

1997

UTCO Associates, LTD., a Utah limited partnership, by and through its general partner, Robert D. Kent v. K. Demarr Zimmerman; Sumerset Houseboats, Div. SMI; and James E. Sharpe, John Does 1-10 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

UTCO 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-
Cross Appellants-Defendants.

No. 970190-CA
930904174

Argument Priority 15

BRIEF OF APPELLANT

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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Appellees-)
Cross Appellants-Defendants.)

BRIEF OF APPELLANT

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

JURISDICTION

This appeal is from an final Judgment of the Third Judicial District Court of Salt Lake County, State of Utah, entered in favor of Defendants Sumerset Houseboats, Div. SMI (“Sumerset”), and its

president James E. Sharpe ("Sharpe") on September 4, 1996 after a jury trial. R.1771-72. Appellant UTCO Associates ("UTCO") initially filed this appeal in the Utah Supreme Court (No. 960446), which had jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j) (1992). On March 19, 1997, the Utah Supreme Court poured over this appeal to this Court for disposition (No. 970190-CA). R.1798. The jurisdiction of the Court of Appeals in this appeal therefore rests upon its pour-over jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(k)(1992).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

The broad issue on appeal is whether the trial court erred in its legal conclusions at trial when it (a) dismissed UTCO's promissory estoppel claims *sua sponte* and when it (b) instructed to the jury regarding defenses not pled by defendants; (c) failed to give several of instructions to the jury regarding the defendants' changing of identifying serial numbers on the Houseboat, the parties' course of dealing, and damages for loss use of property; and (d) granted defendants' motions in limine which precluded UTCO from introducing evidence that the Houseboat serial numbers previously sent to UTCO had been changed by defendants and that a boat bearing the serial number of the Houseboat was subsequently sold by defendants.¹ With the foregoing broad issues in mind, UTCO presents the following questions for review by this Court.

1. Did the trial court err in refusing *sua sponte* to instruct the jury on UTCO's claim for promissory estoppel prior to instructing the jury, which effectively dismissed said claim. Determining whether the trial court's refusal to give a proposed jury instruction constitutes error presents a

¹Defendants filed three "combined" Motions in Limine, one on July 11, 1997 and two more on the morning of July 22, 1997. Record at 1486-90, 1541-47, 1560-65. The trial court then granted the motions prior to the beginning of the trial. Record at 1904-10.

question of law, to which this Court gives no deference. Cornia v. Wilcox, 898 P.2d 1379, 1386 (Utah 1995). R 2606-2611.

2. Did the trial court abuse its discretion in granting defendants' motion in limine which precluded UTCO from introducing evidence on its fraud and negligent misrepresentaiton claims that: 1) the serial numbers on the Houseboats had been altered by defendants; 2) the Houseboat serial numbers previously sent to UTCO by Sumerset and Sharpe had been changed by defendants; 3) a boat bearing the serial number of the Houseboat was subsequently sold by defendants.² In reviewing questions of admissibility of evidence at trial, deference is given to the trial court's advantageous position. Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992) (quoting Whitehead v. American Motors Sales Corp., 801 P.2d 920, 923 (Utah 1990)). Accordingly, this Court does not reverse the trial court's evidentiary decisions made pursuant to Rules 401 and 403 of the Utah Rules of Evidence unless the court clearly abused its discretion. See State v. Wetzel, 868 P.2d 64, 67 (Utah 1993); Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993).

3. Did the trial court err in instructing the jury regarding defendants' alleged "different motivations" and "inferred intent" for purposes of analyzing fraudulent intent. R.1637, 2612-13. A party is entitled to a new trial where it shows that the trial court erroneously or insufficiently instructed the jury, or that the instruction mislead the jury and was prejudicial to the complaining

²The Court further precluded plaintiff from presenting evidence of any complaint, conversation or investigation by any government agency, including the F.B.I. and precluded plaintiff from presenting the testimony of Ellery Sumner and Ken Crooks, the principal investigators for the F.B.I. and the Division of Motor Vehicles regarding the reassignment of the serial numbers, respectively, as witnesses. Defendants filed three "combined" Motions in Limine, one on July 11, 1997 and two more on the morning of July 22, 1997, Record at 1486-90, 1541-47, 1560-65. The trial court then granted the motions prior to the beginning of the trial. Record at 1904-10.

party. Vitale v. Belmont Springs, 916 P.2d 359, 363 (Utah Ct. App. 1996). Determining whether the trial court's refusal to give a proposed jury instruction constitutes error presents a question of law, to which this Court gives no deference. Cornia v. Wilcox, 898 P.2d 1379, 1386 (Utah 1995).

DETERMINATIVE PROVISIONS OF LAW

Rule 12³ and Rule 41,⁴ Utah Rules of Civil Procedure, are determinative.

STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiff appeals from the final judgment of the trial court after a jury verdict. Plaintiff filed this action for damages as against Sumerset Houseboats, Div. SMI's ("Sumerset") and Sharpe for their failure to deliver a Houseboat after receipt of \$60,000.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

UTCO filed its Complaint in this case on July 21, 1993, alleging that defendants Sharpe and Sumerset failed to send a Houseboat as they promised after receiving the Funds from UTCO. The Complaint was later amended and alleges causes of action for breach of contract, negligent misrepresentation, fraud, promissory estoppel, quantum meruit, breach of the covenant of good faith and fair dealing, foreclosure of security interest, conspiracy, conversion, implied contract, disregard of the corporate entity of Sumerset and seeking prejudgment interest and punitive damages. R. 1-11. Defendant Zimmerman answered the Complaint, denied liability, and affirmatively defended on the

³Addendum A.

⁴Addendum B

basis that they had not made the alleged representations to plaintiff, and that he was entitled to retain the money sent by plaintiff in any event. R. 18-27. Defendant Zimmerman further filed a Counterclaim on August 25, 1993. On June 16, 1995 in response to the filing of plaintiff's Second Amended Complaint, R.561-79, Defendants Sharpe and Sumerset filed an answer, and defendant Sumerset filed a counterclaim and third party complaint alleging that plaintiff and its attorneys had conspired to defraud Sumerset. R. 583-607,639-655. On February 26, 1996, the trial court entered its order granting Plaintiff's Motion for Partial Summary Judgment and determined that the First Cause of Action of the Counterclaim, Third Party Complaint, and defendants' Eighth and Ninth Affirmative Defenses should be dismissed. R. 1438-43. On February 9, 1996, UTCO filed its Answer to the only remaining cause of action in the Counterclaim. R. 1303-06.

