2009

State of Utah v. Richard Donald Cooper A.K.A Richard-Donald: Cooper : Brief of Appellant

Utah Court of Appeals

Mark Shurtleff; Utah Attorney General; Counsel for Appellee.
Douglas J. Thompson; Margaret P. Lindsay; Utah County Public Defender Association; Counsel for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. RICHARD DONALD COOPER, A.K.A. RICHARD-DONALD: COOPER, Defendant / Appellant.	Case No: 20090396-CA

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, FROM A CONVICTION ON FOUR COUNTS OF WRONGFUL LIEN, THIRD DEGREE FELONIES, BEFORE THE HONORABLE JUDGE ROBERT ADKINS

MARK SHURTLEFF
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114

Counsel for Appellee

MARGARET P. LINDSAY (6766)
DOUGLAS J. THOMPSON (12690)
Utah County Public Defender Association
P.O. Box 1058
Spanish Fork, UT 84660
Telephone: (801) 318-3194

Counsel for Appellant

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DOUGLAS J. THOMPSON (12690)
Utah County Public Defender Association
P.O. Box 1058
Spanish Fork, UT 84660
Telephone: (801) 318-3194

Counsel for Appellant

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78A-4-103(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue 1. Whether the trial court erred by taking judicial notice and instructing the jury that a document filed by Defendant's son, which was referenced in a document filed by Defendant, was previously determined to be a 'wrongful lien' by another court of this state. This issue was preserved in the trial court by argument on the issue of a jury instruction that eventually became a matter of which the trial court took judicial notice. R. 1166: 21-35. Trial counsel objected both on grounds of Utah Rule of Evidence 201 and Utah Rule of Evidence 403.

Standard of Review. The issue of whether the trial court properly took judicial notice under Rule 201 is reviewed for an abuse of discretion if the fact is not subject to reasonable dispute. *See Finlayson v. Finlayson*, 874 P.2d 843, 847 (Utah App. 1994) (Utah Rule of Evidence 201(b) acknowledges court's discretion to take judicial notice of facts not subject to reasonable dispute).

The issue of whether the matter judicially noticed was more prejudicial than probative under Rule 403 is reviewed by this court for an abuse of discretion. *See Goebel v. Salt Lake City Southern R. Co.*, 2004 UT 80, fn. 1, 104 P.3d 1185 (citing *Diversified Holdings v. Turner*, 2002 UT 129, ¶ 6, 63 P.3d 686).

Issue 2. Whether the trial court erred by denying Defendant's motion for mistrial following the introduction of evidence relating to an ultimate issue through the witness, Judge Lynn Davis. The issue was preserved in the trial court first by stipulation of the parties that Davis would not be allowed to make reference to his legal opinion relating to the existence of a lien on his property (R. 1166: 20-21) and later by lengthy argument following Defendant's motion for mistrial after Davis testified about the existence of a lien (R. 1282: 13-32).

Standard of Review. "This [C]ourt reviews a district court's ruling on a mistrial motion for an abuse of discretion." *State v. McCloud*, 2005 UT App 466, ¶ 9, 126 P.3d 775.

CONTROLLING STATUTORY PROVISIONS

Utah Rule of Evidence 201 and Utah Code Ann. § 76-6-503.5 are set forth in full in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Defendant, Richard Cooper appeals the judgment, sentence, and commitment of the Honorable Robert Adkins, Third District Court.

B. Trial Court Proceedings and Disposition

On March 5, 2007, Defendant, Richard Cooper, was charged by information with four counts of Wrongful Lien, third degree felonies, in violation of Utah Code Annotated § 76-6-503.5, and four counts of Retaliation Against a Witness, Victim, or Informant, third degree felonies, in violation of Utah Code Annotated § 76-8-508.3.

On August 13, 2007 Judge McVey recused himself and the other judges of the Fourth District and referred the case to the Trial Court Executive because an alleged victim in the case was Judge Lynn Davis of the Fourth District. R. 15. On October 10, 2007 the case was reassigned to Judge Christiansen of the Third District. R. 45.

On January 28, 2008, after Defendant declined to obtain his own attorney and refused to apply for a public defender, Judge Terry Christiansen appointed standby counsel from the Salt Lake County Legal Defender's Association. R. 219, 1281: 55. On February 8, 2008, Rudy Bautista appeared as standby counsel for Cooper. R. 150.

On February 22, 2008 the State filed an Amended Information again alleging 4 counts of Wrongful Lien and 4 counts of Retaliation. R. 199. That same day, Richard Cooper waived his preliminary hearing on counts 1, 2, 3, and 4 and the preliminary hearing on count 5, 6, 7, and 8 was conditionally waived. R. 202. The case was assigned to Judge Adkins in West Jordan. R. 202.

On April 24, 2008 the State dismissed counts 5, 6, 7, and 8 and the case was set for a trial.[1] The trial was originally set for July 22, 2008 in West Jordan.

On July 1, 2008, following Cooper's assertions that he had not been arraigned, Judge Adkins formally arraigned Richard Cooper and based on his responses the court entered not guilty pleas to all four counts. R. 1274: 10-13.

On July 14, 2008 the court held a hearing on several matters including Defendant's use of an expert witness on the issue of liens. R. 1275. The trial court denied defense motion to use an expert witness because the defense failed to give the State 30 days notice and the court refused to grant a continuance. R. 1275: 5-8.

On July 22, 2008 the parties were present for what was scheduled to be a jury trial however, due to defendant's behavior both standby counsel and the court were concerned about Cooper's competency to stand trial, especially because he had opted to represent himself. R. 1276: 9, 14, 1277: 4. The court ordered the State to file a Petition of Competency. R. 1276: 14. The trial was struck pending inquiry into Defendant's competency and on July 23, 2008 the court set a hearing on the issue of competency. R. 1277: 8-9.

On October 6, 2008 a hearing was held to review the competency reports. R. 1278. The court found, based on the reports and the statements of Cooper, that he was

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[1] On August 13, 2007, the court struck counts 5, 6, 7, and 8, each for Retaliation Against a Witness, Victim or Informant because the language in the information was incomplete. R. 15. Although the minutes allege that Ms. Ragan motion was to dismiss counts 4-7, which would have been one count of Wrongful Lien and 3 counts of Retaliation, it seems clear from the remainder of the record that counts 5-8 were dismissed. See page 12 of the case minutes found in the front cover of Volume 1 of the record.

competent to proceed. R. 1278: 7.

On January 27, 2009 the court held a final pre-trial conference but Cooper was not present. R. 1280: 3. The court issued a warrant but ordered it be held until the day of the trial. R. 1280: 6. Defense counsel also made a motion to prevent the court from instructing the jury about the prior cases in which a document titled 'Administrative Judgment' was found by another court be a wrongful lien. R. 1280: 7-8. The court decided to wait until trial to decide that issue.

On February 4, 2009 the court held the first day of Cooper's jury trial. The parties stipulated that Judge Davis, who was a victim in this case and would serve as a witness, would be precluded from giving his legal opinion, specifically with respect to whether or not the document filed by Cooper was a lien as a matter of law. R. 1166: 20-21.

Defense counsel again asked the court not to instruct the jury that the 'Administrative Judgment' was declared a wrongful lien in an earlier civil matter because it was a result of a default judgment with a lesser burden of proof. R. 116: 21-22. He argued that the issue of whether these documents were wrongful liens is a material issue of fact, the State's burden of proving each element of the crime cannot be lifted by judicial notice, and the jury must decide whether or not it was a wrongful as a matter of fact. R. 1166: 28-32. The trial court found it could and would take judicial notice of notice of the action of another court in this state and that the 'Administrative Judgment' was determined by a court of competent jurisdiction to be a wrongful lien. R. 1166: 21-35, 102-03.

Defense counsel moved to have the jury instructed as to the definitions of

intentional, reckless and criminal negligence because he wanted to argue to the jury that Cooper's conduct was not intentional but either reckless or negligent. R. 607, 1166: 209. The trial court found that his requested instruction would be confusing. R. 1166: 216.

Counsel also requested the court instruct the jury on the definition of a lien citing Black's Law Dictionary, arguing that the statutory definition was incomplete and confusing because it used the word lien to define what a lien was. R. 1166: 219-20. The court denied the defense motion because it conflicted with the statutory definition. R. 1166: 222.

During the testimony of Judge Davis defense counsel moved for a mistrial based on Davis' statements relating to the documents creating a lien as a matter of law. R. 1282: 13; see stipulation at R. 1166: 21. The court found that Judge Davis did not incorrectly state the law and that, according to the trial court's recollection, the testimony was elicited on cross-examination creating an invited error. R. 1282: 16-32. Defense counsel then asked the court in the alternative to instruct the jury that Judge Davis' testimony about the requirements for a lien was incorrect. The court refused to comment on the testimony of Judge Davis but agreed to instruct the jury that Davis was not testifying as an expert and to give an instruction on what it takes for a judgment to become a lien. R. 1282: 40-41.

Following the State's case in chief defense counsel made a motion to dismiss citing the language of the documents and the fact that they did not create a lien or even purport to create a lien. R. 1282: 44-45. The court denied the motion and found that there

was sufficient evidence for the jury to find that the documents either became liens or purported to be liens. R. 1282: 46.

Defense counsel asked the court to instruct the jury on ignorance or mistake of fact as a defense. Counsel asked the court to require the jury to find that the State proved Cooper "did not have an honest belief" he was filing a complaint for a lawsuit instead of a lien beyond a reasonable doubt. R. 606, 1282: 156. After hearing argument on the matter the trial court denied counsel's request to so instruct the jury because the court's opinion was that "when a document that is entitled judgment names the party who claims to have that judgment and names the debtors who owe money for that judgment and records that in the County Recorder's Office, records that, quote, judgment, that that purports to be a - - a lien or encumbrance." R. 1282: 169.

