

1997

UTCO Associates, LTD. v. K. Demarr  
Zimmerman, Somerset Houseboats, DIV. SMI,  
James E. Sharpe, John 1-10 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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UTC ASSOCIATES, LTD., a Utah  
limited partnership, by and  
through its general partner,  
Robert D. Kent,

Plaintiff-Appellant,

v.

K. DEMARR ZIMMERMAN; SUMERSET  
HOUSEBOATS, DIV. SMI; and  
JAMES E. SHARPE, JOHN DOES  
1-10,

Appellees-Defendants.

No. 970190-CA  
930904174

Argument Priority 15

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REPLY BRIEF OF APPELLANT

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Appeal from a Judgment of the Third Judicial District Court  
for Salt Lake County, Honorable Timothy R. Hanson, District Judge

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 970190-CA

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limited partnership, by and )  
through its general partner, )  
Robert D. Kent, )  
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Plaintiff-Appellant, )  
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v. )  
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**I. INTRODUCTION**

Pursuant to Rule 24(c), Utah Rules of Appellate Procedure, plaintiff and appellant UTCO Associates, Ltd. ("UTC") replies to those new issues raised by defendants and appellees James E. Sharpe ("Sharpe") and Somerset Houseboats, Div. SMI ("Somerset") in their Brief of Appellees

(“Defendants’ Brief”).<sup>1</sup> Sharpe has utterly failed to address certain arguments contained in UTCO’s initial brief. First, Sharpe has failed to cite any Utah case which distinguishes the cases cited by UTCO demonstrating that promissory estoppel is a legal claim under which damages are awarded. UTCO’s Brief of Appellant (“UTCO’s Brief”) at 11-16. Further, Sharpe failed to cite any evidence to refute the jury’s finding that there was no contract. UTCO’s Brief at 16-18. Accordingly, these issues need not be discussed by UTCO in this brief as Sharpe and Sumerset have conceded these arguments.

**II. THE TRIAL COURT’S ERRONEOUSLY FOUND THAT UTCO HAD AN ADEQUATE REMEDY AT LAW BECAUSE OF UTCO’S BREACH OF CONTRACT AND MISREPRESENTATION CLAIMS SUBMITTED TO THE JURY, NOT UTCO’S PENDING BANKRUPTCY PROCEEDING AGAINST ZIMMERMAN AS ASSERTED BY SHARPE.**

Sharpe and Sumerset claim that UTCO’s remedy at law was “its claim filed in Mr. Zimmerman’s bankruptcy”. Defendants’ Brief at 17. Sharpe alleges the claims asserted in Zimmerman’s bankruptcy were the adequate remedy at law referred to by the trial court when it refused to instruct the jury on UTCO’s promissory estoppel claim. Sharpe argues that because the claims in Zimmerman’s bankruptcy were referred to in Sharpe’s Motion for Directed Verdict,<sup>2</sup> then those bankruptcy claims must have been the “adequate remedy at law” for the trial court’s refusal

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<sup>1</sup>Sharpe and Sumerset are sometimes collectively referred to as “Sharpe” based in part on the fact that the only contact which UTCO had with Sumerset was through Sharpe.

<sup>2</sup>It is undisputed that this remedy involved Zimmerman exclusively and did not include UTCO’s claims against Sumerset and Sharpe for breach of their promise to ship the Houseboat to Utah after receiving the Funds from plaintiff. Sharpe and Sumerset argued repeatedly that UTCO’s exclusive remedy was to assert claims against Zimmerman in the Zimmerman bankruptcy proceeding. R. 2400-01. The trial court flatly rejected this argument, when it was presented in Sharpe and Sumerset’s Motion for Directed Verdict, and stated the essence of plaintiff’s claim against Sharpe and Sumerset. R. 2396-97.

to instruct the jury on UTCO's promissory estoppel claim. Defendants' Brief at 8, 16. However, the trial court denied the Motion for Directed Verdict, R. 2416, and allowed plaintiff to continue presenting evidence in support of the promissory estoppel claim. Further, defendant continued to defend the promissory estoppel claim until the close of the evidence when the trial court *sua sponte* dismissed plaintiff's promissory estoppel claim at the close of all of the evidence, five days after the Motion for Directed Verdict was denied, R. 2416.<sup>3</sup>

The trial court did not refer at all to the Zimmerman bankruptcy when it gave the reasons for its refusal to instruct the jury on the promissory estoppel claim. R. 2606-07. Indeed, the trial court's stated basis for dismissing the promissory estoppel claim was because it was "surplusage" and "that the concept of promissory estoppel basically mirrors the causes of action that are being asserted in this case by the plaintiff. And they'll just be surplusage." R.2606-07. Emphases added. The causes of action asserted by plaintiff "in this case" cannot include the claims in the Zimmerman bankruptcy as argued by Sharpe and Sumerset. Instead, the causes of action asserted in this case are for breach of contract against Sumerset and Sharpe as plaintiff alleged in its Brief. See UTCO Brief at 16-18. Accordingly, the "adequate remedy at law" referred to by the trial court was for defendants' breach of their contract with UTCO, not a claim asserted in a separate action in Zimmerman's bankruptcy. Because the jury concluded that there was no contract between UTCO and Sharpe as stated on the Special Verdict Form, R. 1672, the trial court erred when it concluded that plaintiff had an adequate remedy at law, UTCO's breach of contract claim.