The trial court, sitting without a jury, tried this action on July 22, 23, 25, 29, and 30. During the course of the trial, the plaintiff voluntarily dismissed its claims for conversion, quantum meruit, breach of the covenant of good faith and fair dealing, foreclosure of security interest, and conspiracy and plaintiff presented no evidence in support of its Counterclaim. After the evidence was completed and just prior to instructing the jury, the Court dismissed *sua sponte* plaintiff's claim for promissory estoppel despite plaintiff's objection thereto. The jury was only instructed regarding plaintiff's claims for fraud, negligent misrepresentation and breach of contract. The jury returned a special verdict on July 30, 1996 in favor of defendants. R.1670-72. Judgment was entered in favor of defendants on September 4, 1996. R.1771-73. Appellant filed a Notice of Appeal on October 1, 1996. R.1774-79. This is an appeal from the entire judgment of the trial court.

STATEMENT OF FACTS

1. UTCO is a Utah limited partnership duly organized under the laws of the State of Utah and has its principal place of business located in Salt Lake County, State of Utah. R.561. Robert D. Kent is a general partner of plaintiff. R.561. Defendant K. DeMarr Zimmerman ("Zimmerman") is a resident of Davis County, State of Utah, transacting business primarily in Salt Lake County, State of Utah. R.561-62,640. Zimmerman commenced a proceeding under Chapter 7 of the United States Bankruptcy Code on October 6, 1993. R.561-62,640. Defendant Somerset Houseboats, SMI Div. ("Somerset") has its principal place of business in Somerset, Kentucky. R.640 Somerset is in the business of selling and shipping houseboats and has shipped houseboats to Zimmerman's place of business and other location specified by Zimmerman in Utah. R. 640, 2091-93. Somerset has had other substantial contacts with plaintiff in the State of Utah. R. 2091-93. Defendant James E. Sharpe ("Sharpe") is an individual who is the president and sole shareholder of Somerset and resides in or near Somerset, Kentucky. R. 640.

On or about November 20, 1992, Zimmerman arranged to purchase from Somerset a 1993 Somerset Houseboat, Serial No. SZJ02021C393, together with two motors and a generator (collectively referred to as the "Houseboat"), as evidenced by Somerset's invoice No. 04009. R.563,641.

Bruce J. Nelson ("Nelson"), plaintiff's former counsel, had previously arranged for houseboat financing for Zimmerman to purchase other houseboats from Somerset such that plaintiff, Zimmerman and Sharpe had established a course of dealing regarding Zimmerman's purchase of houseboats from Somerset. R.563,641. Pursuant to instructions given by Zimmerman, Somerset and Sharpe sent the original Manufacturer's Statement of Origin ("MSO") to Nelson. R.563,641.

Sharpe and Sumerset sent the MSO to Nelson to induce plaintiff to send \$58,384 (the "Funds") to Sharpe and Sumerset in payment of a portion of the purchase price of the Houseboat. R.2095. Sharpe, in a telephone conversation with Nelson, agreed to deliver the Houseboat to Zimmerman's place of business in Utah upon receipt of the Funds, which Sharpe alleged constituted the portion of the purchase price necessary for Sumerset to ship the Houseboat to Zimmerman in Utah. R. 2198-99.

On or about December 22, 1992, and based upon Sharpe's promise to Nelson to ship the Houseboat to Utah upon receipt of \$58,384, plaintiff agreed to loan (the "Loan") Zimmerman the sum of \$60,000 from which Zimmerman would pay a portion of the purchase price of the Houseboat. R.2197-99. At the time of the Loan and to evidence the same, Zimmerman executed a Note (the "Note") which called for repayment of the \$60,000 under the terms and conditions stated therein. Plaintiff's Exhibit No. 19. At the time of the execution of the Note, Zimmerman also executed a Security Agreement (the "Security Agreement") in favor of plaintiff. Plaintiff's Exhibit No. 20. By the terms of the Security Agreement, Zimmerman pledged the Houseboat as collateral security for the Note. Id. A description of such collateral was attached to the Complaint. R.579.

Pursuant to the terms of the agreement between plaintiff and defendants and their prior course of dealing, and in reliance on the promises and representations of Sharpe and Sumerset, plaintiff caused the Funds to be wired to Sumerset and Sharpe on or about December 29, 1992. R.2196-99,2278-79.

On December 29, 1992, the same day the Funds were received by Sumerset, Sharpe and Sumerset did not apply the Funds to the purchase of the Houseboat as represented to plaintiff, but

instead fraudulently applied the Funds to Zimmerman's purchase of another houseboat from Sumerset. R.1005-08. Sometime between December 29, 1992 and March 9, 1993, Zimmerman, Sharpe and Sumerset attempted to void the sale of the Houseboat to Zimmerman. R.565,642, 2075-76. Zimmerman, Sharpe and Sumerset did not give notice to plaintiff that they had attempted to void the sale of the Houseboat. R.2077.

Sharpe and Sumerset thereafter reassigned the serial number for the Houseboat shown on the MSO sent to Nelson to a second, different houseboat manufactured by Sharpe and Sumerset. R.643. Sharpe and Sumerset then sold the "second" houseboat to John Runda, and issued a second MSO to Runda, which bears the same serial number as the first MSO sent to Nelson. R.643.

The Houseboat never existed and there is no boat which is of the dimensions and has the features described in the invoice sent by defendants to plaintiff which bears Serial No. SZJ02021C393. R.565,643.

The trial court erroneously granted defendants' motion in limine on the first day of trial, July 22, 1996. R.1904-10. The Court then precluded UTCO from introducing evidence that the Houseboat serial numbers previously sent to UTCO had been changed by defendants and that a boat bearing the serial number of the Houseboat was subsequently sold by defendants.⁵ The Court further precluded plaintiff from presenting evidence of any complaint, conversation or investigation by any government agency, including the F.B.I. and precluded plaintiff from presenting the testimony of Ellery Summer and Ken Crooks, the chief investigators for the F.B.I. and the Division of Motor

⁵Defendants filed three "combined" Motions in Limine, one on July 11, 1997 and two more on the morning of July 22, 1997. Record at 1486-90, 1541-47, 1560-65. The trial court then granted the motions prior to the beginning of the trial. Record at 1904-10.

Vehicles, respectively, as witnesses. R. 1541-47,1560-64,1904-10.

After the close of the evidence and prior to instructing the jury, the trial court erroneously dismissed plaintiff's claim for promissory estoppel *sua sponte* and refused to instruct the jury on UTCO's promissory estoppel. The Court stated:

I've indicated in chambers that I was not instructing on the equitable causes of action of promisory [sic] estoppel. For the record, the reasons I have determined not to do that is, I am satisfied the plaintiffs have an adequate remedy at law and, I believe, it is the rule that equitable remedy is not available as long as there is an adequate remedy at law. And I believe there is here.

Also, I am satisfied 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 surplage.

