

2005

JULIAN DEAN HATCH, Respondent, v. LARRY DAVIS, Petitioner: Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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DOCKET NO. 20050078

JULIAN DEAN HATCH,

Respondent,

v.

LARRY DAVIS,

Petitioner.

Case No. 20050078

REPLY BRIEF OF PETITIONER

ON GRANT OF A PETITION FOR WRIT OF CERTIORARI,
INITIAL APPEAL FROM A JURY VERDICT IN FAVOR OF PETITIONER LARRY
DAVIS, THE HONORABLE K.L. MCIFF PRESIDING IN THE SIXTH DISTRICT
COURT IN AND FOR GARFIELD COUNTY, STATE OF UTAH.

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ORAL ARGUMENT IS REQUESTED

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IN THE UTAH SUPREME COURT

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REPLY BRIEF OF PETITIONER

Petitioner Larry Davis, by and through his attorneys, hereby replies to the Brief of the Respondent. In doing so, Davis reasserts the arguments and authorities presented in the initial Brief of Petitioner and makes the following additional points and clarifications. Any argument not specifically addressed herein is not waived, but has been briefed in the initial Brief of Petitioner.

INTRODUCTORY RESPONSE

Throughout the Brief of the Respondent, Hatch extensively refers to the trial court proceedings in support of his position. *See* Brief of Respondent at 2-16. Unfortunately, this version of what actually took place below is incomplete and very misleading. Davis is hamstrung in his ability to correct Hatch's misleading recitations, however, because the transcripts included in the appellate record were carefully selected by Hatch to only include those portions which create the appearance of support for his arguments. In violation of the clear requirements of Utah Rule of Appellate Procedure 11(e)(3), and as

noted by the Court of Appeals,¹ Hatch submitted an incomplete record without advising either the court or Davis that he was doing so. Consequently, the testimony of 11 trial witnesses called by Davis as well as critical arguments and discussions with the trial court and counsel, which addressed the very issues of this appeal, are not a part of the record. Relative to every issue presented by this case, Hatch boldly invites this Court to rule based only upon those portions of the record **he has chosen** to present, without presuming **that the trial court's findings, as well as a jury verdict, are supported by competent and sufficient evidence**. Consistent with long established precedent, this Court must reject this tactic and find that “[n]either the court nor the appellee is obligated to correct appellant’s deficiencies in providing the relevant portions of the transcript”**and that when a complete record is not provided, a reviewing court must not speculate as to what may have occurred, but instead presumes that the trial court’s findings, as well as a jury verdict, are supported by competent and sufficient evidence**. *See e.g.*, Utah R. App. P. 11(e)(2); *State v. Cramer*, 44 P.3d 690, 697 (Utah 2002) (presuming trial court made correct legal determination where appellant failed to include all relevant evidence on appeal); *State v. Theison*, 709 P.2d 307, 309 (Utah 1985) (“We cannot speculate on the existence of facts that do not appear in the record. When crucial matters are not included in the record, the missing portions are presumed to support the action of the trial court”); *State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (appellate court “simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the

¹*See Hatch v. Davis*, 2004 UT App. 378, ¶47.

record”); *State v. Nine Thousand One Hundred Ninety-Nine Dollars*, 791 P.2d 213, 217 (Utah Ct. App. 1990) (“Since counsel failed to provide this court with all relevant evidence bearing on the issues raised on appeal, as required by Utah R. App. P. 11(e)(2), we can only presume that the judgment was supported by sufficient evidence” (internal citations omitted)); *Sampson v. Richins*, 770 P.2d 998, 1002-03 (Utah Ct. App. 1989) (“In essence, Rule 11 directs counsel to provide this court with all evidence relevant to the issues raised on appeal”).

ARGUMENT

I. HATCH WAIVED ENTITLEMENT TO A JURY INSTRUCTION ON THE STATUTE OF LIMITATIONS BY FAILING TO SUBMIT A CORRECT INSTRUCTION.