The cases cited by Sharpe in support of the argument that UTCO had an adequate remedy

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<sup>3</sup>The argument on Defendants' motion for directed verdict is found in the record at R.2389-2416.



at law are distinguishable and inapposite.<sup>4</sup> Knight v. Post, 748 P.2d 1097 (Utah Ct. App. 1988), involved a case involving a claim for quantum meruit, not promissory estoppel. Further, the Court found that plaintiff had failed to exhaust two legal remedies. The first legal remedy that plaintiff failed to exhaust in Knight was for foreclosure a mechanics' lien which lien was never perfected, 748 P.2d at 1100. UTCO did not fail to pursue any claim against any defendant to this action either in the Zimmerman bankruptcy or in this case.<sup>5</sup>

The second legal remedy that plaintiff failed to pursue in Knight was pursuit of the corporation's assets as a creditor in the corporation's bankruptcy proceeding. *Id.* However, this Court noted "that the corporation's bankruptcy action did not necessarily preclude recovery under a properly filed mechanics' lien nor did it toll the requirement of bringing an action to enforce such a lien within the statutory twelve month period." 748 P.2d at 1100, n.2 (citing Munson v. Risinger, 114 So.2d 59, 61 (La.Ct.App.1959)).

In the present case, UTCO was required to pursue its claims against Sumerset and Sharpe separately despite the filing of the Zimmerman bankruptcy because, in the words of Knight, the

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<sup>4</sup>Defendants also argue that "A primary basis for declining to instruct the jury on this claim . . . mirrors the *chief* basis upon which the Motion for Directed Verdict on the promissory estoppel claim was made by Sumerset and Mr. Sharpe." Defendants' Brief at 16 (emphasis added). The Court should note that the "chief" basis for defendants' motion was an alleged lack of reliance. R. 1573-75.

<sup>5</sup>Further, Sharpe claims that plaintiff presented no evidence that showed that UTCO's pursuit of claims in the bankruptcy was fruitless as allegedly required under Knight. However, defendants' expert admitted that recovery of funds by UTCO was speculative because he did "not believe that there is any way to predict the percentage [of the estate which UTCO may receive]." R.2447. Further under Knight, the Court held that the defendant "should not be held liable as a consequence of Knight's failure to successfully assert his legal rights. As in Commercial Fixtures, Knight has failed to exhaust his legal remedies, so may not recover on the basis of quantum meruit." Knight, 748 P.2d at 1100 (Citing Utschig v. McClone, 114 N.W.2d 854 (Wis. 1962)(emphasis added). Accordingly, Knight is further distinguishable from the present case because the plaintiff failed to assert legal rights in a quantum meruit action which rights were then lost by plaintiff. As shown *infra*, the Supreme Court has acknowledged that actions against third parties must be filed within the appropriate statute of limitations for such actions.

Zimmerman bankruptcy did not “toll the requirement of bringing an action” against Sharpe and Sumerset. UTCO filed its claims against all appropriate entities and therefore, met the requirements of Knight.

Sharpe and Sumerset also cite Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1977), for the proposition that exhaustion of remedies is required before equitable relief can be pursued. Defendants’ Brief at 17. In Commercial Fixtures, a supplier of materials brought an action seeking recovery for the value of materials used to improve leased premises at the request of the tenant. The supplier sued the landlord, not the tenant, on a theory of unjust enrichment, not promissory estoppel. Like Knight, Commercial Fixtures is a quantum meruit case, not a promissory estoppel case. Sharpe and Sumerset argue the point of Commercial Fixtures that, where there is an express contract between a supplier and a lessee, an agreement between the supplier and the landlord will not be implied. See Defendants’ Brief at 21. However, Sharpe and Sumerset failed to cite crucial language in the paragraph immediately preceding the quote cited to this Court. Id. The Utah Supreme Court concluded:

The mere fact that a third person benefits from a contract between two others does not make such third person liable in quasi-contract, unjust enrichment, or restitution. See 66 Am.Jur.2d 960. There must be some misleading act, request for services, or the like, to support such an action.

564 P.2d at 774. In the present action, there were several “misleading acts” and “requests for services and the like” to support UTCO’s claims against defendants under the promissory estoppel theory. Indeed, the trial court summarized these actions in the argument on the Motion for Directed Verdict which was denied because of these very acts of defendants:

The Court: But, Mr. Atkin, Mr. Nelson, in his trust account, had Mr.

Zimmerman's money. And that money came from a loan from UTCO. And part of the deal between Zimmerman and UTCO was that they [UTC0] would get a lien on this property.

Now assuming for the sake of discussion, which, of course, we must do, that the testimony that's been offered that Mr. Sharpe said, you send me the money, I will ship you that boat, and the interest of the boat was going to be shipped immediately. It is not the money, it's the loss of the security interest.

...

The Court: Mr. Nelson, wasn't told this boat wasn't built, according to him. And that is the evidence to this point in time.

Mr. Atkin: Well --

The Court: He thought the boat was built. He thought that as soon as the money got there they were going to put the boat on the truck and drive it here.

R. 2396-97.

Sharpe and Sumerset then argue that plaintiff had suffered no damage because the money sent by UTCO to Sharpe was Zimmerman's. The trial court also flatly rejected Sharpe's and Sumerset's claims that plaintiff suffered no damage as a result of the misrepresentations of Sharpe and Sumerset:

The Court: Mr. Atkin, what do you do, maybe I'm misguided here, but if someone makes you a promise and you do something in that regard to that promise, even shipping someone else's money, wiring somebody else's money, and that person doesn't do what they say they're going to do, it seems to me there's something wrong with that.

Mr. Atkin: Well, there has to be — there has to be damages, your honor. There has to be a change of position by the plaintiff that would have caused damage or detriment to the plaintiff. And there just isn't any in this case.