Finally, I'm satisfied that the court of appeals case that was cited to me by plaintiff's counsel, saying that they seem to suggest that the court must send equitable causes of action to the jury is factually distinguishable in this case and I'm satisfied it would be inappropriate to submit that equitable claim to a jury, if it was otherwise proper. R.2606-07.

Later, plaintiff objected to the trial court's refusal to instruct the jury regarding the plaintiff's promissory estoppel claim:

Mr. Gibb: In light of the court's ruling, I don't believe I need to address our exception to Number 18, which was entitled "Promissory Estoppel". The Court has addressed that fully in its ruling and your record, I believe, previously, with respect to that issue.

The Court: Just as long as the record shows that any offered exceptions, or any offered instructions that you submitted in this matter have not been given because of that ruling and that you have an exception to those.

Mr. Gibb: Correct, your Honor. We believe that Instruction Number 18 on promisory [sic] estoppel did adequately state the law. R.2611.

The trial court also refused to instruct the jury on plaintiff's proposed jury instructions

regarding the defendants' changing of identifying serial numbers on the Houseboat, and damages for loss use of property. R. 2610-11. This loss of use of the property was for consequential damages suffered by UTCO as a result of the loss of the money sent to Sumerset and Sharpe.

SUMMARY OF ARGUMENTS

After more than three years of litigation and on the last day of a five-day jury trial, the trial court for the first time informed UTCO that it was refusing to instruct the jury on UTCO's promissory estoppel claim. The trial court cited procedural arguments as a basis for its decision despite the fact that the parties had consented to have the issue tried by the jury. The trial court's *sua sponte* refusal to instruct the jury on the issue of promissory estoppel is contrary to Utah law allowing such claims to be tried to a jury where the parties consent thereto. The promissory estoppel claim was not surplusage as the trial court held. Accordingly, UTCO is entitled to a new trial on its claim for promissory estoppel.

The trial court also improperly prohibited UTCO from presenting evidence that Sumerset and Sharpe had changed the serial numbers on the Houseboat they promised to send to UTCO and further precluded UTCO from introducing evidence that a boat with different dimensions but bearing the same serial number as was sent to UTCO was sold by Sumerset and Sharpe. Under Utah law, fraudulent intent is determined by weighing all surrounding circumstances including those which occur after the fraudulent representation is made because the law recognizes that there is rarely direct evidence of fraud. The trial court erred in excluding evidence described in Sharpe and Sumerset's motion in limine including the changed serial numbers and the subsequent sale to a third person. UTCO is entitled to a new trial on its fraud and negligent misrepresentation claims.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT *SUA SPONTE* DISMISSED PLAINTIFF'S CLAIM FOR PROMISSORY ESTOPPEL.

On July 30, 1996, after the close of the evidence and just prior to instructing the jury, the trial court announced that it was dismissing *sua sponte* plaintiff's claim for promissory estoppel. The trial court stated:

I am satisfied the plaintiffs have an adequate remedy at law 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 surplage.

Finally, . . . I'm satisfied it would be inappropriate to submit that equitable claim to a jury, if it was otherwise proper.

R.2606-07. The trial court did not state whether the *sua sponte* refusal to instruct the jury on UTCO's promissory estoppel claim was under Rule 12 or Rule 41, or whether it was a directed verdict. However, the trial court's failure to cite its basis for refusing to instruct the jury on UTCO's promissory estoppel claim is of no moment as this Court pays no deference to the trial court's legal conclusions decided under any of these rules. This Court reviews for correctness the trial court's refusal to instruct the jury regarding plaintiff's promissory estoppel claim. Cornia v. Wilcox, 898 P.2d 1379, 1386 (Utah 1995).

A. THE PROMISSORY ESTOPPEL CLAIM SHOULD HAVE BEEN PRESENTED TO THE JURY.

Although promissory estoppel is an equitable claim for relief which is normally tried

to the bench,⁶ the Utah Rules of Civil Procedure allow the jury to act as a factfinder in an equity action: "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."⁷ The parties had both agreed that the promissory estoppel claim should be submitted to the jury. Both parties had prepared jury instructions on that claim. The parties knew and agreed to present their case to the jury as evidenced by Defendants demand for a jury trial regarding all issues⁸ and the lack of objection from either party to the trial court's scheduling order and the pretrial order which ordered that the entire case be for a jury trial.⁹ In spite of that consent to submit the issue to the jury, the trial court *sua*

⁶See *Tolhoe Constr. v. Staker Paving & Constr.*, 682 P.2d 843, 849 (Utah 1984).

⁷Rule 39(c), Utah Rules of Civil Procedure. See *Goldberg*, 896 P.2d at 1242 (Citing *Nicholson v. Evans*, 642 P.2d 727, 728 (Utah 1982); *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392, 394 (Utah 1980); *Willard M. Milne Inv. Co. v. Cox*, 580 P.2d 607, 609 (Utah 1978); *Andreason v. Aetna Casualty & Sur. Co.*, 848 P.2d 171, 174 (Utah App.1993); see also 5 James W. Moore et al., *Moore's Federal Practice* ¶ 39.04 (1994) (stating verdict has effect of common law verdict, although action formerly would have been in equity)).

⁸Record at 583, 606.

⁹Although a jury trial on all issues was not formally stipulated to, it is clear on a review of the record and the Court's scheduling and pretrial orders that all parties thought all issues were being tried to a jury. Record at 583,606,1431,1692. Further under Utah law, "[e]xpress consent is unnecessary." *Goldberg v. Jay Timmons &*

sponte found that it would be “inappropriate to submit that equitable claim to a jury.” R.2607. This was error. The trial court’s refusal to instruct was not based on the merits of the claim, but on procedural grounds. The trial court gave three procedural reasons for its refusal to instruct. It did not assess or weigh the evidence submitted by UTCO in support of its promissory estoppel claim. The Court found that plaintiff had an adequate remedy at law, the promissory estoppel claim was “surplusage” and that it would be inappropriate to send an equitable claim to the jury for adjudication. R.2606-07.

The trial court committed prejudicial error when it failed to instruct the jury on UTCO’s promissory estoppel claim. The trial court further compounded that error when it failed to notify the parties until the close of the evidence that the jury would not be consulted and that it would refuse to instruct the jury regarding UTCO’s promissory estoppel. In Goldberg v. Jay Timmons & Associates, 896 P.2d 1241, 1243-44 (Utah Ct. App. 1995), this Court stated:

Associates, 896 P.2d 1241, n. 3 (Utah Ct. App. 1995)(citing *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 52 (3d Cir.1989). The *Goldberg* court further concluded:

Giving the jury's verdict full significance in *Nicholson*, the court found persuasive that plaintiffs demanded a jury trial, with defendants' apparent acquiescence, and the proceedings went forward as if the entire case were being tried by jury as a matter of right. Consequently, it is appropriate for this Court to review the decisions of the judge and jury on that same basis.