A. The Court Of Appeals Reversed Based Upon An Issue That Was Both Unpreserved And Not Properly Supported By The Record.

Of a threshold matter, Hatch did not properly preserve the jury instruction issue he ultimately asserted before the Court of Appeals—that **a statute of limitations instruction in general** should have been given. *See* Brief of Petitioner at 20-23. More specifically, **Hatch only objected at trial to the trial court’s refusal of Hatch’s own proposed instruction.**² Hatch claims, however, that the “issue was properly preserved because the

²If the concepts of “preservation” and “marshaling” mean anything, it must be applied here. Simply, there was no true dispute as to the statute of limitations at trial and Hatch at no time argued for an instruction which attempted to accurately convey the law as guided by this Court in *Retherford v. AT&T Communications*, 844 P.2d 949, 975 (Utah 1992), as discussed herein. Rather, Hatch insisted on his own misleading instruction or none at all. To now allow him to argue that he preserved the matter in the absence of any record effectively grants him license to recreate history.

trial court ruled on the statute of limitations issue stating that it was not a legitimate issue for the jury to consider.” Respondent’s Brief at 23. Hatch misses the point. While showing how the trial court responded to his post-trial motions, it offers nothing relative to how Hatch acted, and more specifically, that Hatch posed any proper and specific objection at trial, explaining his grounds, with specificity, in challenging the trial court’s decision.

In *R.T. Nielson Co. v. Cook*, this Court conclusively stated,

in order to appeal the giving of or the refusal of a jury instruction, a party must properly object to the instructions in the trial court and explain its grounds, with specificity, for challenging the instructions. . . If a party does not object and articulate the grounds with sufficient specificity such that the issue is presented before the trial court for consideration, that issue cannot be raised on appeal.

R.T. Nielson Co. v. Cook, 40 P.3d 1119, 1123 (Utah 2002) (citing Utah R. Civ. P. 51).

Moreover, while an appellate court may review the failure to give an instruction in its discretion and in the interests of justice, the aggrieved party has the burden of presenting special circumstances warranting such a review. *See id.* at 1124. In this case, however, Hatch failed to properly preserve the jury instruction issue.

Moreover, in support of his position, Hatch cites to the abrogated case of *Spears v. Warr*, 44 P.3d 742 (Utah 2002) (abrogated by *RHN Corp. v. Veilbell*, 96 P.3d 935 (Utah 2004) and *Pierce v. Pierce*, 994 P.2d 193 (Utah 2000), for the proposition that an issue is sufficiently preserved for review when a trial court rules on an issue. Thus, Hatch argues that when the trial court indicated in a post-trial memorandum that the statute of

limitations issue was not a legitimate issue for the jury to consider, *see* Brief of Respondent at 23 (citing to R. 798 but meaning R. 793), the jury instruction issue was preserved for appeal. This Court must reject this argument since, again, it does nothing to show that Hatch made a proper and specific objection **at trial regarding giving any instruction other than his own**, and if anything, supports Davis' argument that not only was Hatch's proposed instruction incomplete as it did not account for Hatch's "entire course of conduct" (R. 793), but shows that any error in failing to give a general instruction was harmless error as the trial evidence supported the verdict. This Court should therefore rely on *R.T. Nielson Co.* as controlling authority and find that Hatch has not properly preserved the issue.

Furthermore, Hatch fails to present any persuasive reason or special circumstances justifying a review of the issue absent a showing of a proper objection. Instead, Hatch inexplicably cites *Low v. City of Monticello*, 54 P.3d 1153, 1163 (Utah 2002), and *Busche v. Salt Lake County*, 26 P.3d 862 (Utah App. 2001), for the proposition that an appellate court may affirm a trial court's judgment if it is sustainable on any legal ground apparent in the record. *See* Respondent's Brief at 27. In the instant case, the Court of Appeals did not affirm the decision of the trial court, so the cases provide no guidance in favor of Hatch. Instead, the authority actually supports Davis as this Court may affirm the trial court's orders and affirm this verdict in favor of Davis based on any theory supported by the record, or lack thereof (such as failure for Hatch to preserve the record, the

established rule that a court need not instruct a jury based upon an incomplete instruction, and harmless error³).

Hatch also cites *Anderson v. Utah County Bd. of County Com'rs*, 589 P.2d 1214 (Utah 1979), and *State ex rel S.A.*, 37 P.3d 1172 (Utah App. 2001), for the notion that an appellate court has a duty to address issues that may rise again on remand. *See* Respondent's Brief at 27-28. However, this principle of law does not justify the determination of an issue not properly preserved for appeal, nor whether an appellant presented special circumstances warranting appellate review in the absence of proper preservation. Importantly, if, as Davis suggests, Hatch failed to properly preserve the issue, the issue has been waived and there will be no need for further remand.

Overall, Hatch's argument does not aid this Court's decision. Because Hatch only specifically objected at trial to the court's refusal to give his proposed instruction, the finding by the Court of Appeals that the trial court erred in giving an instruction on the four-year statute of limitations in general was not preserved for appeal. Because the Court of Appeals reversed on an unpreserved issue, this Court must now correct that error.