...

The Court: So that's your theory, there is no damages here? So Mr. Sharpe, in this case, if that's the evidence, at this point in time, it's that he made an intentional misrepresentation about shipping the boat immediately, that he hadn't even built, and that's just too bad. Is that the way we do business in this country?

Mr. Atkin: Well, your honor, we have to look at who has standing to complain. And that's Mr. Zimmerman, who might have had some standing to complain.

The Court: He didn't make a promise to Mr. Zimmerman, he made it to Mr. Nelson. Mr. Nelson is the guy that had the money in his trust account, and he is the guy that decided whether the fifty-eight thousand was going to be sent. And I don't believe for a minute Mr. Nelson would have sent it but for the fact that he got a promise that there was a boat there to be shipped. There wasn't even a boat built.

R. 2401-2403; see also R. 563, 641, 2095, 2091-93, 2196-99, 2278-79, 2077. Accordingly, under Commercial Fixtures, there was a "misleading act" and a "request for services or the like" which allows an independent action to be brought against Sharpe and Sumerset. See also UTCO's Brief at 11-20.

### **III. UTCO RELIED ON THE MISREPRESENTATIONS OF SHARPE AND SUMERSET.**

Reliance is one of the elements of the claim for promissory estoppel. Incredibly, defendants claim that UTCO never relied on the representations of Sharpe and Sumerset. Defendants' Brief at 21-24. Sharpe and Sumerset ask this Court to infer that the trial court found that any reliance by UTCO was insufficient as a matter of law. However, the trial court made no such statement. R. 2606-07. The record containing the trial court's decisions and rationale are devoid of such an important ruling. R.2606-07. Further, Mr. Nelson testified unequivocally that UTCO would never have loaned the money if it did not believe that Sharpe and Sumerset would not ship the Houseboat upon receipt of the Funds from UTCO:

Mr. Nelson: After we talked about those three things I then confirmed with him that if I would wire \$58,384.00 that he would then ship the houseboat, as was our discussion. And he said yes.

Q. That's important. You're very certain he said that to you?

A. I'm as certain as I'm sitting here. And I was shocked when I heard him say today the conversation never took place. I would have never wired the money, which I did, and he received. I would have never wired the money if he hadn't agreed to what we just talked about.

R. 2198-99.

Nelson also confirmed that part of the deal with Zimmerman was to obtain a loan whereby UTCO would obtain an invoice, registration for the Houseboat (MSO) and wiring instructions from Sumerset as it had done four times before. R. 2195-97, 2278-79. Sharpe and Sumerset now erroneously claim: "Thus, the undisputed evidence established that UTCO's decision to loan \$60,000 to Mr. Zimmerman and the loan itself occurred before the alleged promise." Defendants' Brief at 23. However, Mr. Nelson testified that he received the invoice and MSO describing the Houseboat and wiring instructions for the Funds to be sent by UTCO to Sharpe from Sharpe on December 1, which was prior to the closing of the loan on December 21. R. 2195, Exhibits 7-9. Further, the MSO and invoice were sent by Sharpe so that UTCO could accurately describe the Houseboat in its loan documents with Zimmerman. R. 2184-85. Finally, Mr. Nelson testified that the parties had previously done business on three other occasions where UTCO received a security interest in the houseboats and then Sumerset sent the houseboats. R. 2196, 2278-79. UTCO's decision to loan the Funds at issue was based upon its course of dealing with Sharpe and Sumerset, its receipt of documents from Sharpe describing the Houseboat which Sharpe represented he would send to Lake Powell after receipt of the Funds from UTCO and upon conversations with Mr. Sharpe wherein he

confirmed that he would send the boat after the loan closed and the funds were sent. See also UTCO's Brief at 18-20; see also R. 563, 641, 2095, 2091-93, 2196-99, 2278-79, 2077. UTCO's decision was not based solely on the conversation which Nelson had with Sharpe after Zimmerman executed the loan documents as Sharpe claims. There was ample evidence of reliance to support UTCO's promissory estoppel claims.

Finally, Sharpe and Sumerset claim that because UTCO had loaned the money to Zimmerman, it had no interest in the funds wired and therefore, UTCO suffered no damage. As stated above, under its agreement with Zimmerman, UTCO was to receive a \$58,384 security interest in the Houseboat. Sharpe's promise did in fact induce action or forbearance by UTCO from which a detriment was suffered. Indeed, Sharpe admitted that his promise induced UTCO to send funds on or about December 29, 1992 to Sumerset.<sup>6</sup> R. 2060-62, 2092-93. Sharpe testified that he had a "little trail going" or "course of dealing" with UTCO whereby UTCO would send money to obtain an interest in a boat which had been or would be shipped by defendants to Utah. R.2092-93. Sharpe further admitted that he never told Nelson that he was going to apply the payment of \$58,384 to the amount Zimmerman owed Sharpe on another boat. R. 2077. Sharpe also testified that when he was sending MSOs to Nelson he understood that Nelson "would be using that as collateral on the boat" and that the MSO was required to license the boat in another state. R.2095. Finally, Sharpe admitted that the boat described in the MSO and other documents sent to Nelson "was never manufactured by Sumerset." R.2097-98. Sharpe testified under cross-examination that he had admitted in his answers to interrogatories that the \$58,384 was applied the same day it was received

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<sup>6</sup>Record at 2060-61, 2092-93.