Nicholson v. Evans, 642 P.2d 727, 728; see also *Thompson v. Parkes*, 963 F.2d 885, 888 (6th Cir.1992) (holding parties consented to jury trial of equitable issues under Federal Rule 39(c) because "the parties agreed and the court ordered on several occasions that the matter be tried as a jury case"); *Bereda v. Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 52 (3d Cir.1989). ("Since [both parties] requested a jury trial and the subject of an advisory jury was never mentioned at any time during the proceedings, [the parties] must be deemed to have consented to a trial by a nonadvisory jury under Rule 39(c).").

Those same points are persuasive in this action. Record at 583, 606, 1431, 1692.

Federal courts have addressed the issue of when a court must notify parties that a jury's verdict will be advisory and nonbinding in cases in which the parties have otherwise consented to a binding jury trial. See Thompson, 963 F.2d at 888-90; Bereda, 865 F.2d at 52-53. Those courts conclude that "considerations of fairness to the litigants indicate that Rule 39(c) should not be interpreted to allow a district judge to rule a jury verdict advisory after the parties have begun to implement their trial plan."¹⁰

We agree with the federal courts' interpretation of Rule 39(c) and hold the trial court had intended "of its own initiative," Utah R.Civ.P. 39(c), to use an advisory jury, it should have notified the parties before the trial began. See Winegar v. Slim Olson, Inc., 122 Utah 487, 252 P.2d 205, 207 (1953) (holding because Utah Rules of Civil Procedure were fashioned after federal rules, we may examine decisions under federal rules to determine meaning of Utah rules)

B. DAMAGES ARE THE REMEDY FOR PROMISSORY ESTOPPEL CLAIMS.

A cause of action for promissory estoppel requires the equitable enforcement of a promise and the award of damages, a legal remedy, for breach of that promise. In Topik v. Thurber, 739 P.2d

¹⁰Citing Bereda, 865 F.2d at 53; Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc., 730 F.Supp. 662, 664 (E.D.Pa.1990); *see also Thompson*, 963 F.2d at 889 ("The parties are entitled to know prior to trial whether the jury or the court will be the trier of fact."); A.F.M. Corp. v. Corporate Aircraft Management, 626 F.Supp. 1533, 1551 (D.Mass.1985) ("It strikes the [c]ourt as unfair and inequitable to permit a party to wait and see what the jury's verdict will be before making application to the [c]ourt to employ a rule 39(c) advisory jury."); Hildebrand v. Board of Trustees, 607 F.2d 705, 710 (6th Cir.1979) ("To convert a trial from a jury trial to a bench trial ... in the middle of the proceedings is to interfere with counsel's presentation of their case and, quite possibly, to prejudice one side or the other."); 5 Moore et al., *supra*, ¶ 39.10[1] ("[T]he court should give advance notice to the parties when it plans to use an advisory jury."). *But see Merex A.G. v. Fairchild Weston Sys., Inc.*, 29 F.3d 821, 823, 827 (2d Cir.1994) (holding trial court did not abuse its discretion under Rule 39(c) "by waiting until mid-way through trial before telling the parties that the verdict would not be binding." but stating advance notice is "preferable").

The Goldberg court further observed:
"First. '[a]ny good trial lawyer will testify that there are significant tactical differences in presenting and arguing a case to a jury as opposed to a judge.' " Bereda, 865 F.2d at 53 (quoting Hildebrand, 607 F.2d at 710). Second, the parties "will have been able to conduct voir dire with the knowledge of the role the jury will play in the case." Bereda, 865 F.2d at 53. And finally, "[a]ll jury verdicts in cases not triable by right by a jury would effectively be advisory, as the [trial] judge could always rule that the verdict was advisory if the judge did not agree with the jury's verdict." *Id.* at 52." 896 P.2d at 1243.

1101 (Utah 1978), the Utah Supreme Court stated, “The doctrine of promissory estoppel has application when a promise is made which can reasonably be expected to induce action or forbearance and which in fact induces action or forbearance from which a detriment is suffered.” Utah courts have traditionally allowed a flexible approach in granting remedies for breach of a promise which is enforced pursuant to promissory estoppel. In Andreason v. Aetna Cas. & Surety Co., 848 P.2d 171, 176 (Utah Ct. App. 1993), this Court stated, “While the damages must be limited to those incurred through reasonable reliance, the flexible and equitable nature of promissory estoppel allows for damages even where the plaintiff receives a benefit such as improved health, a repaired car, or a repaired home.” In Quagliana v. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975), the Utah Supreme Court held that the promisor’s failure to perform in accordance with what it had promised under the terms of the contract constituted a breach “which entitled plaintiffs to compensation for the injury caused thereby.” Id. at 310.

While the enforcement of the promise is equitable in nature, remedies under a promissory estoppel claim are legal and require the awarding of damages for breach of a promise. Because both legal and equitable claims were alleged by UTCO, the equitable claims should have been submitted to the jury as well. In Zions First Nat’l Bank v. Rocky Mtn. Irr. Inc., 795 P.2d 658, 662 (Utah 1990), the Court stated:

In the federal courts, there is no question that when legal and equitable issues turn on the same operative facts, a jury must decide the legal issue first; the jury’s factual determination binds the trial court in its determination of the parallel equitable issue. We approve of this procedure.

The trial court should not have reserved the issue of fraudulent alteration to itself. The court compounded its error by directing a verdict on the issue as it related

to the RICE counterclaim. There is abundant evidence in the record to support a finding of material, fraudulent alteration, especially when viewed in the light most favorable to Rocky Mountain.

Id. (Citations omitted). The trial court should have instructed the jury on promissory estoppel. That error was compounded because the jury had properly heard the evidence supporting promissory estoppel claim and “damage assessment is peculiarly a jury function.”¹¹ The trial court should have allowed plaintiff’s promissory estoppel claim to be decided by the jury.

**C. BECAUSE THE JURY DID NOT FIND A CONTRACT EXISTED
UTCO DID NOT HAVE AN “ADEQUATE REMEDY AT LAW” AND
THE PROMISSORY ESTOPPEL CLAIM WAS NOT
“SURPLUSAGE.”**

The trial court erroneously held: “plaintiffs have an adequate remedy at law and, I believe, it is the rule that equitable remedy is not available as long as there is an adequate remedy at law. And I believe there is here.” R.2606. Though it is true that where there is an adequate remedy at law, no equitable remedy will be implied,¹² the trial court mistakenly concluded that the jury would find that there was an express contract between the parties. However, the promissory estoppel claim was not redundant because the jury found that there was no breach of contract, and, in fact, no contract between UTCO and Sharpe. The jury found that UTCO was not entitled to recover on its breach of contract claim against Sharpe. R.1672 (Special Interrogatory No. 7). Next to the special

¹¹*Batty v. Mitchell*, 575 P.2d 1040, 1043 (Utah 1978).