³Utah Rule of Civil Procedure 61 provides:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

B. Hatch Provided an Insufficient Appellate Record.

Moreover, Hatch failed in his duty as the appellant to both present a complete record and appropriately cite to the record as required by appellate rules and Utah case law. *See e.g.*, Utah R. App. P. 11(e)(2); Utah R. App. P. 24(a)(5)(A) (requiring citation showing issue was preserved); *State v. Wetzel*, 868 P.2d 64, 67 (Utah 1993). This Court has explained:

Parties claiming error below and seeking appellate review have the duty and responsibility to support their allegations with an adequate record. *Absent that record defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine.*

Wetzel, 868 P.2d at 67 (internal quotations omitted, italics in original).

Hatch has never once cited to the record illuminating the reason *why* his proposed jury instruction was not given. Hatch has never provided record as to what discussion was held before the trial court in coming to its decision, what representation both Hatch and Davis made to the court regarding the instructions, nor, again, that Hatch posed proper and specific objections. Hatch again fails to do so now. *See* Respondent's Brief at 23-28; *cf.* Hatch v. Davis, Case No. 20020778-CA, Brief of Appellant at 6. Therefore, without any record to the contrary and "[i]n the absence of an adequate record on appeal, this Court can only assume the regularity of the proceedings below." *Wetzel*, 868 P.2d at 67. This conclusion is particularly compelling in light of the fact that the trial court "carefully considered [Hatch's] request in light of the evidence and made its ruling on the record" – a record not provided to this Court (R. 917).

C. The Trial Court Was Not Required to Give Hatch's Erroneous Instruction.

As set forth in initial briefing, a trial court is not required to give an instruction that erroneously states the law or is unsupported by the facts presented at trial. *See State v. Bluff*, 2002 UT 66, § 21; *State v. Alonzo*, 932 P.2d 606, 616 (Utah App. 1997); *State v. James*, 819 P.2d 781, 799 (Utah 1991). Nor is a court required to give an instruction that has not been offered as it is not the trial court's duty to make a case for a party. *Cf. State v. Woodall*, 305 P.2d 473, 477 (Utah 1956). Consequently, a party must offer a correct instruction before he can complain of the trial court's failure. *See Kesler v. Rogers*, 542 P.2d 354, 358 (Utah 1975).

Also as set forth in initial briefing, and with regard to claims of intentional infliction of emotional distress:

Because of the nature of this cause of action, it can be difficult to determine when all its elements—intentional, outrageous conduct proximately causing extreme distress—have come into being. Of particular difficulty is the element of injury—extreme emotional distress.

Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992)

This Court also recognized:

we hold that the statute of limitations for intentional infliction of emotional distress does not begin to run until the distress is actually inflicted, *i.e.*, when the plaintiff suffers **severe emotional disturbance**. . . Although easy to describe, this standard is difficult to apply, particularly because the element of emotional distress is specific to the plaintiff in each case. Because the tort of intentional infliction of emotional distress requires *actual* emotional distress, . . . , this element is to be gauged subjectively.

Id. at 975-976

Hatch argues, however, that the instruction he proposed was not an incorrect statement of law as the continuing violation theory alluded to in *Retherford* was not clearly established law. Hatch reasons:

The cases cited by Davis regarding the refusal of the trial court to give an erroneous instruction are. . .clearly distinguishable by their facts, as they deal with instructions that are clearly erroneous and directly contrary to the law. . . These cases are far different than in this case, where this Court in Retherford stated that the four year limitation period did apply; and that it was not adopting the continuing violation theory for infliction of emotional distress.

Respondent's Brief at 26.

Contrary to Hatch's argument is the fact that in *Retherford*, the facts of the particular case did not require this Court to formally adopt a "continuing violation theory." Rather, this Court decided on the specific facts of that case that the alleged intentional infliction of emotional distress did not accrue until September 1985, thereby placing the April 1989 filing of the complaint within the four-year statute of limitations. *See Retherford*, 844 P.2d at 976-77. This Court stated that "the record before us identifies this moment [when the plaintiff experienced the extreme emotional distress]." *Id.* at 976. No such specific date could be pinpointed in this case.