to the other boat. R.2148-50. Nelson testified that he called Sharpe on numerous occasions and verified that if UTCO sent \$58,384.00, Sharpe would send a boat described in the MSO and other documents that Sharpe had previously sent to Nelson. R.2196-99. Upon receiving Mr. Sharpe's assurances that a boat would be sent upon receipt of the \$58,384, Mr. Nelson sent the money to Somerset. R. 2199-2202. Nelson testified that he found out that the boat bearing the serial number on the MSO sent to Nelson had been sold to another person. R.2210-11.<sup>7</sup> In sum, UTCO presented adequate evidence in support of its promissory estoppel claim.<sup>8</sup>

**IV. DEFENDANTS FAIL TO ADDRESS OR DISTINGUISH THE CASE LAW CITED BY UTCO WHICH DEMONSTRATES THAT THE TRIAL COURT ERRED WHEN IT EXCLUDED EVIDENCE THAT SHARPE CHANGED SERIAL NUMBERS ON BOATS AND SOLD THE BOAT TO ANOTHER PARTY.**

Defendants failed to distinguish UTCO's case law which demonstrate that the Court should look to all of the surrounding circumstances in a fraud action to allow the plaintiff to show the fraudulent intent of the defendants. See UTCO Brief at 22-24. Defendants have merely stated that the Court has discretion in making evidentiary rulings and that all relevant evidence was presented.

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<sup>7</sup>See *Zions First Nat'l Bank v. Rocky Mtn. Irr. Inc.*, 795 P.2d 658, 663-64 (Utah 1990)("Our rules of civil procedure require that the pleadings be conformed to the evidence presented at trial when no objection is made to the introduction of such evidence. Utah R.Civ.P. 15(b); see *Poulsen v. Poulsen*, 672 P.2d 97 (Utah 1983) (mandatory for trial court to grant leave to amend to conform to evidence); *General Ins. Co. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 505-06 (Utah 1976) (failure to object to evidence outside scope of pleadings is implied consent to try issue raised by such evidence). The trial court has no discretion to deny such an amendment. *General Ins. Co.*, 545 P.2d at 506. *By not giving the proposed instructions on common law fraud and attempted theft by deception, the trial court failed to comply with rule 15(b).* Furthermore, our case law requires that the trial court instruct the jury on each party's theory of the case so long as it is supported by competent evidence. *See, e.g., Powers v. Gene's Bldg. Materials, Inc.*, 567 P.2d 174, 176 (Utah 1977); *Pacific Chromalox Div. v. Irey*, 787 P.2d 1319, 1328 (Utah Ct.App.1990)."(Emphasis added).

<sup>8</sup>Sharpe and Somerset also make a lengthy argument that UTCO maintains a case can never be dismissed once presented to a jury. Defendants' Brief at 24-25. However, that is not the case. UTCO simply argued that the Court's basis for failing to instruct the jury was erroneous. UTCO's Brief at 11-20.

Defendants' Brief at 28-31. Further, defendants argue that the only reason why UTCO wanted to present such evidence was to show a "technical violation of the hull identification statute", Defendants' Brief at 27, n. 15 and that such evidence is inadmissible under Rule 402, Utah Rules of Evidence.<sup>9</sup>

UTCO submits that a violation of a statute is a basis which the jury may properly consider when determining whether the defendants' acts are fraudulent, but that was not the only reason UTCO wanted to present such evidence. UTCO was entitled to show that defendants reassigned the serial numbers to hide the fraud alleged by UTCO. As noted by this Court, "[a] Court may look to all of the surrounding facts and circumstances and a continuing pattern of wrongful behavior is one indicator of fraudulent intent." Harline v. Barker, 854 P.2d 595, 601 (Utah Ct. App. 1995)(emphasis added)(internal quotation and citation omitted); See also Bails v. Car, 558 P.2d 458 (Mont. 1976) (holding that fraudulent intent must be determined in light of all surrounding circumstances); Ledbetter v. Webb, 711 P.2d 874 (N.M. 1985) (holding that facts and circumstances surrounding a transaction may provide clear and convincing evidence of fraudulent intent). In Selvage v. J.J. Johnson & Assoc., 910 P.2d 1252, 1262 (Utah Ct. App. 1996), this Court stated, "The existence of fraudulent intent is a factual question, which may be inferred from all of the attendant circumstances. It necessarily involves weighing the evidence presented and assessing the credibility of witnesses--

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<sup>9</sup>It is also interesting to note that Sharpe claims in the initial portion of his brief: "No serial numbers were altered or changed", Defendants' Brief at 13 and 31, and yet in the latter portion of his brief Sharpe admits that he did "merely a reassignment on paper of a serial number to avoid a gap in serial numbers." Defendants' Brief at 31. UTCO submits that alteration and change of a serial number by Sharpe has been admitted although Sharpe prefers to call it a "reassignment."



tasks largely within the province of the fact-finder.”<sup>10</sup>

Sharpe and Somerset argued at trial that UTCO’s evidence regarding the change of serial numbers was not relevant because the assignment of the serial number to a different boat and the sale of that boat occurred three months after the transaction with UTCO.<sup>11</sup> However, subsequent conduct supports an inference of prior intent not to fulfill a promise or representation. See, e.g., Miller v. National Am. Life Ins. Co., 54 Cal. App. 3d 331, 126 Cal. Rptr. 731 (Cal. Ct. App. 1976). Indeed, as noted by one Court, “[s]ince fraud is usually denied, it must be inferred from all facts and circumstances . . . including subsequent conduct.” Garden State Standardbred Sales Co. Inc. v. Seese, 611 A.2d 1239, 1243 (Pa. Super. Ct. 1992) (emphasis added).