¹²*See American Towers Owners’ Association, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1193 (Utah 1996) (“[I]f a legal remedy is available, such as breach of an express contract, the law will not imply the equitable remedy of unjust enrichment.” *Citing Mann v. American Western Life Ins. Co.*, 586 P.2d 461, 465 (Utah 1978) (“Recovery in quasi contract is not available where there is an express contract covering the subject matter of the litigation.”); *Davies v. Olson*, 746 P.2d 264, 268 (Utah.Ct.App.1987) (“Recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists.”).

interrogatory on the verdict form, the jury wrote: “No contract UTCO/Sharpe.” R.1672. Because the jury found that there was no breach of contract, UTCO did not have an adequate remedy at law.¹³ The jury should have been allowed to make factual findings regarding UTCO’s promissory estoppel claim as a separate and independent claim.

The question should have been submitted to the jury, to which Sharpe had no objection, and because the operative facts support legal and equitable causes of action. In this case, the jury did not receive the opportunity to adjudicate the facts as the parties consented and to find, as an alternative to the breach of contract claim, that Sharpe was liable on a theory of promissory estoppel. See Billings v. Union Bankers’ Ins. Co., 918 P.2d 461, 467(Utah 1996)(jury may properly consider alternate theories on same set of facts). The trial court simply erred when it refused to instruct the jury on UTCO’s promissory estoppel claim.

The trial court’s basis for its refusal to instruct on that claim should not withstand the scrutiny of this Court. The trial court held that the promissory estoppel claim was “surplusage.” Black’s Law Dictionary defines “surplusage” as “extraneous, impertinent, superfluous, or unnecessary matter.” Black’s Law Dictionary, 572 (5th ed. 1983).¹⁴ This Court should hold that UTCO’s promissory estoppel claim was an independent and separate claim from all of UTCO’s other claims and that it was not “surplusage.”

While the operative facts may be similar, the elements of a claim for fraud or negligent

¹³Record at 1671-72.

¹⁴Addendum E.

misrepresentation and the elements of a claim for promissory estoppel are different and are not redundant. Indeed, the burden of proof for fraud is clear and convincing evidence while the burden of proof for promissory estoppel is a preponderance of the evidence. The differing burdens of proof provide a further distinction between the misrepresentation claims and the promissory estoppel claims. The trial court erred in its conclusion that an adequate remedy at law existed and that the promissory estoppel claim was “surplusage.” The court should have allowed the jury to make findings with respect to the promissory estoppel claim.

D. UTCO PRESENTED ADEQUATE EVIDENCE TO HAVE THE JURY DECIDE PLAINTIFF’S PROMISSORY ESTOPPEL CLAIM.

The trial court did not make any determination as to the merits of UTCO’s promissory estoppel claim. Its refusal to instruct the jury was based solely on procedural grounds. The court did not, for example, direct a verdict against UTCO based on insufficiency of the evidence presented. Even so, ample evidence was introduced at trial to support the promissory estoppel claim. UTCO introduced evidence that Sharpe promised to send a boat upon receipt of money from UTCO and that Sharpe reasonably expected the promise to induce action or forbearance. See Restatement (Second) of Contracts, Section 90 (1979). The evidence showed that the promise did in fact induce action or forbearance by UTCO from which a detriment was suffered. UTCO presented evidence that Sharpe had promised that he would ship the Houseboat to Utah upon receipt of moneys from UTCO’s attorney, Mr. Bruce J. Nelson.¹⁵ Indeed, Sharpe admitted that his promise induced UTCO to send

¹⁵Record at 2198-99.

funds on or about December 29, 1992 to Somerset.¹⁶ Thereafter, Sharpe and Somerset allege in their Amended Answer, that the “sale of the Houseboat to Zimmerman was terminated by Zimmerman and at the request of Zimmerman, the funds that had been paid toward purchase of this houseboat were credited to other accounts of Zimmerman with Somerset.” R.642-43. They also admit that “the serial number shown on the MSO sent to Nelson was assigned to a different houseboat than the houseboat which Zimmerman had agreed to purchase” and “that Somerset sold a houseboat to a John Runda which bears the same serial number as the MSO sent to Nelson”. R.642-43.

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 Somerset.” 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 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

¹⁶Record at 2060-61, 2092-93.

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 Although defendants later objected to this line of questioning, they did not move to strike Mr Nelson's testimony that a boat bearing the serial number sent to Nelson was sold to a third party Accordingly, the trial court should have allowed plaintiff to put on evidence and should have instructed the jury regarding the changing of identification numbers described in defendants' motion in limine ¹⁷

In sum, UTCO presented adequate evidence in support of its promissory estoppel claim The evidence supported each element of the promissory estoppel claim as shown above The jury could have reasonably found for UTCO on its promissory estoppel claim based on that evidence UTCO is prejudiced because the trial court refused to instruct or otherwise adjudicate UTCO's promissory estoppel claim and UTCO is therefore entitled to a new trial on its claim for promissory estoppel The judgment should be reversed

¹⁷See *Zions First Nat'l Bank v Rockv 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 *Bv 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 Irev*, 787 P 2d 1319, 1328 (Utah Ct App 1990)")(Emphasis added)

II. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT SHARPE CHANGED THE SERIAL NUMBERS ON BOATS AND SOLD THE BOAT TO ANOTHER PARTY.¹⁸

On July 11, 1993, defendants filed their first “combined” motion in limine to preclude UTCO from presenting evidence regarding defendants’ alteration of serial numbers and subsequent sale of the Houseboat with the serial number that was on the MSO sent to UTCO. R.1486-90. Thereafter, on the opening day of trial, defendants filed two more “combined” motions in limine to preclude the testimony of witnesses and presentation of other evidence regarding that same issue. R.1541-47,1560-64. The trial court discussed the matter at length in with the parties’ counsel in chambers and off the record. Upon return to the courtroom, defendants’ counsel indicated that he had nothing further to say on the record which had not been previously covered in chambers. R. 1904. The trial court then asked UTCO’s counsel several questions and UTCO’s counsel indicated that cases cited to the trial court “indicate very clearly that subsequent events can help to establish the fraudulent intention of the defendant at the time that the act occurs. . . .I think the fact finder should be looking to all of the facts and circumstances in order to fairly evaluate and understand.” R.1908. The Court stated:

I’m going to grant the motion. I can’t see any relevance to the proposition that the, at least based on what I’ve heard so far, that the reassignment of a serial number to another boat, to a third person who is not claiming to be involved in this situation, has any relevance to the state of mind of the defendant for purposes of committing fraud at the time these representations were made. I recognize after events may have some probative value, but in this case I can’t see what it might be.