Following the close of the evidence and instructions, the jury found Cooper guilty on four counts of Wrongful Lien. R. 1282: 299. On March 24, 2009 the trial court ordered a diagnostic evaluation to be completed by the Utah State Prison. R. 1042. Because the Diagnostic Unit at the prison was closed the evaluation was not performed. R. 1049.

On April 6, 2009 Cooper was sentenced by Judge Adkins to a commitment at the Utah State Prison for an indeterminate term of zero to five years and fined the sum of $5,000 for each of the four counts. R. 1163: 16. Each of the prison terms was set to run consecutively. Id. The court suspended the prison sentences and placed Cooper on probation for 72 months. R. 1162: 17. Cooper was ordered to serve a 60-day sentence in the Salt Lake County Jail with credit for time served. R. 1163: 18. The court imposed a

$1,500 fine and ordered Cooper to obtain a mental health evaluation and complete any recommended treatment including a cognitive restructuring course. R. 1163: 18. The court also prohibited Cooper from filing documents with the County Recorder's Office without the assistance of a licensed attorney or title company. R. 1163: 18-19.

Defendant filed his notice of appeal on May 4, 2009. R. 1081.

STATEMENT OF FACTS

Testimony of Claudette Barrett

Claudette Barrett is the land records supervisor administrator at the Utah County Recorder's Office. She certifies documents, locates land information and records, etc. Through Barrett the State introduced two documents. The first document called the 'Consent Judgment' was received as State's Exhibit 1 and the trial court noted a stipulation that the signature on page 5 is the signature of the Defendant, Richard Cooper. R. 1166: 101. The second document called the Administrative Judgment was received as State's Exhibit 2 and it bore the number AJ-2 7-21-98. Barrett certified that both these documents were pulled from the County Recorder's office and were true and correct. R. 1166: 103-04. During Barrett's testimony the trial court took judicial notice that the administrative judgment referenced in the consent judgment was determined previously be a court of competent jurisdiction to be a wrongful lien. R. 1166: 102-03.

The County Recorder's office receives liens, judgments, deeds of trusts, and loan agreements, some of which describe property associated and some do not. These documents are permanent public records. R. 1166: 106. The County Recorder's office has computers where the public can access these documents as well as access via a

website from home computers. These documents can be searched by party name and be found without a related property description. After a document is recorded the original is sent to the party listed as "when recorded mail to" in the upper left corner. R. 1166: 109.

When a person files a document at the County Recorder's office the office does not check identification of the person, nor do they verify or scrutinize the document to be recorded. The office records all documents brought to be recorded. R. 1166: 111-12.

Testimony of Rodney Rivers

Rodney Rivers is an attorney who primarily practices in the area of real estate. Rivers represented Richard and Mary Pace on a matter concerning a piece of property they purchased at a tax sale from Utah County. R. 1166: 114. The Paces had purchased 63 percent of a property in Provo and they wanted to make use of their ownership. R. 1166: 115. Rivers ran a title search on the property and found both Richard Cooper's name, and the name of Cooper's son, Jerry Cooper. R. 1166: 115. Rivers could not determine who owned the remaining 37 percent of the property because there were many other documents recorded at the County Recorder. Rivers decided to litigate to determine who owned the property. R. 1166: 120.

After failing to locate Cooper, and with permission from the court, Rivers served Cooper by publishing notice in the local Utah County paper and by sending a copy to the only known address in Arizona but this happened after the Paces had already obtained a judgment against Jerry Cooper and the other trusts. R. 1166: 122, 135, 137-38. Cooper's son, Jerry Cooper, was also a party to this lawsuit and he was personally served. R. 1166:

124. Rivers and the Paces attempted to persuade the other owners to purchase the Paces' interest in the property but were unsuccessful. R. 1166: 124.

Throughout the lawsuit Cooper was uncommunicative, he did not respond to being served or to letters and did not file anything with the court. R. 1166: 124-25. The court eventually entered a default against Richard Cooper because he did not participate in the litigation. R. 1166: 125. Jerry Cooper was involved in the suit. He filed documents personally and on behalf of trusts and corporations who were also on the title, however those filings were stricken for failure to comply with the court's orders. R. 1166: 125, 141. When those pleadings were stricken the court granted River's petition and the Paces' were awarded judgment of $60,000 in the suit against Jerry Cooper. R. 1166: 138-39, 141.

Rivers was shown Exhibit No. 2, the 'Administrative Judgment' and he stated that the author of the document, according to the purported signature, is Richard Cooper. R. 116: 126-27.[2] Rivers was also shown Exhibit No. 1, the 'Consent Judgment', signed by Richard Cooper, which Rivers understood to purport to be a judgment against him for 4.2 million dollars based on a reference to Exhibit 2, the 'Administrative Judgment.' R. 1166: 128-29. Rivers never entered into any kind of contractual agreement with either Richard or Jerry Cooper, or any of the other purported owners of the property in question except for his contract for legal representation with the Paces. R. 1166: 130.

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[2] According to Exhibit No. 2, titled 'Administrative Judgment', the document is to be returned to Jerry C. Cooper, Jerry C. Cooper is listed at the "Aggrieved Party/Creditor", and the document is said to have been "Prepared and submitted" by Jerry C. Cooper. Rivers later corrected himself and noted that Jerry Cooper's name is on Exhibit 2.

Rivers was served at his house with papers similar to the exhibits but he was never a party to a lawsuit involving Richard Cooper, Jerry Cooper or any of the other purported owners. The only involvement Rivers has had with Cooper was the suit he filed for the Paces, at least the only involvement by a court that Rivers recognized as having any legitimate jurisdiction. R. 1166: 132.

Testimony of Mary Pace

Mary J. Pace is married to Richard Pace. She and her husband purchased a piece of property, an old laundromat, from the county at a tax sale in 1997 for approximately $4,500. R. 1166: 188-90. When the Paces went to the property they encountered a sign that told them "Friend only are welcome. All public officials and others shall not enter nor interfere without court order. Threat or use of force may be used to prevent or terminate... unlawful entry or interference." R. 1166: 194. The Paces have never entered the building on the property.

The Paces have paid approximately $30,000 in attorney's fees and taxes since they purchased their 67% of the property. R. 1166: 194-95. Mrs. Pace has had no other relationship, business or otherwise, with Jerry Cooper, Richard Cooper, or any of the other owners of the property. R. 1166: 196.

Mary Pace received the Administrative Judgment and understood it to mean that if she did not pay $4,200,000 then she would have a lien on her properties and possessions. R. 1166: 204. According to the Consent Judgment, Mary Pace and her husband are listed as debtors and owe $4,200,000 each. R. 1166: 196-97.

Testimony of Judge Lynn W. Davis

Lynn Davis is a Judge in the Fourth District Court. Judge Davis was served with both State's Exhibit No. 1, the document titled 'Administrative Judgment,' and State's Exhibit No. 2, the document titled 'Consent Judgment.' R. 1166: 148.

In 2002 Judge Davis was assigned as judge over the suit the Paces filed and he made the ultimate decision and judgment in that case. R. 1166: 149. The Paces filed the case to establish their interest in a piece of property they purchased at a tax a sale. R. 1166: 156. The defendants filed a number of answers but they were stricken because they failed to obey orders of the court, namely they refused to be represented by counsel. R. 1166: 157. Judge Davis made the ultimate decision in that case in January of 2004 and, to his knowledge, his decisions were not appealed by any party to the case. R. 1166: 149-50. (In fact notice of appeal was filed in February of 2004. R. 1166: 172).

Judge Davis was served with a copy of State's Exhibit No. 2, Consent Judgment, on January 29, 2007, 5 days after it was recorded. R. 1166: 150. Judge Davis has never had any contractual relationship with Richard Cooper. R. 1166: 151. Davis claimed the documents filed by Cooper clouded the title to his home by showing a judgment for 4.2 million dollars against his name but he did not run a title search because it would have cost him hundreds of dollars. R. 1166: 169-70.

Judge Davis filed a petition to nullify the documents filed against him and the Third District Court declared the Administrative Judgment, State's Exhibit No. 2, a wrongful lien. R. 1166: 153.

In Judge Davis' opinion the 'Administrative Judgment' and 'Consent Judgment' have no legal basis in the State of Utah and would not be enforced in a court of law. R. 1166: 174. However, Judge Davis believed these documents created a lien on his home as a matter of law. R. 1166: 167. Although Davis did not run a title search to verify that the documents had created a lien on his home it was his legal opinion that the 'Consent Judgment' for $4.2 million clouded the title of his property. R. 1166: 169-70.

When the State rested its case Judge Davis was called as a witness for the defense but was treated as a hostile witness. R. 1282: 47-48. Judge Davis testified that if he had said earlier at trial that Judge Fuch's had found the 'Consent Judgment' to be a wrongful lien he would have been mistaken because the order does not make reference to the 'Consent Judgment' but to the "Administrative Judgment." R.1282: 68-69. Judge Davis was shown a copy of Utah State Annotated § 76b-5-201 and testified that according to the statute a judgment entered in a district court does not create a lien upon or affect the title to real property unless the judgment is recorded in the office of the county recorder where the title to the property has been filed. R.1282: 69-70.