Defendants also allege that evidence of changing the serial numbers was excluded or should have been excluded under Rule 403, Utah Rules of Evidence. Under Utah law, “[a]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful.” Joufflas v. Fox Television Stations, Inc., 927 P.2d 170, 173 (Utah 1996) (quoting Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1378 (Utah 1995)). Harmful error occurs

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<sup>10</sup> *Citing In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *State v. Delaney*, 869 P.2d 4, 6 (Utah App.1994); *State v. Harmon*, 854 P.2d 1037, 1040 n. 4 (Utah App.1993), *aff’d*, 910 P.2d 1196 (Utah 1995); *State v. Garrett*, 849 P.2d 578, 582 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993).

<sup>11</sup> Defendants cite State v. Winward, 909 P.2d 909, 913 (Utah Ct. App. 1995) for the proposition that “fraud allegations are subject to the evidentiary requirements and limitations set forth in the Utah Rules of Evidence as are all other claims.” Defendants’ Brief at 26-27; 31-32. However, in Winward this Court was deciding an issue in a criminal forgery case. Further, the Court found that the trial “court erred in allowing the State to present evidence suggesting defendant had committed wrongful acts against the Bauers, Bassett, ERA Realty, and Mountain America Credit Union, apparently on the assumption that the State would ultimately be able to establish that those persons and/or entities had actually been defrauded and that these frauds had been somehow accomplished by defendant’s forgery of a check made payable to someone else.” Winward, 909 P.2d at 913. In the present case, the acts of defendants would prove the fraud perpetrated against UTCO directly, not some third party. Winward is therefore inapposite.

where "the likelihood of a different outcome in the absence of the error is 'sufficiently high so as to undermine confidence in the verdict.' "Id. at 174 (quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)). In this case, the following evidence was admitted:

- 1) The Houseboat Sharpe promised to deliver was never constructed by Somerset; R. 565, 643, 2097-98;
- 2) The Houseboat at issue did not exist on the date Sharpe received \$58,384 from UTCO even though Sharpe promised to send the Houseboat after receiving the Funds, R. 565, 643, 2097-98;
- 3) A Houseboat matching the MSO and invoice which Sharpe sent to UTCO was never constructed, R. 565, 643, 2097-98;
- 4) The Houseboat represented in the MSO and invoice sent to UTCO never existed, R. 2097-98;
- 5) The Houseboat with the serial number on invoice and MSO sent to UTCO was sold to someone else, R.2211.

While UTCO believes the presented evidence was compelling, evidence of the change of serial numbers should have been presented to the jury, as it constituted additional evidence from which the jury would have found that Sharpe had the fraudulent intent necessary to support UTCO's claims for fraud and negligent misrepresentation. Indeed, preclusion of evidence from which Sharpe's fraud may be inferred creates prejudicial harm to UTCO. Confidence in the jury verdict must be questioned because of the exclusion of evidence of Sharpe's fraud, and because the outcome of the trial would have been different.

In sum, evidence that Sharpe and Somerset reassigned the serial number for the Houseboat

shown on the MSO they sent to Nelson to a different houseboat and then subsequently sold the second houseboat is relevant to UTCO's fraud claim, specifically on the issue of fraudulent intent. The fact that this conduct occurred three or four months after Sharpe and Somerset attempted to void their transaction with Zimmerman and UTCO does not in any way diminish the relevance of that evidence. The trial court erroneously granted defendants' motion in limine and UTCO is entitled to a new trial on its claims for fraud and negligent misrepresentation.

### **CONCLUSION**

After more than two years of litigation and without stating any sufficient grounds therefor, the trial court improperly dismissed plaintiff's claim for promissory estoppel at the close of the evidence and erroneously excluded evidence regarding reassignment of serial number for the houseboat on the first day of trial. UTCO's claim for promissory estoppel is a legal claim which was not "surplusage" to UTCO's claims for fraud, negligent misrepresentation and breach of contract. Alternatively, if this Court rules that UTCO's promissory estoppel claim is equitable in nature, UTCO did not have an adequate remedy at law which precluded submission of the promissory estoppel claim to the jury. Further, the trial court's exclusion of evidence from which fraudulent intent must be inferred constitutes prejudicial error which warrants reversal of the dismissal of UTCO's claims for fraud and negligent misrepresentation. Plaintiff prays that the judgment of the trial court be vacated and that this action be remanded for a new trial on plaintiff's causes of action for fraud, negligent misrepresentation, promissory estoppel, punitive damages, and breach of contract.

DATED this 27th day of February, 1998.

DURHAM, EVANS, JONES & PINEGAR



Jeffrey M. Jones

J. Mark Gibb

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of February, 1998, I caused two true and correct copies of the foregoing to be mailed in the U.S. Mail, first-class, postage prepaid to the following:

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH :  
Plaintiff/Appellee : Case No. 970229-CA  
vs. :  
LISA DEHERRERA, : Priority No. 2  
Defendant/Appellant :

---

REPLY BRIEF OF APPELLANT  
- - - - -

APPEAL FROM A CONVICTION FOR POSSESSION OR USE  
OF METHAMPHETAMINE, A THIRD DEGREE FELONY, IN  
VIOLATION OF UTAH CODE ANN. § § 58-37-  
8(2)(a)(1) 1953 AS AMENDED, IN THE FOURTH  
JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF  
UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