¹⁸The Court should note as stated above, the subsequent sale of the Houseboat to another party was presented to the jury. *See supra* n. 20 and accompanying text.

The fact that the boat with a serial number did not exist, and was never built to the specifications in the original invoice, is all the plaintiff needs in that regard. The rest of it is surplusage and a waste of time. Unless the evidence changes, it's not coming in. The Motion is granted.

That doesn't mean you can't put in evidence that there never was a boat with that serial number, or that was the serial number on the invoices and there is no such boat, but it's not, I don't see any relevance to the fact that serial number now appears on some other boat. The motion is granted. R.1910.

The trial court erroneously precluded the presentation of this evidence because it deemed it was not relevant and because it was "surplusage." As shown below, the exclusion of that evidence was prejudicial to UTCO as it would have assisted the jury in determining the intent of defendants at the time they made representations to UTCO that a boat would be shipped to Utah if UTCO sent money to defendants. UTCO is therefore entitled to a new trial on its claims for fraud and negligent misrepresentation.

Direct evidence of fraudulent intent is seldom, if ever, present. Thus, fraudulent intent must usually be proven by evidence regarding all the facts and circumstances surrounding the transaction at issue. Indeed, 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--tasks largely within the province of the fact-finder.¹⁹

In this case, the reassignment by Sharpe and Sumerset of the serial number for the Houseboat shown on the MSO they sent to Nelson to a second, different, houseboat manufactured by Sharpe and Sumerset and the subsequent sale of the second houseboat are some of the facts and circumstances that the jury should have been allowed to examine to determine whether Sharpe and Sumerset possessed the requisite fraudulent intent. Indeed, evidence that Sharpe and Sumerset reassigned the serial number only three or four months after they attempted to void the sale of the Houseboat to Zimmerman without giving notice to UTCO is proof that Sharpe and Sumerset never intended to consummate their transaction with Zimmerman and UTCO. That evidence was clearly relevant to UTCO's fraud claim.

Sharpe and Sumerset argued at trial that the evidence in question was not relevant because the assignment of the serial number to a different boat and the sale of that boat occurred several months after the transaction with UTCO. As UTCO argued to the trial court, 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.

¹⁹Citing *In re Beeslev*, 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).

Seese, 611 A.2d 1239, 1243 (Pa. Super. Ct. 1992) (emphasis added).

In sum, evidence that Sharpe and Sumerset 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 Sumerset 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

The trial court improperly dismissed plaintiff's claim for promissory estoppel and erroneously excluded evidence regarding reassignment of serial number for the houseboat. 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 23rd day of October, 1997.

DURHAM, EVANS, JONES & PINEGAR

A handwritten signature in black ink, appearing to read "Jeffrey M. Jones", written over a horizontal line.

Jeffrey M. Jones

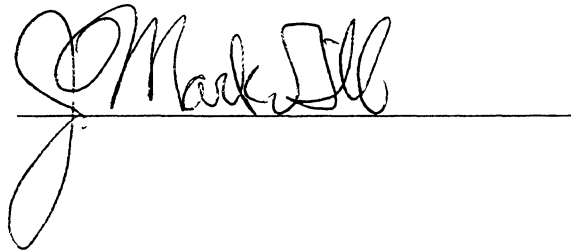
J. Mark Gibb

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 1997, 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:

Blake S. Atkin
ATKIN & LILJA
136 South Main Street, #810
Salt Lake City, Utah 84101

A handwritten signature in cursive script, appearing to read "Mark Lill", is written over a horizontal line. A large, stylized loop extends from the bottom of the signature.

ADDENDUM

Rule 12, Utah Rules of Civil Procedure	Addendum A
Rule 41, Utah Rules of Civil Procedure	Addendum B
Rule 401, Utah R. Evidence	Addendum C
Rule 403, Utah R. Evidence	Addendum D
Black's Law Dictionary ("Surplusage")	Addendum E
UTCO's Proposed Instruction No. 18, Promissory Estoppel (Not Given)	Addendum F
Transcript of Decision Granting Defendants' Motion in Limine	Addendum G
Transcript of Decision Refusing to Give Instructions on UTCO's Promissory Estoppel Claim	Addendum H
Special Verdict Form	Addendum I

Tab A

***25 Utah Rules of Civil Procedure, Rule 12**

WEST'S UTAH COURT RULES
UTAH RULES OF CIVIL
PROCEDURE
PART III. PLEADINGS, MOTIONS,
AND ORDERS

*Current with amendments received through
10-15-96.*

RULE 12. DEFENSES AND OBJECTIONS

(a) When Presented. A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6)

failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

***26 (c) Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more

definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of

failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

*27 (i) Pleading After Denial of a Motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for Costs of a Nonresident Plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a \$300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of Failure to File Undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

Tab B

***84 Utah Rules of Civil Procedure, Rule 41**

WEST'S UTAH COURT RULES
UTAH RULES OF CIVIL
PROCEDURE
PART VI. TRIALS

*Current with amendments received through
10-15-96.*

RULE 41. DISMISSAL OF ACTIONS**(a) Voluntary Dismissal; Effect Thereof.**

(1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any

claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

***85 (c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) Bond or Undertaking to Be Delivered to Adverse Party. Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was

obtained.

Tab C

*399 Utah Rules of Evidence, Rule 401

WEST'S UTAH COURT RULES
UTAH RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND
ITS LIMITS

*Current with amendments received through
10-15-96.*

RULE 401. DEFINITION OF "RELEVANT
EVIDENCE"

"Relevant evidence" means evidence having any
tendency to make the existence of any fact that is

of consequence to the determination of the action
more probable or less probable than it would be
without the evidence.

Advisory Committee Note

This rule is the federal rule, verbatim, and is
comparable in substance to Rule 1(2), Utah Rules
of Evidence (1971), but the former rule defined
relevant evidence as that having a tendency to
prove or disprove the existence of any "material
fact." Avoiding the use of the term "material fact"
accords with the application given to former Rule
1(2) by the Utah Supreme Court. *State v.*
Peterson, 560 P.2d 1387 (Utah 1977).

Tab D

***401 Utah Rules of Evidence, Rule 403**

Advisory Committee Note

**WEST'S UTAH COURT RULES
UTAH RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND
ITS LIMITS**

*Current with amendments received through
10-15-96.*

**RULE 403. EXCLUSION OF RELEVANT
EVIDENCE ON GROUNDS OF PREJUDICE,
CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 402 [Rule 403]. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also *Smith v. Estelle*, 445 F.Supp. 647 (N.D.Tex.1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

Tab E

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By
HENRY CAMPBELL BLACK, M. A.