Moreover, even assuming that *Retherford*'s allusion to the acceptance of a continuing violation theory was not controlling at the time, Hatch's proposed instruction was still incomplete and would have erroneously advised the jury as to the law. Again, Hatch's proposed statute of limitations instruction stated:

Utah's four (4) year limitation period applies to Davis's claims for intentional infliction of emotional distress.

Under Utah law, that statute of limitations begins to run when the cause of action accrues.

A tort cause of action, including intentional infliction of emotional distress, accrues when all of its elements come into being and the claim is actionable.

The statute of limitations for intentional infliction of emotional distress begins to run **when emotional distress is suffered**.

If emotional distress was suffered before the last four (4) years preceding Davis's Counterclaim, which was filed July 21, 1999, Davis's claim for emotional distress is time barred and you cannot award damages for Mr. Davis for such distress.

(R. 695) (incorrect pagination in record, emphasis added).

This instruction is not only incorrect in failing to account for ongoing conduct, but it effectively advises the jury that Davis' claim is time barred and that no damages could be awarded if **any** emotional distress was suffered prior to the four years before the filing of the claim. While this Court's opinion in *Retherford* may not have firmly resolved how continuing conduct would be considered, this Court clearly acknowledged that there were times where a continuing violation would occur and provided guidance as to how to deal with the issue. Moreover, *Retherford* clearly allowed recovery if some of the outrageous conduct, and additionally some of the emotional distress, was outside of the four-year period. So long as the plaintiff subjectively suffered the **extreme or severe** emotional distress within the limitations period, recovery is allowed. By proposing an instruction suggesting that Davis could not recover if any emotional distress was suffered prior to the four-year period, Hatch's instruction was incorrect and misleading and the trial court correctly refused it.

II. THIS COURT MUST PRESUME THAT DAVIS DEMONSTRATED AN EXCEPTION TO THE “PRESENCE” REQUIREMENT FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

While it is true that a trial court’s interpretation of law is reviewed for correctness, *see* Brief of Respondent at 28, the Court of Appeals’ decision not only analyzes a question of law (*i.e.*: will Utah recognize an exception to the presence requirement?), but also applies that law to this case and makes findings of fact (*i.e.*: did the evidence support a showing sufficient to meet any exception to the presence requirement and did the evidence likely impact the jury verdict?). The Court of Appeals’ “fact-finding” was improper absent a complete record. Ignoring the fact that almost the entirety of Davis’ case had been purposely excised from the appellate record, the Court of Appeals nonetheless claimed an ability to determine both what evidence was presented on this issue as well as the manner in which the evidence likely impacted the proceedings. *See Hatch v. Davis*, 2004 UT App 378, ¶ 53 (“In the instant case, **no. . .compelling circumstances exist**, especially when **there was no evidence presented** that Defendant’s wife was injured or suffered emotional distress as a result of Plaintiff’s conduct” and continuing that “**because the jury likely took this evidence** [of conduct toward Judy Davis] into account. . .we conclude that **Defendant [sic] was prejudiced** by the admission of this evidence”) (emphasis added).

In sum, although Davis urges this Court to adopt exceptions to the presence requirement usually necessary for a claim of intentional infliction of emotional distress, regardless of what this Court ultimately determines “is Utah law” on this issue, that ruling

should have no impact on the verdict in this case. Application of the ruling to these facts cannot fairly be accomplished while only reviewing the record of half a case.

A. This Court Should Adopt Exceptions to the “Presence Requirement.”

As noted by Davis in his initial brief, courts have recognized that comment *l* and the caveat to Section 46 of the Restatement (Second) of Torts may provide an exception to the “presence” requirement in a claim for intentional infliction of emotional distress. *See* Petitioner’s Brief at 27-31. Among the cases decided by courts utilizing this exception are *Foster v. Trentham’s Inc.*, 458 F. Supp. 1382, 1384 (E.D. Tenn. 1978); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1166 (Colo. App. 1981); and *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1274 (3d Cir. 1979). Contrary to Hatch’s claim that “such cases deal **only** with the circumstances of a loved one dying or being sexually assaulted,” Respondent’s Brief at 30 (emphasis added), none of the aforementioned cases deal with such circumstances. Rather, *Foster* dealt with a wife distressed by the malicious prosecution of her husband, *Malandris* dealt with a wife distressed by her stockbroker’s access of her account through her husband, and *Chuy* dealt with a plaintiff distressed by a team physician’s comments made to the news media. Moreover, the decisions in these cases relied upon the fact that “the plaintiff was the party most likely to suffer emotional distress upon learning of the defendant's actions.” *Malandris*, 703 F.2d at 1166. Thus, contrary to Hatch’s argument, it is not only “[u]nder such egregious circumstances [as death or assault] an exception may arise to the presence requirement.” Respondent’s Brief at 30.