Testimony of Lisa Garner

Lisa Garner is an attorney with a title company in Utah County. R. 1282: 73. She has practiced real estate and title related law for twelve years with two different title companies, Equity Title of Utah and Utah Standard Title. Id. As a licensed title officer she searches properties and the condition of the property to make sure that there are no liens or encumbrances recorded. R. 1282: 74. Garner was recognized as an expert in the area of real estate and property law. R. 1282: 76.

Garner performed property address searches for the properties mentioned in the 'Administrative Judgment' and 'Consent Judgment' documents. R. 1282: 76. She also performed names searches by property owners for any tax liens or judgments listed by the owners. R. 1282: 77. She presented a title search report for property in American Fork owned by the Pace Family Trust, which has Richard and Mary Pace as trustees. R. 1282: 78. Garner did not find any liens, easements, encumbrances or interests on the Paces' property nor did she find any reference to the 'Administrative Judgment' or the 'Consent Judgment' recorded against the Paces. R. 1282: 91. Neither the 'Administrative Judgment' nor the 'Consent Judgment' was attached to the Paces or their property. R. 1282: 93.

Garner also presented a preliminary title report for Rodney and Julie Rivers. R. 1282: 95. Although Garner did find references in the report to mortgages, the search did not reveal any reference to the "Administrative Judgment' or the 'Consent Judgment' on the Rivers' property or their names. R. 1282: 97. In fact, based on the fact that the Rivers recorded a deed of trust in April of 2007, Garner's expert opinion is that she would have approved a deed of trust because neither the 'Administrative Judgment' nor the 'Consent Judgment' would have interfered with the property. R. 1282: 98.

Garner also performed a title search for the property listed in the documents relating to Judge Davis. R. 1282: 99. No liens or encumbrances were listed on the building associated because it was the courthouse, which is a State building. R. 1282: 99. In Garner's expert opinion, even though Judge Davis presumably conducted a civil action to remove any purported liens from himself and his property, neither the 'Administrative

Judgment' nor the 'Consent Judgment' would have shown up on a name search of Lynn W. Davis, just as it did not for the others. R. 1282: 101.

Garner also testified that despite the fact that title companies would not have discovered or given any credence to these documents it's possible that someone who was looking to lend money to another person could go to the County Recorder's Office to find out what the person's financial status was instead of running a credit check or verifying their status from references. R. 1282: 131-33.

Testimony of Richard Cooper

Richard Cooper testified he built and owned a laundromat in Provo since 1970. R. 1282: 173. He worked in the construction and remodeling business. Id. In 1992 the Trust Resolution Corporation was managing the property in Provo and failed to pay the property taxes that year totaling $2,700. R. 1282: 175, 179. In 1996 a tax deed sale was conducted which Cooper contests was invalid because he alleges he was not given notice of the sale at that time. R. 1282: 206.

When Cooper became aware that the taxes for 1992 had not been paid and that a tax deed had been sold he immediately sent an offer of payment to the buyers. R. 1282: 177. He tried to resolve the issue the day he found out about it by making an offer to the Paces and has made a total of three offers. R. 1282: 189. However, the Paces never responded to his offers. R. 1282: 179, 181, 189. At the time the taxes were not paid the property was titled in the name of the Cooper Family Christian Equity Trust and Cooper was a member of the trust. R. 1282: 204.

Cooper then filed a document titled "sworn offer of performance in good faith to discharge the C.F.T.'s liability in full" in order to pay off the taxes for 1992 and preserve his rights in the property. R. 1282: 179. C.F.T. is the Cooper Family Trust. Id. Cooper was trying to prevent losing a $200,000 building based on a $3000 unpaid tax. Id.

Cooper learned that Judge Davis had ordered the laundromat sold following a suit filed by the Paces but he had not been served in that case nor was he aware of the litigation while it was pending.[3] R. 1282: 181. At the end of the litigation the Paces were awarded $60,000 plus ownership of the laundromat. R. 1282: 182. In reaction to the judgment from the Pace's civil suit Cooper's son Jerry Cooper prepared the document 'Administrative Judgment' which was filed in 2004 in order to "preserve a civil right to stop this action of taking the laundry through phony tax deed sale." R. 1282: 182-83. The 'Administrative Judgment' was a compliant and was meant to establish a claim and an obligation, asking for a response to find out the facts involved in the action that took title to the laundry. R. 1282: 183.

This document, the 'Administrative Judgment', was filed as a complaint requiring a response in order to get some type of relief from the seizure of his property and not as a lien. R. 1282: 184. The 'Consent Judgment' was filed in 2007 along with a document called 'affidavit of truth' demanding a response within 30 days. Id. A copy of the 'Consent Judgment' was delivered to Richard and Mary Pace, Rodney Rivers, and Lynn W. Davis at the only addresses Cooper could find. R. 1282: 185. The 'Consent

[3] On cross examination Cooper admitted that although he had not been served in the case he did learn about the lawsuit approximately six months after it began from his son Jerry Cooper who was actively engaged as a party to the suit. R. 1282: 209.

Judgment' was not filed with the intention to create a lien; it was a demand to respond with firsthand knowledge of the facts alleged in the document and notice that those served could deny the facts alleged. R. 1282: 186. In total, Cooper filed, or caused to be filed, eight documents with the County Recorder's Office directly related to what he called the unjust enrichment issue surrounding the civil case giving the Paces title to the laundry. Id.

These documents were filed in the County Recorder's Office in order to preserve the record in hopes of getting the liens off his property. R. 1282: 187. In these documents Cooper alleged that the Paces would owe him $4.2 million dollars unless they answered his complaint. R. 1282: 193. Cooper believed that the 'Administrative Judgment', which was based on three prior documents which laid the base for the 'Administrative Judgment' and which the other parties did not respond to, provided an obligation for the Paces, Judge Davis, and Rodney Rivers to pay him $4.2 million dollars if they failed to respond. R. 1282: 194.

Both the 'Administrative Judgment' and the 'Consent Judgment' were and are complaints. R. 1282: 196, 198. Cooper intended to create a suit when he filed those documents at the County Recorder's Office and considered the fee he paid a filing fee, just as if he had filed it at the District Court. R. 1282: 198-99, 202. Cooper did not file his complaints in a court because it was a private matter that he was trying to resolve privately. R. 1282: 202-04. Cooper considered the suit he filed civil rights case because he felt his Constitutional rights were violated and ignored. R. 1282: 214. He supported

his claim by looking to Federal law and case law related to Constitutional violations. R. 1282: 215.

Cooper was convicted of two counts of corruptly obstructing the administration of the Internal Revenue Service by making a false income tax refund claim, a federal felony. R. 1282: 188, 191.

Testimony of Kerry R. McConnell

Kerry McConnell was called on rebuttal to Cooper's testimony. He is employed at the Utah County Auditor's Office where he supervises the office's tax administration portion including setting tax rates and preparing tax sales. R. 1282: 240-41. On May 15, 2007 a tax sale occurred on the property listed in the "Administrative Judgment." R. 1282: 242. According to the auditor's office, prior to the time of the tax sale the property (the laundromat) was owned by a George O. Stanford in the care of a management trust, and an undivided interest of 63 percent was purchased by Richard W. Pace and /or Mary J. Pace. R. 1282:242.

The tax notice showed a tax delinquency of five years from 1992 till 1997 although it is unclear whether that means no taxes were paid during that period or that partial payments were made. The total delinquent tax amount in 1992 was $998.82 and after penalties and interest the total amount was $4,3770.10. R. 1282: 244.

The tax sale statute provides that if there is a structure on a piece of property, a house or a business, during the sale an auctioneer begins with 100 percent undivided interest and then the bids go down until the last bidder is willing to pay the delinquent

amount for the lowest percent of the property and the original owner retains the rest. R. 1282: 248-49.

SUMMARY OF ARGUMENT

Taking judicial notice of a prior court's ruling is appropriate only where the fact is admitted to prove the fact that a proceeding took place and not prove the underlying facts adjudicated in the prior matter, especially where the matter being noticed is an ultimate issue to be decided by the jury. Cooper asserts that the trial court erred by taking judicial notice of a prior court's finding that the 'Administrative Judgment' had been found to be a wrongful lien and had been referenced by a the 'Consent Judgment' at issue in this case in violation of Rules of Evidence 201 and 403.

A denial of a motion for mistrial on the basis of improper testimony may be upheld where the evidence admitted is vague, insignificant, accidental and unlikely to have substantially influenced the jury. But where the improper testimony supporting the motion is significant and was likely to affected the outcome of the trial such a denial should be reversed by this Court. Cooper asserts that the trial court's denial of his motion for mistrial following a significant amount of improper opinion and conclusion testimony by Judge Davis should be reversed because Davis's testimony was intentionally directed at the central issue in the case about which the state could not produce any other persuasive evidence. Because the improper testimony was so significant the trial court abused its discretion.