ABRIDGED FIFTH EDITION
BY
THE PUBLISHER'S EDITORIAL STAFF

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stock, without deducting debts or liabilities; and as the accumulation of moneys or property in excess of the par value of the stock.

As to surplus Earnings; Profit, and Water, see those titles.

Accumulated surplus. That surplus which results from the accumulation of profits.

Acquired surplus. Surplus acquired by the purchase of one business by another.

Appreciation surplus. Surplus which results from the revaluation of the assets of a business.

Appropriated surplus. That portion of surplus which is earmarked or set aside for a specific purpose.

Capital surplus. All surplus which does not arise from the accumulation of profits. It may be created by a financial reorganization or by gifts to the corporation. The entire surplus of a corporation other than its earned surplus.

Earned surplus. The portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses from the date of incorporation, or from the latest date when a deficit was eliminated by an application of its capital surplus or stated capital or otherwise, after deducting subsequent distributions to shareholders and transfers to stated capital and capital surplus to the extent such distributions and transfers are made out of earned surplus. Earned surplus shall include also any portion of surplus allocated to earned surplus in mergers, consolidations or acquisitions of all or substantially all of the outstanding shares or of the property and assets of another corporation, domestic or foreign. See also **Earned surplus**.

Initial surplus. That surplus which appears on the financial statement at the commencement of an accounting period and which does not reflect the operations for the period covered by the statement.

Operating surplus. That surplus transferred to earned surplus at the end of an accounting period.

Paid-in surplus. Surplus paid in by stockholders as contrasted to earned surplus that arises from profits.

Reserved surplus. See **Appropriated surplus**, above.

Revaluation surplus. Surplus arising from a revaluation of assets above cost, usually in connection with a recapitalization (sometimes called "recapitalization surplus") or quasi-reorganization (sometimes called "reorganization surplus").

Unearned surplus. Includes paid-in surplus, revaluation surplus, and donated surplus.

Surplusage. Extraneous, impertinent, superfluous, or unnecessary matter. The remainder or surplus of money left. See also **Surplus**.

Pleading. Allegations of matter wholly foreign and impertinent to the cause. All matter be-

yond the circumstances necessary to constitute the action. Any allegation without which the pleading would yet be adequate. On motion, the court may order stricken from the pleadings any insufficient defense, redundant, immaterial, or scandalous matter. Fed.R.Civil P. 12(f).

Surprise. Act of taking unawares; sudden confusion or perplexity. In its legal acceptation, denotes an unforeseen disappointment against which ordinary prudence would not have afforded protection.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding because of surprise. Fed.R.Civil P. 60(b).

Ground for new trial. As a ground for a new trial, that situation in which a party is unexpectedly placed without fault on his part, which will work injury to his interests. He must show himself to have been diligent at every stage of the proceedings, and that the event was one which ordinary prudence could not have guarded against. A situation or result produced, having a substantive basis of fact and reason, from which the court may justly deduce, as a legal conclusion, that the party will suffer a judicial wrong if not relieved from his mistake. The general rule is that when a party or his counsel is "taken by surprise," in a material point or circumstance which could not have been anticipated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial should be granted.

Surrebutter /səˈrɒbʊtər/. In common law pleading, the plaintiff's answer of fact to the defendant's rebutter. It is governed by the same rules as the replication. It is no longer required under modern pleading.

Surrejoinder /səˈrɔɪndər/. In common law pleading, the plaintiff's answer of fact to the defendant's rejoinder. It is governed in every respect by the same rules as the replication.

Surrender. To give back; yield; render up; restore; and in law, the giving up of an estate to the person who has it in reversion or remainder, so as to merge it in the larger estate. A yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them. The giving up of a lease before its expiration. In old English law, yielding up a tenancy in a copyhold estate to the lord of the manor for a specified purpose. The giving up by a bankrupt of his property to his creditors or their assignees; also, his due appearance in the bankruptcy court for examination as formerly required by the bankruptcy acts.

Surrender is contractual act and occurs only through consent of both parties. Surrender differs from "abandonment," as applied to

Tab F

INSTRUCTION NO. 18

PROMISSORY ESTOPPEL

In this action, plaintiff claims that defendant promised to deliver the Houseboat in Utah upon receipt of the money sent by plaintiff. A promise that one should reasonably expect to induce action or forbearance on the part of another person, and which does reasonably induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise. If you find that plaintiff has proven the foregoing elements by a preponderance of the evidence, plaintiff is entitled to damages.

References:

Restatement (Second) of Contracts § 90 (1979)
MUJI 26.15

7-30-56
R. J. [signature]
RM

Tab G

1 THE COURT: I'M GOING TO GRANT THE MOTION.
2 I CAN'T SEE ANY RELEVANCE TO THE PROPOSITION THAT THE,
3 AT LEAST BASED ON WHAT I'VE HEARD SO FAR, THAT THE
4 REASSIGNMENT OF A SERIAL NUMBER TO ANOTHER BOAT, TO A
5 THIRD PERSON WHO IS NOT CLAIMING TO BE INVOLVED IN
6 THIS SITUATION, HAS ANY RELEVANCE TO THE STATE OF MIND
7 OF THE DEFENDANT FOR PURPOSES OF COMMITTING FRAUD AT
8 THE TIME THESE REPRESENTATIONS WERE MADE. I RECOGNIZE
9 AFTER EVENTS MAY HAVE SOME PROBATIVE VALUE, BUT IN
10 THIS CASE I CAN'T SEE WHAT IT MIGHT BE.

11 THE FACT THAT THE BOAT WITH A SERIAL NUMBER
12 DID NOT EXIST, AND WAS NEVER BUILT TO THE
13 SPECIFICATIONS IN THE ORIGINAL INVOICE, IS ALL THE
14 PLAINTIFF NEEDS IN THAT REGARD. THE REST OF IT IS
15 SURPLUSAGE AND A WASTE OF TIME. UNLESS THE EVIDENCE
16 CHANGES, IT'S NOT COMING IN. THE MOTION IS GRANTED.

17 THAT DOESN'T MEAN YOU CAN'T PUT IN EVIDENCE
18 THAT THERE WAS NEVER A BOAT WITH THAT SERIAL NUMBER,
19 OR THAT WAS THE SERIAL NUMBER ON THE INVOICES AND
20 THERE IS NO SUCH BOAT, BUT IT'S NOT, I DON'T SEE ANY
21 RELEVANCE TO THE FACT THAT SERIAL NUMBER NOW APPEARS
22 ON SOME OTHER BOAT. THE MOTION IS GRANTED.