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JAN 28 1996

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**ARGUMENT**

**POINT I**

THE STATE CONCEDED THAT DEPUTY SHIVERDECKER CONDUCTED AN UNLAWFUL TERRY FRISK OF DEFENDANT IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The only argument in Appellee's brief responding to Appellant's contention that the Terry frisk was not supported by reasonable suspicion is a footnote. Appellee's Br. at 3, n.1. The State argues that the issue of the unlawful Terry search of Appellant's person is not properly preserved for appeal. Id. However, implicit in Defendant's preservation of the illegal actions of the Utah County Sheriff's Office at the roadblock in question is the preservation of the issue relating to the unlawful search of Appellant at the roadblock. (R. 41-82, 113, 118-119). The State did not factually dispute the unlawful Terry search of Appellant, and thereby, conceded to Appellant's arguments on this point. Therefore, this Court should reverse the trial court's denial of Appellant's motion to suppress on the basis that regardless of whether she was legally stopped, Deputy Shiverdecker did not have reasonable suspicion that Appellant posed a danger to

officer safety which would justify a Terry frisk, and that the scope of Deputy Shiverdecker's search of Appellant exceeded the scope of a Terry frisk. See Appellant's Br. at 41-45 (citing: Terry v. Ohio, 392 U.S. 1 (1968); State v. Rochell, 850 P.2d 480 (Utah App. 1993); State v. Carter, 812 P.2d 460 (Utah 1991); State v. Deitman, 739 P.2d 616 (Utah 1987)).

## POINT II

**THIS COURT SHOULD CONSIDER APPELLANT'S CHALLENGES TO THE CONSTITUTIONALITY OF THE CHECKPOINT STATUTE.**

Additionally, the State argues in its brief that this Court should not address Appellant's challenges to the constitutionality of the Administrative Traffic Checkpoint Act (Utah Code Annotated §§ 77-23-101 thru 77-23-105 (1953 as amended)), hereinafter ATCA. Appellee's Br. at 11-12. However, if this Court were to accept the State's assertion, the constitutionality of ATCA would perhaps forever evade constitutional challenge. The State argues: "On appeal, the *State does challenge the court's ruling on the plan's unconstitutional noncompliance with the statute.* The issue of good faith is independent of the statute's constitutionality and determines the outcome of the case." Appellee's Br. at 12 (emphasis added). Thus, pursuant to the State's argument, the constitutionality of ATCA will essentially never be ripe for review, because the issue will always be able to be decided on a good faith analysis. Appellant asserts that the constitutional issue in the case at bar is similar to the circumstance where appellate courts address issues which are technically moot, but the issue will likely recur, and is capable of evading review. Wickham v. Fisher, 629 P.2d 896 (Utah 1981); See also Roe v. Wade, 410 U.S.

113 (1973). Therefore, Appellant requests this Court to review the constitutionality of ATCA under the Fourth Amendment of the United States Constitution and Article I, § 14 of the Utah Constitution.

Additionally, because at the present time, neither the Utah Supreme Court nor the Utah Legislature has adopted the good faith exception to the exclusionary rule, this Court must at least review the constitutionality of ATCA under Article I, § 14 of the Utah Constitution. Where the good faith exception to the warrant requirement does not presently exist under Article I, § 14, the only means of resolution of the issues before this Court require a constitutional analysis of ATCA pursuant to Article I, § 14 of the Utah Constitution.

### POINT III

THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE LEON GOOD FAITH EXCEPTION APPLIED TO THE CIRCUMSTANCES OF THE PRESENT CASE.

In Appellee's brief, the State ultimately conceded that the Leon [United States v. Leon, 468 U.S. 897 (1984)] good faith exception does not apply to the present case: "While Leon expressly limited that decision to the good faith execution of judicially authorized searches only, its rationale has been more fully developed in Illinois v. Krull [Illinois v. Krull, 480 U.S. 340 (1987)]." Appellee's Br. at 15. In the present case, it is undisputed that the officers did not stop and search defendant pursuant to a warrant supported by judicial determination of probable cause. Thus, the only possible argument that the good faith exception applied to the facts of the present case, is

according to the expanded good faith exception pursuant to the holding in Krull, 480 U.S. 340.

However, upon careful review, this court should determine that even the expanded good faith exception in Krull does not salvage the conduct of law enforcement personnel in the present case. The holding in Krull addressed the following issue:

[W]hether a similar exception [to the Leon exception] to the exclusionary rule should be recognized when officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment."

Krull, 480 U.S. at 342. The majority of the Court in Krull ultimately held that although the statute in question was held to be unconstitutional, the officer "relied, in objective good faith, on a statute that appeared legitimately to allow a warrantless administrative search of respondents' business." Id. at 360. The present case is distinguishable from Krull in at least two significant points: (1) in the present case, the trial court found that the officers did not follow the requirements of the statute in question providing for administrative traffic checkpoints; (R. at 106, 107) and (2) the statute at issue, ATCA, has not yet been found to be unconstitutional. In order for the extended good faith exception as created by Krull to apply, officers must follow the requirements of the statute on which they purport to justify their actions. Krull, 480 U.S. at 349. Furthermore, the statute must subsequently be deemed unconstitutional, or the necessity for an expanded good faith exception would never arise. Id. at 360.

Therefore, as the State conceded, the good faith exception as created in Leon, 468 U.S. 897 does not apply to the facts of the

present case, and as discussed above, the expanded good faith exception pursuant to Krull, 480 U.S. 340 is also inapplicable. The trial court's holding that the good faith exception to the exclusionary rule pursuant to the Fourth Amendment applies to the facts of the present case was not correct, and this court should reverse the trial court's ruling and remand this matter for further proceedings.