ARGUMENT

I. Judicial Notice of the Prior Wrongful Lien

Cooper appeals the trial court's decision to take judicial notice that the 'Administrative Judgment' was determined by a court of competent jurisdiction to be a wrongful lien. Cooper argues that do so was at odds with both Utah Rule of Evidence 201 and Rule 403 and that doing so was an abuse of the trial court's discretion.

a. Relevant Law

Utah Rule of Evidence 201 states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and a court should take notice of a fact "if requested by a party and supplied with the necessary information." UTAH R. EVID. 201(b), (d). If the case is criminal in nature "the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." UTAH R. EVID. 201(g).[4]

Under the first category of judicially noticed facts, facts generally known within the jurisdiction, Utah appellate courts have recognized things like common behavior of farm animals (*State v. McNaughtan*, 58 P.2d 5 (Utah 1936)), the principle growing season within the state (*Willis v. Kronendonk*, 200 P. 1025 (Utah 1921)), that Panguitch is in Garfield County (*State v. Bailey*, 282 P.2d 339 (Utah 1955)), that snow is an unstable

[4] Utah Rule of Evidence 201 is the federal rule verbatim. See UTAH R. EVID. 201 Advisory Committee Note.

surface likely to shift (*Bowden v. Denver & R.G.W.R. Co.*, 286 P.2d 240 (Utah 1955)), that in Utah during the month of August no heat is required for comfortable occupancy of a building (*Amussen Land v. Co-operative Drug Co.*, 206 P. 704 (Utah 1922)), that children are prone to be less mindful of danger than adults (*Woodward v. Springs Canyon Coal Co.*, 63 P.2d 267 (Utah 1936)), that escalators are widely used in public buildings and people use them daily without injury (*Sanone v. J.C. Penney Co.*, 404 P.2d 248 (Utah 1965)), and that whiskey and moonshine are intoxicating liquids (*State v. Hawkins*, 16 P. 2d 713 (Utah 1932)).

This first kind of fact noticed by the courts are facts that are well known, undisputable, and not subject to controversy and are judicially "noticed as a matter of judicial convenience and economy." 1 UTPRAC RULE 201. No one with a straight face can dispute that whiskey is an intoxicating liquid. Courts take notice of these kinds of facts in order to prevent the task of having to present evidence on issues that cannot be contested but for one reason or another must be shown.

Under the second category of judicially noticed facts, those capable of accurate and ready determination by sources whose accuracy cannot reasonably be questioned, Utah appellate courts have recognized that February 28, 1927 was a Monday and not a legal holiday (*Independent Gas & Oil Co. v Beneficial Oil Co.*, 266 P. 267 (Utah 1928) (Court was considering the timeliness of a bill of exceptions following entry of judgment apparently due on February 28, presumably court examined a calendar)), the reliability of a well known DNA testing method (*State v. Butterfield*, 2001 UT 59, ¶ 29, 27 P.3d 1133 (proponent must first prove general acceptance in the relevant scientific community)),

that liquid milk weighs approximately eight pounds per gallon (*Allen v. Industrial Com'n*, 729 P.2d 15 (Utah 1986)), and the time the sun set on a given day and the duration of twilight (*Preece v. Oregon Short Line R. Co.*, 161 P. 40 (Utah 1916)). The taking of judicial notice on these types of facts depends on the availability and apparent accuracy of their sources presented to the court. Where the court has a reliable source before it, a source whose accuracy cannot reasonably be questioned, the court may take judicial notice of the existence of a fact, however, "[i]f the record does not reveal a source whose accuracy cannot reasonably be questioned regarding the subject matter of its judicially noticed fact, the court on appeal is likely to reverse." 1 UTPRAC RULE 201[D][2][d].

This second category can also include facts taken from the records of judicial proceedings. In some instances courts will only take judicial notice of facts from judicial proceedings if it is from the same case and in some instances courts will take notice of proceedings from other cases so long as the record or files relied upon are placed before the court. *See Studebaker Sales, Inc., v Nissan*, 533 F.2d 510 (10th Cir., 1976) (courts may take judicial notice of its own records, especially in the same case), *State in Interest of Hales*, 538 P.2d 1034 (Utah 1975) (courts should not take notice of proceedings in another case unless files of the other case are placed in evidence before the court), *see State v. Shreve*, 514 P.2d 216 (Utah 1973) ("It seems to be the law that a court will take judicial knowledge of its own records so far as those records are a part of the matter before the court. However, records of other proceedings in the court cannot be judicially noticed and must be introduced in evidence in order to be considered in the pending case"); *but see Spencer v. Industrial Com'n*, 20 P.2d 618 (Utah 1933) (court in one case

cannot take judicial notice of its own records in another and different case"), *Robison v. Kelly*, 255 P. 430 (Utah 1927) (a court cannot, in one case, take judicial notice of its records in another and different case).

While Rule 201 has been interpreted to allow courts to take judicial notice of judicial proceedings and records it is unclear exactly what types of facts can be noticed and exactly what type of foundation must be laid in order to satisfy the "sources whose accuracy cannot reasonably be questioned" standard. Cooper asks this Court to clarify this issue and urges the court to find that at very least this Court impose a requirement that trial courts make the foundation for their findings of accuracy part of the record and require the party requesting the judicial notice to produce that foundation to the opposing party.

There is a distinction between noticing the fact that the prior litigation or proceeding took place and taking judicial notice of the truth of the matters decided in the other proceeding. Courts in other jurisdictions have confronted this issue directly and have ruled that while courts may take judicial notice of a document or order of another court to establish the fact of the litigation or proceedings, court cannot take judicial notice of a document or order of another court for the truth of the factual matters decided therein. See *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384 (2nd Cir. 1992); *City of Amsterdam v. Daniel Goldreyer, Ltd.*, 882 F.Supp. 1273 (E.D.N.Y. 1992); *Sea Tow Services Intern., Inc. v. Pontin*, 607 F.Supp.2d 378 (E.D.N.Y. 2009); *Copple v. Astrella & Rice, P.C.*, 442 F.Supp.2d 829 (N.D.Cal. 2006); *Boloun v. Williams*, 2002 WL 31426647, ___ F.Supp.2d___ (N.D.Ill. 2002); *Werner v. Werner,* 267 *F.*3d 288, 295 (3d

Cir. 2001); *Taylor v. Charter Med. Corp.,* 162 *F.*3d 827, 830 (5th Cir. 1998); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.,* 128 *F.*3d 1074, 1082 (7th Cir. 1997); *United States v. Jones,* 29 *F.*3d 1549, 1553 (11th Cir. 1994); *Holloway v. A.L. Lockhart,* 813 *F.*2d 874, 879 (8th Cir. 1987); *Morrissey v. Luzerne County Cmty. Coll.,* 117 *Fed.Appx.* 809, 815 (3d Cir. 2004); *United States v. Collier,* 68 *Fed.Appx.* 676, 683 (6th Cir. 2003). "The overriding rationale for these federal decisions is that the facts found by a judge upon resolution of contested evidence cannot usually be considered beyond 'reasonable dispute'" *State v. Silva*, 926 A.2d 382, 385 (N.J.Super 2007) (*citing* FED.R.EVID 201(b)).

Silva is an example of a case where a trial court improperly took judicial notice of another court's findings with the intent to temper it with the rule's caveat that the jury need not "accept as established any fact which has been judicially noticed." In *Silva* the defendant had been accused of violating a temporary protective order by going to his condominium and punching his girlfriend in the face. *Silva*, 926 A.2d ar 383-84. Prior to his criminal trial, another court denied continuation of the protective order and the court found that it would have been impossible for defendant to commit the assault. *Silva*, at 384. At his criminal trial the court granted the defendant's motion to take judicial notice of the findings from protective order hearing pursuant to N.J.R.E 201(b).[5] The New Jersey Superior Court reversed the trial court and noted that admission of the other

[5] "Facts which may be judicially noticed include... (4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state." N.J.R.E 201(b). Even though New Jersey's rule specifically provides for records of another court "facts that can be reasonably questioned or disputed," even those found by a court of competent jurisdiction, "may not be judicially noticed." *Silva*, at 385.

court's findings was improper because the doctrine of judicial notice "cannot be used to take notice of the ultimate legal issue in dispute." Id. at 385.

If a fact may be judicially noticed it must further meet the requirements of Rule 403. Utah Rule of Evidence 403 provides for the exclusion of otherwise relevant and admissible evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." UTAH R. EVID. 403. Rule 403 exclusion applies to matter judicially noticed as well. *See Tambourine Comercio Intern., v. Solowsky*, 312 Fed.Appx. 263, 289, 2009 WL 378644 (11th Cir. 2009); *see also United States v. Wolny*, 133 F.3d 758, 765 (10th Cir. 1998) (matters judicially noticed are subject to the rules of relevance).

"The threshold question when considering the admissibility of any piece of evidence is whether it is relevant." *State v. Bluff*, 2002 UT 66, ¶ 42, 52 P.3d 1210. "Evidence is relevant if it has '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.'" *Bluff*, 2002 UT 66, ¶ 42 (citing UTAH R. EVID. 401). "If evidence has some probative value, but has a tendency to unduly prejudice or confuse the issues or to mislead the jury, the trial court *493 must balance the probative value against those countervailing factors to determine whether the evidence should be admitted." *Pearce v. Wistisen*, 701 P.2d 489, 493-94 (Utah 1985).

In *Tambourine Comercio Intern., v. Solowsky*, the defendant's motion to exclude the ruling and judgment of a prior trial was granted and upheld on grounds that it would have been confusing to the jury and caused unfair prejudice to the defendant. The

plaintiff wanted the court to introduce the fact that plaintiff had prevailed in a case against a client of the defendant and that the client had been found to have stolen $10 million from the plaintiff. *Tambourine*, 312 Fed.Appx. at 287-88. The court found danger in the "jury learning of the [prior judgment] and inappropriately assuming that since [the defendant] received six million dollars from [the client], that sum was part of the stolen [plaintiff's] ten million and that [defendant] too must have stolen it from [plaintiff]." Id.