In addition, Hatch argues that without a “presence” requirement, there is no way to limit the number of individuals that may state a claim for intentional infliction of emotional distress. *See* Respondent’s Brief at 29. Hatch contends,

The purpose of the presence requirement is to put some limit on such liability to the plaintiffs who are present at the time, as distinguished from those who later discover what has occurred. Without such a limitation the number of persons who may suffer emotional distress is virtually unlimited.

Id. This argument ignores the aforementioned requirement typically imposed by courts utilizing the exception—that the claimant be the party most likely to suffer emotional distress upon learning of the defendant’s actions. Obviously there are limits upon the number of potential persons who are *most likely* to suffer, so consequently, there is no absolute need for the “presence” requirement in all but the most egregious circumstances.

B. Due To An Inadequate Record, Application of the Facts To This Court’s Ultimate Ruling Is Improper.

Whether this Court recognizes any exception to the presence requirement under “Utah law” or not, further application of that ruling to the facts of this case would be improper due to the incomplete appellate record provided by Hatch. Any application of the law espoused by this Court would necessarily require a review of the trial evidence. For example, if the Court finds that the presence requirement will not be recognized in Utah, the Court must then apply that ruling to the facts of this case to see if the error in allowing testimony concerning Judy Davis was harmful. *Accord* Utah Rule Civ. P. 61. Further, if the Court finds that the presence requirement will be excepted in Utah under certain conditions, the Court would similarly be required to review the trial testimony to

determine whether the evidence supported the exceptions. However, in this case where there are huge voids in the record of the trial evidence, such factual application cannot be conducted. Consequently, no matter which course this court takes regarding the legal issue, there is no means by which the court can weigh its effect upon proceedings below.

Accord Utah rule Civ. P. 61.

III. THIS COURT SHOULD FIND THAT A PROPERLY INSTRUCTED JURY VERDICT CURED ANY POSSIBLE DEFECT IS DAVIS' INITIAL PLEADINGS.

A jury which had been fully and properly instructed on all of the elements of a claim of abuse of process fully considered the evidence presented to them and rendered a verdict in favor of Davis. Incredibly, the Court of Appeals reversed that verdict choosing to ignore both the correctness of the instructions as well as the fact that a complete record of what evidence the jury considered was not before them. Instead, the Court of Appeals reached back to the pleadings on file and ruled that Hatch's motion to dismiss should have been granted. Even if this Court should determine that the pleadings were indeed insufficient, this Court should also find that any plausible defect was fully cured not only through the civil discovery process, but when the jury received and considered this case based upon complete and accurate instructions.

A. Davis Sufficiently Pled a "Willful Act" in Accordance with Utah's Liberal Pleading Requirements.

An abuse of process claim requires: (1) an ulterior purpose, and (2) an act in the use of the process not proper in the regular prosecution of proceedings. *See Hatch v.*

Davis, 2004 UT App 38, ¶ 34. With respect to pleading this claim under Utah’s pleading requirements,

a complaint is required to give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. A complaint does not fail to state a claim unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.

Christensen v. Lelis-Automatic Transmission Service, 467 P.2d 605, 607 (Utah 1970); *see also, Peeples v. State*, 2004 UT App 328, ¶ 19, n.1.

With respect to these liberal pleading rules, Hatch’s argument is largely immaterial. *See* Respondent’s Brief at 34. He focuses on the fact that “Davis never amended his pleadings and never sought leave to amend his counterclaim for abuse of process, in order to include any further allegations or facts that would constitute a willful act for an abuse of process claim.” *Id.* Such argument misses the mark and ignores the purpose of the rules. Indeed, this Court has stated,

the fundamental purpose of our liberalized pleading rules is to afford parties the privilege of presenting whatever legitimate contentions they have pertaining to their dispute **subject only to the requirement that their adversary have fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. The functions of issue-formulation and fact-revelation are appropriately left to the deposition-discovery process.**

Williams v. State Farm Ins. Co., 656 P.2d 966, 971 (Utah 1982) (emphasis added).

With this standard in mind, Davis’ counterclaim provided adequate notice of the nature and basis of his abuse of process claim; thus, there was no need to amend.

