younger child testified that: (1) the night of the altercation, she talked to Erickson about “huge bruises on her arms” that Erickson said Saks had caused; (2) Saks pushed Erickson over and Erickson “literally fell on the ground”; (3) Erickson was wearing a “bright blue shirt,” though Erickson and Saks agreed that Erickson’s jacket was black; and (4) Erickson did not walk toward Saks at all.

When asked if she thought Saks pushed Erickson, the child responded, “I don’t know.”

At 9:48 that evening, Erickson called Saks and left a message that did not mention a physical altercation. At 11:19 p.m., she sent an email accusing him of laying his “hands on [her] in an aggressive way” and pushing her into the landscaping.<sup>6</sup>

Erickson testified that she began to experience stiffness, pain, and discomfort through her neck and shoulders roughly four days after the alleged assault. She sought chiropractic help and had a deep tissue massage. On January 15, 2008, Erickson called the police department but was uncomfortable with them sending someone to her house. She also took one of her children to a regular appointment, where the child’s therapist, Yvette Saeugling, noticed yellowish bruises on Erickson’s upper arm.

On January 25, 2008, Erickson went to the Dubuque police station and reported the incident to Officer Brooke Huberty. Erickson deterred Huberty from investigating, and Huberty understood that Erickson simply wanted to log the incident for future reference. Huberty testified that she observed bruises that looked like “three finger marks” on Erickson’s left arm, between her elbow and her shoulder in the later stages of bruising.

On January 31, 2008, Erickson filed a petition for relief from domestic abuse. After a trial, the district court entered a final domestic abuse protective order and found by a preponderance of the evidence that Saks had committed domestic abuse assault against Erickson in violation of Iowa Code chapter 236

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<sup>6</sup> The younger child also called Saks later that evening and left two angry messages.

(2007). Saks appeals, arguing: (1) he did not commit domestic abuse assault; and (2) any assault that occurred was with justification. Erickson cross-appeals asking for appellate attorney fees.

## **II. Standard of Review**

Because civil domestic abuse cases are tried in equity, our review is de novo. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001).

## **III. Domestic Abuse Assault**

Saks asserts that Erickson did not prove by a preponderance of the evidence that he committed domestic abuse assault. We disagree.

A person commits an assault when, without justification, the person does any of the following:

(1) Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

(2) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

Iowa Code § 708.1.

### **A. Proof by a Preponderance of the Evidence**

Erickson and the parties' older child testified that Saks grabbed Erickson's arms. Huberty and Saeugling both noticed bruising on one of Erickson's upper arms. Huberty testified that the bruises were in the later stages and looked as if they had been there for awhile. This evidence supports Erickson's claim that Saks grabbed her upper arms. While we agree with Saks that Erickson's testimony was histrionic and not entirely credible, the parties' older child, who witnessed the alleged incident, confirmed Erickson's claim that Saks grabbed her arms. This offensive conduct caused bruising and constitutes assault.

## **B. Intent**

Saks asserts that he did not have the requisite intent to cause pain or injury that is required by the Iowa Code. Assault is a general intent crime. *Bacon ex rel. Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). “General intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender’s voluntary act, irrespective of any subjective desire to have accomplished such result.” *Id.* Thus, Erickson must only prove that Saks intended to do the act that constitutes the assault, not that he intended the result. *Id.* Saks need only be aware that he was doing the act and have done the act voluntarily. *Id.* We find that Saks intended to grab Erickson’s arms. The testimony of the parties’ older child establishes that Saks stopped Erickson by grabbing her. It is clear that Saks intended to stop Erickson, and the contact that occurred as a result of Saks’s efforts to stop Erickson establishes general intent.

## **IV. Justification**

Saks argues that even if we decide that he committed an assault, the assault was with justification. Saks did not raise the affirmative defense of justification at the district court level. Because this issue was not raised or decided by the district court, we decline to address it. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)

## **V. Appellate Attorney Fees**

Erickson requests an award of appellate attorney fees. Pursuant to Iowa Code section 236.5(3), this court has the authority to award attorney fees. An award of attorney fees is not a matter of right, but is within the discretion of the

court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We decline to award attorney fees to Erickson.

## **VI. Conclusion**

Saks committed an assault when he grabbed Erickson's elbows. Saks's affirmative defense of justification cannot be raised for the first time on appeal and is waived. We decline to award appellate attorney fees to Erickson.

**AFFIRMED.**