As demonstrated by *Tambourine*, even though the court must "look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact," where there is danger the jury will make inappropriate assumptions about the relationship between the prior court's judgment and the ultimate issues in the pending case, the court must be cautious not to admit evidence that has a strong tendency to mislead the jury. *Id.*

b. Application

The document entitled 'Administrative Judgment' was prepared and filed with the Utah County Recorder's Office on November 15, 2004 by Jerry C. Cooper, Richard's son. See State's Exhibit 2, see also R. 1166: 103 (Administrative Judgment was pulled from the County Recorder's Office). Judge Lynn Davis filed a suit before Judge Quinn and successfully had the 'Administrative Judgment' declared a wrongful lien. R. 1166: 32-33.[6] Richard Cooper prepared and filed a document called 'Consent Judgment' with the Utah County Recorder's Office on January 24, 2007. See State's Exhibit No. 1; see

[6] There was some confusion about the orders obtained by Judge Davis. See R. 1166: 32-33. Unfortunately none of these records were made part of the record. Even Cooper's standby counsel did not have a copy of Judge Quinn's order. R. 1166: 33, 71.

also R. 1166: 17 (Cooper stipulated to his signature), 1166: 103 (Consent Judgment was pulled from County Recorder's Office). Within that document Cooper alleged that all of the issues of fact contained in the document "Administrative Judgment, Claim AJ-2 7-21-98" were ratified, confirmed and incorporated into the 'Consent Judgment.' See State's Exhibit No. 1.

Prior to trial the State submitted a jury instruction asking the court to instruct the jury that the document entitled "Consent of Judgment" [sic] contained a reference to a right in 'Administrative Judgment' and that the 'Administrative Judgment' was determined by another court of competent jurisdiction to be a wrongful lien. R. 862. The State's requested jury instruction, which eventually became the text of the judicial notice was not accompanied by a copy of that other court's order, or if it was it was not made part of the record. R. 1166: 70-75.

Cooper took issue with the State's requested instruction for several reasons. First and foremost because the decision made by the other court was a civil judgment with a different standard of proof, that the judgment was apparently a default judgment not heard on its merits, and that the question of whether or not Cooper's 'Consent Judgment' constituted a lien was a material issue of fact for the jury to decide. R. 1166: 28-31. Cooper argued that the court should not "take... shortcuts and take an issue of material fact away from the jury by telling them that it's already been found when the standard of proof was much lower." R. 1166: 33.

In defending its request, the State alleged that it would be impossible to prove their case of wrongful lien against Cooper because it would be too difficult to show that

the documents filed was not authorized by any state or federal statute. R. 1166: 25. It was the State's position that under the wrongful lien statutes a judge is supposed to determine whether or not something is a wrongful lien as a matter of law and that the State must then prove the other elements (that the defendant had no reasonable bases to believe he had an interest in the property or assets). R. 1166: 26-27. The State also responded to the burden of proof matter by claiming that the court's finding something to be a lien for the purposes of § 76-6-503.5 at a reduced burden of proof was similar to the court determining someone competent to stand trial. R. 1166: 27-28.

The trial court found that the instruction requested by the State could instead be presented as a matter of judicial notice under Rule 201 and that it would take notice of the other court's ruling upon request by the State. R. 1166: 74. The court said "[i]t appears to the Court that it [the fact that the 'Administrative Judgment' had been found to be a wrongful lien] cannot reasonably be questioned, that this was a judicial determination on a matter involving the administrative judgment." R. 1166: 34. Judge Adkins took judicial notice of the following:

> "Ladies and gentlemen of the jury, the Court is taking judicial notice of a matter. I am taking judicial notice of the action of another court of this state. The document entitled 'consent judgment' recorded on January 24, 2007, that's been received as Exhibit No. 1 contains a reference to a right in Administrative Judgment Claim AJ-27-21-98, dated 12 November 2004. You are hereby instructed that said document referenced therein as administrative judgment was determined previously by a court of competent jurisdiction of this state to be a wrongful lien. You may consider the previous decision of that court finding that the

administrative judgment was a wrongful lien in your deliberations in this case. And you may give that previous decision the weight you think it deserves."

R. 1166: 102-03. Essentially the trial court told the jury that the document filed by Jerry Cooper created a wrongful lien and Richard Cooper's 'Consent Judgment' makes reference to that wrongful lien, you are free to consider that a competent judge found the first document a wrongful lien in your deliberations about whether the second document is itself a wrongful lien. Cooper asserts that the trial court's judicial notice was an error for two reasons.

First, the trial court violated Rule 201 by admitting the judgment of another court without presentation of the judgment into the record, by failing to ensure both parties were properly given notice of what was being noticed, and by taking notice of a prior judgment on a contested issue for the truth of the matter decided. Second, the trial court violated Rule 403 by failing to properly balance the danger of unfair prejudice and confusion with the probative value of the fact judicially noticed.

In this case there can be no doubt that the judicial notice of the prior court's finding was admitted for the purpose of proving that the 'Administrative Judgment' filed by Cooper's son at the County Recorder's Office was a wrongful lien and therefore, the 'Consent Judgment' which makes reference to it filed by Cooper is also a wrongful lien. Counsel for the State admitted as much during argument when Mr. Kennard told Judge Adkins, "[t]o take the defense's position that the Court cannot come back and instruct the jury as a matter of law that the Third District has determined that the administrative judgment was a wrongful lien would, in essence, be saying, your Honor, that... we would

have to come in here and prove beyond a reasonable doubt that the document Mr. Cooper filed under six-eight was not expressly authorized by this chapter or another state or federal statute." R. 1166: 25. In other words, if the trial court was unwilling to tell the jury that this document was a wrongful lien as a matter of law, the State would be required to prove each of the elements of the crime beyond a reasonable doubt. Mr. Kennard apparently thought that task would be "impossible" and so he asked the court to prove his case for him, and the court obliged. R. 1166: 26. The State, perhaps in recognizing that it was trying to put upon the court some of its role in proving its case, then stated that the State "still ha[s] to prove that Mr. Richard Cooper knowingly and intentionally filed a lien" and [t]hat he had no reasonable basis to be able to believe that he had an interest in the assets or a right to be able to claim that." R. 1166: 26-27.

Kennard believed the justification allowing a court to make a determination on a defendant's competency to stand trial by a standard of proof less than beyond a reasonable doubt allowed the court to determine an element of a crime and instruct the jury thereon. R. 1166: 27-28. According to Kennard, it was unthinkable that the jury should be allowed to come to the complete opposite conclusion, on the issue of whether these were wrongful liens, than did judge in a civil action. R. 1166: 27.

Precisely because the jury could come to a different result, (because the matter of these documents creating liens was a contested issue both before Judge Quinn and in this case) the trial court should not have taken judicial notice of the other court's findings. Just as in *Silva*, where the findings "deal with one of the ultimate questions confronting the jury," the question of whether or not Cooper "ma[d]e, utter[ed], record[ed], or file[d]

a lien" when he filed the 'Consent Judgment' should not have been influenced by the trial court's judicial notice. *Silva*, 926 A.2d 382, 387; UTAH CODE ANN. § 76-6-503.5(2).

Further, just as in *Tambourine*, the trial court should have found danger in the jury learning of the judgment against Jerry Cooper and inappropriately assuming that because Jerry's document had been found to be a wrongful lien by a judge, Richard's document must therefore be a lien as well. The instruction in this case is even more prejudicial than that in *Tambourine* or *Silva* because here the court not only took judicial notice of the fact that a judgment was entered but it also made reference to facts in this case and alleged that there may be a reason why the prior judgment would influence their deliberation about the 'Consent Judgment' in this case.

The court erred further when it attempted to temper its notice with the required statutory caveat. Utah Rule of Evidence 201 requires in a criminal case that the court "instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." UTAH R. EVID. 201(g). Clearly this caveat means that the jury must be notified that they may believe or disbelieve that the fact noted actually exists or took place. In this case, according to the rule, the court should have made it clear to the jury that they need not accept as conclusive the fact that the 'Administrative Judgment' was a wrongful lien and they need not accept that a prior court found it to be so. But here, after having tied the 'Consent Judgment' to the 'Administrative Judgment' and citing the prior judgment, the court told the jury it may consider the fact that the 'Administrative Judgment' was found to be a wrongful lien in their deliberation and give that fact the weight they think it deserved. R. 1166: 103. That is not the right instruction and a failure

to properly instruct the jury that they need not accept the judicially noticed fact as conclusive is a significant error.

In *United States v. Jones*, 580 F.2d 219 (6th Cir., 1978), the Sixth Circuit Court of Appeals discussed the legislative history behind Federal Rule of Evidence 201(g) (of which Utah Rule of Evidence 201 copies verbatim) and the requirement that courts instruct juries that they need not accept the matter judicially noticed as conclusive. The Court noted "Congress intended to preserve the jury's traditional prerogative to ignore even uncontroverted facts in reaching a verdict." *Jones*, 580 F.2d 219, 224. The Court recognized a similar concern expressed by the Utah Supreme Court in *State v. Lawrence*, 234 P.2d 600, 603 (Utah 1951), where judicial notice that a stolen automobile was worth at least $50 was improper no matter how logical it seemed because "[i]f a court can take one important element of an offense from the jury and determine the facts for them because such fact seems plain enough to him, the which element cannot be similarly taken away, and where would the process stop?"

Not only did the court's notice improperly connect a ruling of a prior court to facts in this case but it also improperly instructed the jury as to what the judicially noticed fact was supposed to do. Cooper asks this Court to follow the aforementioned courts who have examined this issue and follow their application of Federal Rule of Evidence 201, of which the Utah rule follows verbatim, and find that Utah courts may not take judicial notice of other court's documents or orders for the truth of the matters asserted therein. Especially, as in this case, where the underlying issues noticed go directly to an ultimate issue in the case. Cooper asks this Court to follow the precedent established by the Utah

Supreme Court in cases like *Shreve* and *In the Interest of Hales* and hold that judicial notice should not be taken of the another court's record unless the case files are placed before the court and are made part of the record. Cooper asks the Court to find that the trial court abused its discretion by taking judicial notice of the earlier court's findings in spite of the disproportionate amount of unfair prejudice and confusion created by its introduction as demonstrated by *Tambourine*.