However, even absent the liberal pleading rules, Davis did in fact allege in his

counterclaim an improper willful act associated with Hatch's use of process. Specifically, Davis alleged that Hatch sought to coerce him and the other residents of Boulder to comply with Hatch's position. (R. 5-6; R. 61-62). Under these circumstances, such coercion amounts to nothing short of extortion, and allegations of this conduct may clearly form the basis of a claim for abuse of process. *See Hatch v. Davis*, 2004 UT App 38, ¶ 33 ("usual case of abuse of process is one of some form of extortion") (citing Restatement (Second) of Torts § 682 cmt. b (1977)); *see also, Kool v. Lee*, 134 P. 906, 910 (Utah 1913) (citing as example a case involving extortion).

B. The Discovery Process Further Revealed the Facts Supporting Davis' Claim.

Also as noted above and in prior briefing to this Court, Utah's liberal pleading rules leave the functions of issue-formulation and fact-revelation to the deposition-discovery process. *Williams*, 656 P.2d at 971. Throughout discovery in this case, Davis clearly set forth his theory that Hatch used this lawsuit to compel Davis and others to comply with his views and as a means of living off the filing of frivolous lawsuits. Hatch was given more than reasonable and fair notice of Davis' theory and the type of litigation it would involve, a point Hatch completely ignores in his brief to this Court. *See* Respondent's Brief at 32-35.

C. The Properly Instructed Jury Verdict Moots a Defective Pleading.

Finally, and perhaps most importantly, a properly instructed jury verdict should trump any technical defect in an initial pleading. Hatch argues that Davis has failed to

state *any* law in support of his argument that this Court should consider the jury verdict as it relates to the abuse of process claim. *See* Respondent’s Brief at 34. To the contrary, Davis supported his argument with the analogous cases of *State v. Whittle*, 1999 UT 96, ¶ 13; *State v. Blubaugh*, 904 P.2d 688, 694 n.3 (Utah App. 1995); and *State v. Quas*, 837 P.2d 565, 566-67 (Utah App. 1992). Although criminal, these cases provide useful guidance. In each, a defendants’ post-verdict challenge to defects in charging or bindover were considered to have been mooted or cured by the juries’ ultimate verdicts. If a criminal defendant’s constitutionally guaranteed right to appeal is trumped by a jury’s verdict, it would seem to follow that in civil litigation where there are no constitutional rights at issue, that the same standard would apply.

In this case the jury returned their verdict after being directed on the elements of “abuse of process” **based upon an instruction proposed by Hatch**.⁴ Under such a circumstance, it is appropriate for this court to presume that any perceived defect in the wording of the complaint was cured when the jury was fully and accurately instructed on the elements of the claim.

D. Hatch Misconstrues Davis’ Argument

Finally, Hatch incorrectly states that Davis is arguing for a relaxation of the requirements for an abuse of process claim. *See* Respondent’s Brief at 35. He stated,

Given the allegations in Davis’ counterclaim for abuse of process, it is clear that Davis has failed to allege a “willful act” outside the regular course of the proceeding, as part of his claim for abuse of process. This element

⁴ This instruction was not appealed.


properly limits the claim to instances where the process is abused outside its regular course of proceeding, not simply when a party filing may have an ulterior motive. This is why the courts have refused to imply an improper act from an ulterior motive. This Court should not expand the requirements for an abuse of process claim to include such an implication, as argued by Davis; otherwise, any allegation made by a party that an action was commence [sic] for an improper purpose alone, i.e. to intimidate, would be sufficient to state a claim for abuse of process.

Id. However, Davis has not suggested that the simple act of filing a lawsuit with an ulterior motive is sufficient, or that an improper act is not required for an abuse of process claim. Rather, he has consistently argued that coercion and extortion of the type employed by Hatch should be considered improper acts, as should filing lawsuits as a money-making career, and should therefore satisfy the “willful act” requirement of abuse of process. *See* Petitioner’s Brief at 42; Hatch v. Davis, Case No. 20020778-CA, Brief of Appellant at 31.

CONCLUSION

Based on the foregoing, and the points and authority set forth in Davis’ initial Brief of Petitioner, this Court should reverse the Utah Court of Appeals’ decision and uphold the jury verdict and award favorable to Larry Davis.

DATED this 27th day of July 2005.



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MAILING CERTIFICATE

I hereby certify that on this, the 21 day of July 2005, a true and correct copy of the foregoing Reply Brief of Petitioner was mailed, postage prepaid, to Budge Call, 8 East Broadway, Suite 720, Salt Lake City, Utah 84111.

Michelle Carter

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