Furthermore, as the State conceded in its brief, the court in Krull "noted that the good faith exception might not apply if an officer erroneously, although in good faith, acted outside the scope of a statute." Appellee's Br. at 18 (citing: Krull, 480 U.S. at 360 n.17). Thus, even if the Court were to agree with the State that the Krull good faith exception applies to the facts of the present case, the fact that the trial court held that the officer's actions, even if they were in good faith, were outside the scope of the statute. (R. 106, 107). In other words, even if the Utah County Sheriff's Officers acted in good faith reliance on the magistrate's approval of their roadblock plan, the trial court still determined that their actions were not in conformity with ATCA (R. 106, 107), and therefore, the good faith exception to the exclusionary rule does not apply.

#### POINT IV

##### **THE UTAH COUNTY SHERIFF'S OFFICE AND THE UTAH COUNTY ATTORNEY'S OFFICE DID NOT ACT IN GOOD FAITH**

The State would have this Court find that substantial good faith is enough good faith for the good faith exception to the exclusionary rule to apply. (Appellee's Br. at 19-29). However, circumstances which "almost" satisfy an exception to the warrant

requirement is wholly inadequate to overcome the *per se* unreasonableness of warrantless searches. State v. Wells, 928 P.2d 386 (Utah App. 1996); State v. Brown, 853 P.2d 851 (Utah 1992); and Katz v. United States, 389 U.S. 347 (1967). Exceptions to the warrant requirement are narrowly drawn. See Terry v. Ohio, 392 U.S. 1 (1968); State v. Roybal, 716 P.2d 291 (Utah 1986). The United States Supreme Court stated, "[t]he exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn." Jones v. United States, 357 U.S. 493 (1958).

In State in Interest of A.R., 937 P.2d 1037 (Utah App. 1997), this Court stated that the good faith exception is one of the limited exceptions to the warrant requirement. Id. at 1044 n.7. The State's assertion that substantial good faith is sufficient to qualify as an exception to the warrant requirement and the application of the exclusionary rule is completely contrary to the narrowly, carefully, and jealously carved exceptions to the requirement that officers obtain a warrant prior to stopping and seizing people in our country.

Furthermore, the mere substantial compliance with the requirements of ATCA was due to the choice of the Utah County Sheriff's Office and the Utah County Attorney's Office. The original roadblock plan submitted to the magistrate by the Utah County Attorney's Office and the Utah County Sheriff's Office only partially complied with the requirements of ATCA. (SR. 1-39). However, even the degree of partial compliance with ATCA decreased over the period of years in which the original plan was amended numerous times until the amendment which was in effect at the time Appellant was stopped at the roadblock. (SR. 53-79). The fact that

the Utah County Sheriff's Office and Utah County Attorney's Office were able to get magistrates to rubber-stamp the original roadblock plan together with numerous amendments which only partially complied with ATCA does not justify application of the good faith exception. Leon, 468 U.S. 919 n.20; Krull, 480 U.S. at 355.

Where the Utah County Sheriff's Office and Utah County Attorney's Office invited the magistrates to erroneously rubber-stamp roadblock plans which only partially complied with ATCA, they cannot now claim that they acted in good faith because the magistrate accepted their invitation to approve a plan based only on partial compliance. It is incongruent and inherent bad faith on the part of the Utah County Attorney's Office and Utah County Sheriff's Office to invite error on the part of a magistrate, and subsequently, claim that they reasonably relied on the magistrate's finding that the roadblock plan was sufficient under ATCA even though it only partially complied with ATCA's requirements. This Court should not permit the State to rely on invited error. State v. Blubaugh, 904 P.2d 688, 700 (Utah App. 1995); State v. Emmett, 839 P.2d 781, 788 (Utah 1992); State v. Barella, 714 P.2d 287, 288 (Utah 1986).

Even if the State's compliance with ATCA rises to the level of substantial rather than simply partial compliance, it is not sufficient to justify the finding that the good faith exception to the warrant requirement is applicable, and this Court should reverse the trial court's finding of good faith.

Additionally, the trial court specifically found that the actions of the Utah County Sheriff personnel operating the roadblock in question exceeded the scope of permissible roadblocks



as articulated by the U.S. Supreme Court in Michigan v. Sitz, 496 U.S. 444 (1990). (R. 106-107). Thus, under the objective reasonable officer standard of good faith, the officers in the present case either knew or should have known that the roadblock which they were conducting far exceeded the brief detention and inquiry to look for signs of impairment authorized in Sitz. Id. at 447-55. This Court should not find that the Utah County Sheriff's Office acted in good faith in conducting the roadblock in question.

#### POINT V

THE TRIAL COURT DID NOT FIND THAT DEFENDANT FAILED TO ARTICULATE A POLICY-BASED REASON TO CONSIDER AN INDEPENDENT ANALYSIS UNDER THE STATE CONSTITUTION AND TO THEREBY REJECT THE GOOD FAITH EXCEPTION.

The State argues in its brief that because the trial court did not address the state constitutional arguments made by Appellant, "the trial court implicitly concluded that defendant failed to articulate a policy-based reason to depart from federal law, and, thus, properly refused to construe a good faith exception to the state exclusionary rule different from the federal good faith exception." Appellee's Br. at 30. The State's argument is wild speculation. If any conclusion were to be drawn by the trial court's silence on Appellant's arguments relative to a separate analysis pursuant to Article I, § 14 of the Utah Constitution from the analysis pursuant to the Fourth Amendment, such a conclusion would be that the trial court considered the independent State constitutional analysis and determined that although the analysis is separate and distinct, the result is the same. Appellant maintains that the arguments made before the trial court and in Appellant's Brief asserting a separate and distinct analysis of the

roadblock issues pursuant to Article I, § 14 of the Utah Constitution should be reviewed by this Court for correctness. State v. Deli, 861 P.2d 431, 433 (Utah 1993). If this Court is reluctant to review Appellant's arguments pursuant to Article I, § 14, then Appellant would request that this issue be remanded to the trial court for further findings of fact and conclusions of law.