The trial court should not have taken judicial notice of the fact that the 'Administrative Judgment' was determined by a court of competent jurisdiction to be a wrongful lien because it was a judicial proceeding of another court admitted without the benefit of the record or file before the trial court as demonstrated in *Hales*, *Shreve*, *Robison*, and *Spencer*. Taking judicial notice in this case also violate Rule 201 because the underlying matters were neither "generally known within the territorial jurisdiction" nor "capable of accurate and ready determination by sources whose accuracy cannot be reasonably questioned." UTAH R. EVID. 201

In the alternative, even if it was appropriate for the court to take judicial notice according to Rule 201, the notice should have been excluded by Rule 403 because the of its limited probative value and the court's refusal minimize the prejudicial effect by noticing to the jury the differential standards of proof, the fact that they need not accept that the 'Administrative Judgment' was in fact a wrongful lien, and the fact that the other court's determination was an uncontested matter. In either case the trial court's taking judicial notice was an error that proved critical to Cooper's case.

c. Harmful error.

In *Redevelopment Agency of Roy v. Jones*, 743 P.2d 1233, 1235 (Utah App. 1987), where this Court found the trial court to have erred by taking judicial notice of a contested issue, the Court noted that such an error would be "harmless unless it probably would have had a 'substantial influence in bringing about a different verdict.'" (*Citing Redevelopment Agency v. Tanner*, 740 P.2d 1296, 1303-04 (Utah 1987)). Here, even in a light most favorable to the verdict, the erroneous judicial notice clearly had a substantial influence on the jury. The State had to prove that the 'Consent Judgment' either created a lien or purported to create a lien. They presented four witnesses, none of who could confirm that the 'Consent Judgment' actually created a lien, and none of which conducted title search to discover whether any lien or encumbrance existed.[7] The defense presented Lisa Garner who unequivocally testified that no lien or encumbrance was created by the filing of the 'Consent Judgment' and that none of the alleged victims had any lien or encumbrance related to themselves or their property stemming from Richard Cooper or the 'Consent Judgment.' Even if every word of the State's evidence is to be believed, none of the evidence presented, other than inference taken from the judicial notice, could have proved that any liens were actually created by the filing of the 'Consent Judgment.'

On the second issue, whether the 'Consent Judgment' purported to create a lien, the jury had the 'Consent Judgment' in evidence. State's Exhibit 1. That document

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[7] Judge Davis's testimony relating to the creation of a lien should have been excluded and was counteracted by Lisa Garner's expert testimony about the lack of any lien or encumbrance on any of his property or the property of the other alleged victims. R. 1166: 152, 167, 170; 1282: 99-101.

alleged that the Paces, Rivers, and Davis are "Debtors" and that they owe Richard-Donald: Cooper, the injured 3rd party Creditor, $4.2 million. State's Exhibit 1: 2-4. It further states that "Debtors agree that the Statement and Demand for payment [a separate document] is a 'true bill in commerce' which by operation of law provides 90 days to discharge the 'account receivable' or the account become [sic] a 'commercial lien'" and that the unpaid debt may be "assigned giving a new owner a Right of Lien". Id. at 4.

The document itself says that another document, the 'Statement and Demand for Payment,' a document not produced in evidence and not claimed to have been filed, may give rise or become a commercial lien. The document itself says that the unpaid debt creates a 'right of lien' that can be transferred to a new owner. Nothing on the face of the 'Consent Judgment' purports to create a lien. The 'Consent Judgment' does not call itself a lien or assert that it creates an encumbrance on any property. None of the witnesses testified that the 'Consent Judgment' purported to create a lien. In fact the witnesses testified that the 'Consent Judgment' purported to say they owed money, not that their property had been encumbered. Therefore, given the fact that the jury had no evidence that the 'Consent Judgment' actually created a lien or that it held itself out to create a lien or encumbrance, the court's judicial notice had a substantial influence on the guilty verdict.

Based on the evidence, the jury had to have found that something about the 'Consent Judgment', aside from what its actual effect was and aside from what it claimed to do, made it a lien or something that purported to be a lien. Cooper asserts that is exactly what the trial court's erroneous judicial notice did. It directed the jury's attention

to a connection between two pieces of evidence and took notice that the 'Administrative Judgment' was a wrongful lien, inferring that the 'Consent Judgment' could, as a derivative of the 'Administrative Judgment', be a wrongful lien as well. That inference, in the face of undisputed evidence to the contrary, created a substantial influence on the verdict and as such constitutes harmful error.

The trial court's decision to take judicial notice of the prior court's finding the 'Administrative Judgment' a wrongful lien and the reference in the 'Consent Judgment' to the 'Administrative Judgment' was improper under Rules 201 and 403 because the court noticed the "ultimate issue in dispute" (*Silva*, 926 A.2d at 275), took notice of a fact neither generally known nor capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, and ignored the threat misleading the jury with an inappropriate relationship between the prior court's holding and the ultimate issue in this case (*Tambourine*, 312 Fed.Appx. 263, 289). Because the remainder of the evidence provided no proof that the 'Consent Judgment' either created or purported to create a lien, the notice had a substantial influence in bringing about the guilty verdicts and was therefore harmless.

II. Motion for Mistrial

Cooper asserts that the trial court abused its discretion by denying his motion for a mistrial following Judge Davis's testimony on matters that the parties and the court agreed would be excluded and were beyond the type allowed by lay witnesses. Cooper asserts that Judge Davis's testimony was so prejudicial, given the totality of the evidence and the materiality of the testimony, that Cooper was denied a fair trial.

a. Relevant Law

Utah Rule of Evidence 701 states "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

In *State v. Madsen*, 2002 UT App 345, 57 P.3d 1134, the defendant was convicted of damaging a jail and theft. The trial court had excluded any evidence of the fact that the defendant had been "incarcerated in punitive isolation." *Madsen*, 2002 UT App 345, ¶ 11. The defendant moved for a mistrial following testimony from an officer on the excluded subject and the trial court denied the motion because it found that the testimony was not sufficiently prejudicial. Id. This Court upheld that ruling on the principle that a trial court will not be found to have abused its discretion unless "the court's decision is plainly wrong in that the incident so likely influenced the jury that the defendant cannot be said to have had a fair trial." Id. (*citing State v. Decorso*, 1999 UT 57, ¶38, 993 P.2d 837). This Court found nothing to support the notion that the improper testimony influenced the jury to a degree that the defendant was denied a fair trial.

In *Decorso*, after specifically being ordered not to discuss any other alleged crimes of the defendant, a witness testified that he had read a newspaper article about "some of the crimes" they were trying to charge the defendant with. *Decorso*, 1999 UT 57, ¶ 37. The Utah Supreme Court found the reference to "some of the crimes" was vague and

insignificant because evidence of other crimes, other than those excluded, was properly admitted so that the jury may have suspected the other crimes were those they had heard about. Id. at ¶ 39-40.

"A review of our case law amply reveals that a mistrial is not required where an improper statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the testimony presented." *State v. Allen*, 2005 UT 11, ¶ 40, 108 P.3d 730. In *Allen*, a co-conspirator witness, when asked about a conversation with the defendant, testified that the defendant had said "You don't got nothing to worry about, you haven't done anything. They're going to continue to do this. Things like that. *He had told me that they had asked him to come in for a lie detector test.*" *Allen*, 2005 UT 11, ¶ 36. The lie detector statement was made at the end of a lengthy answer by the witness in passing, not intentionally elicited by the State and was innocuous in light of the witness's other statements. Further, despite the defendant's contention that the reference would lead the jury to suspect he was hiding negative results, the Court was persuaded that the testimony did not require a mistrial because the statement "was not intentionally elicited or planned," was "vague," was made briefly at end of a long direct examination, the "proceedings continued without undue interruption," "no further attention was directed to either a lie detector test or [the witness's] statement," and the court "offered to give the jury a curative instruction" which was declined. *Id.* at ¶ 43. These reasons supported the Court's finding that the statement was innocuous and therefore the trial court did not abuse its discretion. *Id.* at ¶ 44.

In *State v. Case*, 547 P.2d 221 (Utah 1976) the State called a witness to refute the defendant's alibi. That witness "inadvertently referred to the fact that the defendant had come out of prison the day before the alleged offense" and "again on redirect Craig testified that when the defendant was out of the 'point,' referring to the prison, he lived with his parents." *Case*, 547 P.2d, at 223. The Supreme Court upheld the denial of motion for mistrial because the evidence was not mentioned again by either party nor the court, and because the statement was not intentionally elicited by the prosecution. *Id.*

In *State v. Butterfield*, 2001 UT 59, 27 P.3d 1133, the defendant was charged with aggravated burglary, rape of a child, sodomy of a child and sexual abuse of a child. A police detective testified he had obtained a photo of the defendant to use in a photo array from the Salt Lake County Jail, implying that the defendant had been arrested before. *Butterfield*, 2001 UT 59, ¶ 45. The defendant moved for a mistrial arguing the statement was improper and prejudicial. The trial court denied the motion finding the remark to be "vague" and "fleeting." The Utah Supreme Court found, in affirming the trial court, that the defendant failed to show any "evidence anywhere in the record to suggest that the jury relied on [the detective's] statement for its verdict" and given the totality of the evidence against the defendant he failed to show a "substantial likelihood that the jury would have found him not guilty had the improper statement not been made." *Id.* at ¶ 47.