23 MR. JONES: YOUR HONOR, I HAD A COUPLE OF
24 HOUSEKEEPING MATTERS BEFORE --

25 THE COURT: YOU ARE GOING TO HAVE A JURY.

Tab H

1 SHEET ON THE FRONT OF YOUR INSTRUCTIONS SO I HAVE JUST
2 NOTED ON YOUR COVER LETTER THAT EXPLAINS HOW YOU PUT
3 THE INSTRUCTIONS TOGETHER THAT THESE ARE YOUR
4 ORIGINALS AND NOT -- I WILL RULE ON THOSE, AS
5 INDICATED.

6 MR. HAWKINS: THANK YOU.

7 THE COURT: FINALLY, AS I ASK COUNSEL TO
8 AGREE UPON INSTRUCTIONS, AT LEAST THE ONES YOU COULD,
9 THAT DIDN'T HAVE THE FORMAL COVER SHEET EITHER, IT
10 CAME UNDER THE LETTER MR. GIBB AND MR. JONES SIGNED.
11 AND I WILL JUST MARK ON THE TOP OF THOSE THAT THEY
12 WERE THE STIPULATED INSTRUCTIONS.

13 I'LL HAVE THOSE PUT IN THE FILE AS WELL.

14 THERE IS A COUPLE OF THINGS I NEED TO SAY,
15 FOR THE RECORD, ON INSTRUCTIONS, AND THEN YOU MAY TAKE
16 YOUR EXCEPTIONS, GENTLEMEN.

17 I'VE INDICATED IN CHAMBERS THAT I WAS NOT
18 INSTRUCTING ON THE EQUITABLE CAUSES OF ACTION OF
19 PROMISORY ESTOPPEL. FOR THE RECORD, THE REASONS I HAVE
20 DETERMINED NOT TO DO THAT IS, I AM SATISFIED THE
21 PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW AND, I
22 BELIEVE, IT IS THE RULE THAT EQUITABLE REMEDY IS NOT
23 AVAILABLE AS LONG AS THERE IS AN ADEQUATE REMEDY AT
24 LAW. AND I BELIEVE THERE IS HERE.

25 ALSO, I AM SATISFIED THAT THE CONCEPT OF

1 PROMISSORY ESTOPPEL BASICALLY MIRRORS THE CAUSES OF
2 ACTION THAT ARE BEING ASSERTED IN THIS CASE BY THE
3 PLAINTIFF. AND THEY'LL JUST BE SURPLUSAGE.

4 FINALLY, I'M SATISFIED THAT THE COURT OF
5 APPEALS CASE THAT WAS CITED TO ME BY PLAINTIFF'S
6 COUNSEL, SAYING THAT THEY SEEM TO SUGGEST THAT THE
7 COURT MUST SEND EQUITABLE CAUSES OF ACTION TO THE
8 JURY, IS FACTUALLY DISTINGUISHABLE IN THIS CASE AND
9 I'M SATISFIED IT WOULD BE INAPPROPRIATE TO SUBMIT THAT
10 EQUITABLE CLAIM TO A JURY, IF IT WAS OTHERWISE PROPER.

11 I'VE ALSO ADVISED YOU I AM NOT SENDING THE
12 QUESTION OF ATTORNEYS FEES TO THE JURY. AND I'LL
13 INSTRUCT THE JURY, AND I ASSUME YOU'LL TAKE AN
14 APPROPRIATE EXCEPTION, THAT THEY ARE NOT TO CONSIDER
15 THE EVIDENCE OF ATTORNEYS FEES IN CONNECTION WITH
16 DAMAGES IN THIS CASE.

17 I AM SATISFIED THAT NEITHER APPELLATE COURT
18 OF THIS STATE HAS HELD THAT ATTORNEYS FEES CAN BE
19 SUBMITTED TO A JURY, ARE OTHERWISE RECOVERABLE IN A
20 CASE LIKE THE ONE BEFORE THE COURT, WHERE THERE'S A
21 CLAIM FOR BREACH OF CONTRACT, AND IT WAS BETWEEN
22 BUSINESSMEN, BASICALLY DEALING AT ARMS LENGTH.

23 I BELIEVE, THAT IF THE GENERAL RULE IS TO BE
24 FURTHER EXPANDED, COMMON LAW RULE SAYING THAT YOU
25 CAN'T RECOVER ATTORNEYS FEES UNLESS IT IS BROUGHT BY

Tab I

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UTCO ASSOCIATES, LTD., a	:	SPECIAL VERDICT
Utah limited partnership, by	:	
and through its general	:	
partner ROBERT D. KENT,	:	
	:	
Plaintiff,	:	CASE NO. 930904174
	:	
vs.	:	
	:	
K. DeMARR ZIMMERMAN,	:	
SUMERSET HOUSEBOATS, a	:	
Division of SMI, and JAMES E.	:	
SHARPE,	:	
	:	
Defendants.	:	

MEMBERS OF THE JURY:

Please answer the following questions from the appropriate degree of proof, as set forth in the question. At least six members of the jury must find in favor of the answer to each question. When the verdict form is completed, the foreperson should sign and date the verdict form and advise the bailiff that you have reached a verdict and are ready to return to the courtroom.

1. Do you find by clear and convincing evidence that UTCO Associates, Ltd. is entitled to recover on its claim of fraud against defendant James E. Sharpe?

ANSWER: Yes_____ No ✓ (8)

If you answered question number 1 "no", skip question number 2.

2. What amount of damages were proximately caused by defendant Sharpe's fraud?

\$_____

3. Do you find from a preponderance of the evidence that UTCO Associates, Ltd. is entitled to recover on its claim of negligent misrepresentation against James E. Sharpe?

ANSWER: Yes_____ No ✓ (8)

If you answered question number 3 "no", skip to question number 6.

4. Considering all the negligence that caused UTCO's loss, what percentage is attributable to:

A. Plaintiff, UTCO _____%

B. Defendant Sharpe _____%

C. Defendant DeMarr Zimmerman _____%

TOTAL 100 %

5. What amount of damage was proximately caused by the foregoing negligence?

\$_____

6. Do you find by clear and convincing evidence that plaintiff is entitled to recover punitive damages?

ANSWER: Yes _____ No ✓ (8)

7. Do you find by a preponderance of the evidence that UTCO Associates, Ltd. is entitled to recover on its claim of breach of contract against defendant Sharpe?

ANSWER: Yes _____ No ✓ (8) no contract UTCO/Sharpe

If you answered question number 7 "no", answer none of the remaining questions and have your foreperson sign and date your verdict. If you answered "yes" to question number 7, please answer question number 8.

8. What amount of damages did the defendant Sharpe's breach of contract proximately cause UTCO?

\$ _____

Dated this 30 day of July, 1996.

Carol Chase
FOREPERSON