#### POINT VI

BECAUSE UTAH APPELLATE COURTS HAVE NEVER RECOGNIZED A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE PURSUANT TO ARTICLE I, § 14 OF THE UTAH CONSTITUTION, THE TRIAL COURT'S RULING SHOULD BE REVERSED.

The Utah Supreme Court has never recognized a good faith exception to the exclusionary rule pursuant to Article I, § 14 of the Utah Constitution. State v. Rowe, 806 P.2d 730 (Utah App. 1991), rev'd in part, 850 P.2d 427 (Utah 1992); State v. Larocco, 294 P.2d 460, 473 (Utah 1990); State v. Mendoza, 748 P.2d 181, 187 (Utah 1987) (Zimmerman, J., concurring). The State cites cases such as State v. Chapman, 921 P.2d 446 (Utah 1995) in an attempt to argue that Utah appellate courts have adopted the good faith exception to the exclusionary rule. However, Chapman, and all other cases in Utah which have affirmatively applied a good faith analysis, have done so pursuant to a Fourth Amendment analysis. Appellant is unaware of any case in Utah which has addressed the good faith exception pursuant to Article I, §14 of the Utah Constitution. Therefore, at the present time, there is no good faith exception to exclusion of evidence when a police officer's violates a person's rights under Article I, §14.

The State argues in its brief, "Indeed, this Court, as an intermediate court of appeals, is not even the proper forum to

decide whether Utah lacks a good faith exception comparable to the federal exception. . . ." Appellee's Br. at 34. Because there presently does not exist a good faith exception under Article I, §14 of the Utah Constitution, and the State concedes that this Court is not the proper forum to create such an exception, then the trial court is certainly not the forum to create a good faith exception under Article I, §14. Therefore, the trial court erred in not granting Appellant's motion to suppress based on the fact that the trial court clearly found that the officer's actions in the present case were unconstitutional (R. 6-7), and absent a good faith exception pursuant to Article I, §14 exclusion of the evidence is the only proper remedy. State v. Thompson, 810 P.2d 415 (Utah 1991).

#### POINT VII

#### **A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT BE ADOPTED PURSUANT TO ARTICLE I, §14 OF THE UTAH CONSTITUTION.**

In State v. Anderson, 910 P.2d 1229 (Utah 1996), the Utah Supreme Court stated, ". . . Utah courts should construe article I, §14 in a manner similar to constructions of the Fourth Amendment except in compelling circumstances." Id. at 1235. According to the arguments in Appellant's Brief, Appellant asserts that both the good faith exceptions pursuant to Leon, 468 U.S. 897 and Krull, 480 U.S. 340 present the type of compelling circumstances which justify Utah Courts in diverging from Fourth Amendment analysis and resorting to the State Constitution as approximately 14 other states have done in striking down the good faith exception under its respective state constitution.

Additionally, at least one State, Illinois, while accepting the good faith exception pursuant to Leon, 468 U.S. 897, declined to accept the expanded good faith exception pursuant to Krull, 480 U.S. 340 (more state's are almost certain to follow):

We are not willing to recognize an exception to our state exclusionary rule that will provide a grace period for unconstitutional search and seizure legislation, during which time our citizens' prized constitutional rights can be violated with impunity. We are particularly disturbed by the fact that such a grace period could last for several years and affect large numbers of people. This is simply too high a price for our citizens to pay. We therefore conclude that article I, section 6, of the Illinois Constitution of 1970 prohibits the application of Krull's extended good-faith exception to our state exclusionary rule.

[W]e note that our decision today does not impact the Leon good-faith exception. . . . [O]ne can fully accept the rationale and result in Leon while rejecting the rationale and result in Krull. This is precisely what Justice O'Connor did in her dissent in Krull.

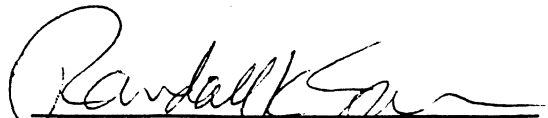
People v. Krueger, 675 N.E.2d 604 (Ill. 1996).

Due to the compelling circumstances relative to the good faith exception and the confusion that is created when reviewing courts are forced to "entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant," Leon, 468 U.S. at 959 (Brennan J., dissenting) Utah Appellate courts should decline to adopt the good faith exceptions created in Leon, 468 U.S. 897 and Krull, 480 U.S. 340.

#### CONCLUSION AND PRECISE RELIEF SOUGHT

For all of the reasons set forth in Appellant's Brief and Appellant's Reply Brief, this court should reverse the trial court's denial of defendant's motion to suppress and remand this case to the Fourth District Court with directions to suppress the evidence and dismiss the charge.

Respectfully submitted this 20<sup>th</sup> day of January, 1998.

  
Randall K. Spencer  
Attorney for Deherrera

### Mailing Certificate

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant this 20<sup>th</sup> day of January, 1998 to the following: Kenneth A. Bronston, Assistant Attorney General, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Fl., Salt Lake City, Utah 84114.

A handwritten signature in cursive script, appearing to read "Randall K. P.", written over a horizontal line.