In *State v. Wach*, 2001 UT 35, 24 P.3d 948, the defendant was convicted of aggravated kidnapping and assault. The victim testified that she wore an security alarm around her neck when the defendant was around. *Wach*, 2001 UT 35, ¶ 44. The defense made a motion for mistrial arguing the statement implied the victim feared the defendant

in violation of rule against improper character evidence. The trial court's denial was upheld by the Supreme Court because the remark "did not render Wach's trial so unfair that the trial court was 'plainly wrong in denying Wach's motion for mistrial." *Id.* at ¶ 46. The statement did not render the trial unfair because the statement was not inflammatory given the fact that the rest of the testimony describing the violent nature of the assault perpetrated against the victim was so much more probative on the issue of the defendant's character. *Id.*

From these cases it is clear that a trial court's denial of a motion for mistrial based on the admission of improper statements will not be overturned where the statements are vague, insignificant, made in passing, not referred to by the parties, not intentionally elicited, or innocuous when compared to the rest of the evidence admitted. However, it stands to reason that where an inadmissible statement is not vague or insignificant, not made in passing, where the statement intentionally elicited, or where the statement is in fact significant when compared to the rest of the evidence presented on the central issue, a trial court's denial of the motion for mistrial is an abuse of discretion because in such an instance the evidence would likely influenced the jury and the defendant can be said to have been denied a fair trial.

b. Application

On the morning of trial the defense asked the court to prevent Judge Davis from testifying to legal opinions "because he [had] not been noticed up as an expert." Specifically the defense moved to excluded Davis from giving his belief or opinion that the documents at issue were in fact liens attached to his property. R. 1166: 20-21. The

State stipulated to that motion and the court accepted it. R. 1166: 21. Following Judge Davis's testimony, defense counsel made a motion for mistrial. R. 1282: 13. The motion alleged that Davis made incorrect statements of law, introduced hearsay, and stated as a matter of law that judgments are liens and that is how he knew the 'Consent Judgment' clouded his title in violation of the stipulated exclusion. R. 1282: 13-14. Counsel also argued that his statements would mislead and confuse the jury, and due to his position have an undue influence on the jury causing prejudice to Cooper. R. 1282: 15, 20-21.

In reply, the prosecutor argued that he could not remember the exact the statements the defense was describing and claimed that a mistrial was not appropriate without a record of the context of the statements. R. 1282: 16-17. The State also argued the defense invited the error by asking questions that "went beyond the scope of what his testimony would have been allowed as a lay person" and that the defense had asked the questions that elicited the statements in question creating an invited error. R. 1282: 17-18. The State alleged that the defense invited the error when it asked Davis whether this was a lien as a matter of law. R. 1282: 24. The State also thought it would be better for the Court of Appeals to "fish out" the issue of mistrial with a complete record. R. 1282: 19.

The trial court, in recalling the testimony, stated that Davis "made it clear that... the document was not what it claimed to be, that is a judgment, but I think what he was saying is, when you have a judgment and record that judgment in the County Recorder's Office, it does in fact become a lien on the property." R. 1282: 31-32. The court went on to find that the "vast majority of what came out during Judge Davis' testimony regarding the action of Judge Fuchs and Judge Quinn, was really brought out by Mr. Bautista." Id.

Essentially the court denied the motion on two grounds; first, because the testimony did not constitute an erroneous statement of the law, and second, because the statements about the earlier courts' decisions were invited by the defense.

Even if Judge Davis's testimony was not an erroneous statement of the law it would not change the fact that it contained evidence that was stipulated as excluded. Further, Davis's statements about what is required to create a lien were far less damaging and inappropriate than the statements that applied the law to the facts and made legal determinations, namely that when Cooper filed the 'Consent Judgment' with the County Recorder's Office it created a lien on Judge Davis's property and clouded title to his home. These statements were opinions and legal conclusions based not on any actual knowledge of a given event or fact but upon Davis's speculation. It was these statements and their violation of the Rules of Evidence and the stipulated exclusion which were the grounds for the mistrial, not Davis's comments on what is required for a lien. The trial court abused its discretion by failing to recognize the erroneous and prejudicial evidence introduced by Judge Davis following Cooper's motion for mistrial.

Unlike the improper testimony in *Decorso*, Judge Davis's testimony was not vague or insignificant. In answer to the State's question, what was the "only reason that you have a $4.2 million lien filed against you?", Davis said "I have no idea why I have a $4.2 million lien filed against my wife and my home." R. 1166: 152 (see R. 1284, transcriber's correction letter). These statements are clearly not insignificant because they goes to the heart of the issue to be decided by the jury. They were not vague either, his statements specifically referred to the documents at issue in this case and their legal

effects relative to the elements of the charged crime. His statements addressed whether or not the 'Consent Judgment' is a lien against his property.

For the same reasons, unlike the evidence challenged in *Allen*, Judge Davis's statements were not made in passing and were not innocuous. In *Allen* the witness only mentioned that the defendant had been asked to take a lie detector test, not whether he had taken the test or what the outcome of the test was. While the jury may have speculated about such things the fact that the statement or those inferences were not the subject of the question asked nor were those inferences directly related to what the State had to prove helped make the improper testimony "innocuous." *Allen*, at ¶ 44. Here, Davis's improper statements were not tangentially related and tied to the end of a run-on question. Davis's improper statements were obviously the result of questions by the State and were related to the heart of the issue to be decided, not to mention they came from the mouth of a witness who was not shy about the fact that he was a District Court judge.

Unlike the statement in *Case*, Judge Davis's statements were not inadvertent, or unintentional. Judge Davis testified that he had a lien placed on his home based on the 'Consent Judgment' which he called a "gibberish document." R. 1166: 152. In *Case*, the testimony that he had been in prison would have been prejudicial to the defendant because it was evidence of prior bad acts. However, except for the risk of the jury assuming conduct in conformity with his bad character, this testimony would not have had an adverse effect on the jury's decision whether or not the defendant committed aggravated robbery. But here, Davis's testimony was intentional and directed precisely at proving that Cooper had filed a wrongful lien, the central issue of the case. Davis did not

accidentally mention that the 'Consent Judgment' was a lien in passing while describing his interaction with Cooper. Davis's answers did not come as an inadvertent or unexpected answer to questions asked in other areas, they were the direct result of questions from the State designed to elicit the ultimate conclusion of law.

At trial, following the motion for mistrial, the State argued that the error, if any, created by Judge Davis's testimony was invited error because the defense "can't lay into a trial mistrial by - - by introducing through his own questioning of a witness things that then later, he's going to come back and say it's a mistrial, because those are questions and - - things that are coming out through his examination[.]" R. 1282: 18. Thee State alleged that "it was Mr. Bautista that actually launched into the questioning... basically asking, inviting the witness to be able to testify as an expert." R. 1282: 17. However, access to the record shows the inadmissible comments made by Davis were not the result of an invited error on cross-examination but began to be introduced on direct examination following a question which explicitly referred to the document in question as a 'lien,' and the statements made during cross were only elicited in order to try to confront the incorrect and prejudicial statements already made on direct.

The trial court, in denying the motion for mistrial, said "the Court believes that what came out, as - - as I recall, or at least the vast majority of what came out during Judge Davis' testimony regarding the action of Judge Fuchs and Judge Quinn, was really brought out by Mr. Bautista. I- -I don't recall that that came out on Mr. Kennard's direct examination. If it - - if it did, I don't recall that." R. 1282: 32. Unfortunately, the trial court's memory was incorrect and Davis made several statements violating the stipulation

preventing Davis from giving his legal opinion and making statements about matters of law.

On direct examination Mr. Kennard asked Davis whether he was served the 'Consent Judgment' before or after he had finished in the case filed by the Paces. R. 1166: 149. Judge Davis answered "[t]he consent judgment against me for $4.2 million was recorded against my home before I was even served with the document." R. 1166: 150. This unresponsive statement made the conclusion that the filing of the document attached a lien to his home, a matter which Davis was not authorized to speak to and which required the defense to confront on cross examination. See R. 1166: 169-70.

On direct Kennard later asked Davis if he knew the reason he had a "$4.2 million lien filed against [him]?" and Davis responded, "I have no idea why I have a $4.2 million lien filed against my wife and my home." R. 1166: 152 (see R. 1284, transcriber's correction letter). He continued, "I don't have the foggiest clue as a matter of law how that came about other than the fact these so-called gibberish documents have been filed with the Office of Utah County Recorder's and clouded the title on our home." Id. Davis's statements were answers to the State's question referring to the Cooper's document as a lien, and they display unequivocally that Davis believed the 'Consent Judgment' was a lien as a matter of law that clouded the title to his home, precisely the area on which Davis was not to testify.

Davis then stated that his interaction with the Coopers included proceeding "with a petition to nullify these *liens*, both against his son and against him, and courts have ordered the nullification of the *liens*." R. 1166: 153 (emphasis added). To which

Kennard followed up by asking Davis about Judge Quinn's ruling declaring the 'Administrative Judgment' a wrongful lien. R. 1166: 153. Davis answered that that was "one of the two lawsuits" and that he "proceeded also against Richard Donald Cooper and that was declared to - - that order was entered by an Honorable Dennis Fukes [Fuchs] on the 31st day of October of 2007 and his ruling was the document entitled 'administrative judgment' recorded on a given date - -" at which time the prosecutor stopped him. R. 1166: 153-54. This statement, although stopped short of completion, was again an instant where answers to the State's question elicited an answer in the prohibited area causing the defense to have to confront the issue.

By no fault of the defense, Judge Davis testified that the 'Consent Judgment' was recorded against his home, it was a lien that clouded title of his home, that it was a lien that was nullified by district court judges, and that the 'Consent Judgment' was not meaningless because it clouded the title of his home and had to be ruled void by judges. The State's assertion and the trial court's memory that the improper statements were brought out by the defense are manifestly untrue. Of course, these topics were discussed further on cross-examination but not until after Davis had repeatedly testified to them on direct. The Utah Supreme Court has established the propriety of a defendant addressing excluded evidence to confront evidence on the same issue introduced by the State in *State v. Saunders*, 1999 UT 59, ¶ 24, 992 P.2d 951.

In *Saunders* the defendant testified regarding allegations of prior misconduct during a trial for sexual abuse of the same child involved in the earlier allegations. On cross-examination the State inquired further into those allegations and then argued those

facts to the jury. On appeal this Court held that the use of that evidence by the State was proper because the defendant "opened the door" with his testimony on direct examination. The Utah Supreme Court however, reversed stating that the defendant did not open the door but was forced to respond in his direct examination to earlier testimony from the State regarding those allegations. *Saunders*, 1999 UT 59, ¶ 24. The Court cited *State v. Span*, 819 P.2d 329 (Utah 1991), noting "[i]t would be unfair for a prosecutor to question a witness on prohibited information or issues, but then require the defendant to forego cross-examination, which could ameliorate the damage caused, to preserve an objection to the prosecutor's misconduct."

In *Span* the State wanted to admit evidence that the alleged victim in an arson case did not have a motive to burn his own building because he suffered a loss as a result of the fire. *Span*, 819 P.2d at 333. Defense counsel objected to the evidence arguing it was irrelevant. The trial court agreed and excluded the evidence. Id. The prosecutor continued his direct examination on the topic and asked the witness whether or not he had suffered as a result of the fire and whether he had started the fire. On appeal the State conceded that the prosecutor violated the court's order but argued that the issue was waived by defense counsel's questioning on the same subject. *Id.* at 334. The court held this argument meritless for the reasons cited in *Saunders*.

That same principle applies in this case. The prosecutor repeatedly elicited testimony relating to Judge Davis's opinion of the legal effect of the 'Consent Judgment' and allowed Davis to talk not only about his legal opinion but also about the judgments of other district courts relating to the 'Administrative Judgment' and about a court's

nullification of a lien created by the "Consent Judgment." The fact that the defense questioned Davis extensively on cross-examination about these issues does not change the fact that the State presented improper testimony first. The State asked Judge Davis to "tell the jury… the only reason the [he had] a $4.2 million dollar lien filed against [him]." R. 1166: 152 (see R. 1284, transcriber's correction letter). As in *Span* and *Saunders*, a defendant does not invite error by addressing improper and prejudicial issues in response to their introduction by the State. In contrast to the State's assertion that "the defense can't lay into a trial mistrial by[] introducing through his own questioning of a witness things that later, he's going to come back and say it's a mistrial," this Court should find that the erroneous statements by Davis, although some were made during cross-examination, were the result of Davis's questioning by the State and the defense's attempts to ameliorate the damage did not invite error.

It is unquestionable that Judge Davis testified on direct examination, both as direct answers to questions and as unresponsive answers, that he believed the 'Consent Judgment' was a lien, that it clouded the title to his home, and that the 'Consent Judgment' was declared a wrongful lien by another judge. This testimony was not only admitted in violation of the stipulation of the parties but also to Rule 702. Cooper's motion for mistrial following Davis's testimony should have been granted because the improper testimony was not vague, it was not insignificant, it was not made passing or inadvertent, and it was not unintentional or innocuous. Because the improper testimony likely influenced the jury on the most important issue in the case, whether the 'Consent

Judgment' was a lien, the trial court's failure to grant the mistrial was an abuse of discretion.

CONCLUSION AND PRECISE RELIEF SOUGHT

For any or all of the foregoing reasons Defendant, Richard-Donald: Cooper, asks this Court to reverse his conviction and commitment and remand to the District Court for further proceedings consistent with this Court's findings.

Respectfully submitted this 2nd day of July, 2010.

Margaret P. Lindsay
Douglas J. Thompson

CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing Appellant's Brief postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 2nd day of July, 2010.

ADDENDA

Utah Rule of Evidence 201 – Judicial Notice of Adjudicative Facts

Utah Code Ann. § 76-6-503.5 – Wrongful Liens

Correction to the Record
- Volume 1166 – Cover page
- Volume 1166 – page 152
- Letter from Lisa Collins Re: Transcript of Hearing Dated Feb. 4, 2009 (R. 1283)
- Letter from Matthew Rose Re: Correction to Transcript Dated Feb. 4, 2009 (R. 1284).

Utah Rule of Evidence 201. Judicial Notice of Adjudicative Facts

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not. (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the re- quest may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Utah Code Ann. § 76-6-503.5. Wrongful liens and fraudulent handling of recordable writings--Penalties

(1) "Lien" means:

(a) an instrument or document filed pursuant to Section 70A-9a-516;

(b) an instrument or document described in Subsection 38-9-1(6); and

(c) any instrument or document that creates or purports to create a lien or encumbrance on an owner's interest in real or personal property or a claim on another's assets.

(2) A person is guilty of the crime of wrongful lien if that person knowingly makes, utters, records, or files a lien:

(a) having no objectively reasonable basis to believe he has a present and lawful property interest in the property or a claim on the assets; or

(b) if the person files the lien in violation of a civil wrongful lien injunction pursuant to Title 38, Chapter 9a, Wrongful Lien Injunctions.

(3) A violation of this section is a third degree felony unless the person has been previously convicted of an offense under this section, in which case the violation is a second degree felony.

(4)(a) Any person who with intent to deceive or injure anyone falsifies, destroys, removes, records, or conceals any will, deed, mortgage, security instrument, lien, or other writing for which the law provides public recording is guilty of fraudulent handling of recordable writings.

(b) A violation of Subsection (4)(a) is a third degree felony unless the person has been previously convicted of an offense under this section, in which case the violation is a second degree felony.

(5) This section does not prohibit prosecution for any act in violation of Section 76-8-414 or for any offense greater than an offense under this section.

THIRD DISTRICT COURT - WEST JORDAN

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 071402198
	)	
RICHARD DONALD COOPER,	)	
Defendant.	)	

BEFORE THE HONORABLE ROBERT ADKINS

FOURTH DISTRICT COURT - PROVO
125 North 100 West
Provo, Utah 84601

JURY TRIAL
February 4, 2009

ORIGINAL

TRANSCRIBED BY: Toni M. Gehm

20090396-CA

A. Yes, sir.

Q. And could you just tell us briefly what is your oath that you take, in essence, to being a judge?

A. I have an obligation to follow the constitution of this state and the constitution of the United States.

Q. Would that include following the law and following the procedures as outlined by the State of Utah and the Supreme Court in regards to how lawsuits are conducted how decisions are made, the opportunities parties are given to, you know, litigate a lawsuit and things like that?

A. Sure. Absolutely. And I did so in this case.

Q. Can you tell us -- tell the jury, Judge Davis, briefly about the case that I'm assuming you're believing is the only justification -- not the justification the only reason that you have a $4.2 million filed against you?

A. I have no idea why I have a $4.2 million lien filed against my wife and my home. We own our home. It's a modest home. We've worked hard through our entire lives. It's paid for. And now there's a cloud on the title as it relates to $4.2 million and I have -- I don't have the foggiest clue as a matter of law how that came about other than the fact these so-called gibberish documents have been filed with the Office of the Utah County Recorder's and clouded the title on our home.

Q. So, Judge Davis, but your previous testimony was is

Utah Court of Appeals

450 South State Street
P O Box 140230
Salt Lake City, Utah 84114-0230

Appellate Clerks' Office (801) 578-3900
Judges' Reception (801) 578-3950
FAX (801) 578-3999
Utah Relay 1-800-346-4128

June 29, 2010

CRAIG LUDWIG
WEST JORDAN DISTRICT COURT
8080 S REDWOOD RD STE 1701
WEST JORDAN UT 84088

Re: State v. Richard Donald Cooper, 071402198, 20090396-CA
Hearing date/transcript Feb. 4, 2009
Transcribed by Toni Gehm.

Dear Craig:

Please enclose a copy of the attached correction letter to the transcript of the hearing held Feb. 4, 2009. Please have an entry made in CORIS. Thanks.

Sincerely,

Lisa A. Collins
Clerk of the Court

cc: Doug Thompson
Margaret Lindsay
Marian Decker
Laura Dupaix

Matthew B Rose RPR
Certified Court Transcriptionist
3043 South Sierra Heights Circle
Mesa Arizona 85212
Phone (480)882 8119
Fax (602)391-2229

June 23, 2010

Lisa Collins
Clerk of the Court
Transcript Manager
Utah Court of Appeals
450 S State Street
PO Box 140230
Salt Lake City, UT 84114-0230

Re State of Utah v Richard Donald Cooper 20090396-CA

Dear Lisa

I am hereby sending this Errata letter as I have been informed of a necessary correction in the Jury Trial Transcript dated February 4, 2009 in the above entitled case

The correction is located on page 152, line 15 and should read as follows

15 reason that you have a $4 2 million ***lien*** filed against you?

Please distribute the enclosed copies of this letter to all parties involved and add this letter to the Original Transcript

If you have any questions, please feel free to contact me

Sincerely,

Matthew B Rose