

2000

Howard F. Hatch v. Dwane J. Sykes : Brief of Appellant

Utah Court of Appeals

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Dwane J. Sykes; Sam Primavera; Attorneys for Appellees.

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IN THE UTAH COURT OF APPEALS

HOWARD F. HATCH

Plaintiff/Appellant

v.

DWANE J. SYKES, et al.

Defendants/Counter-Claimant
and Appellees

Case No. 20000250-CA
UTAH COURT OF APPEALS
BRIEF

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BRIEF OF APPELLANT

Appeal from lower court's finding that Dwane J. Sykes ("Sykes") did
not transfer properties to others with intent to hinder, delay, or defraud
creditors.

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COMPLETE LIST OF ALL PARTIES

List of parties to the proceeding in the Fourth Judicial District Court for Utah County whose judgment is sought to be reviewed are Plaintiff Howard F. Hatch; Defendants Dwane J. Sykes; William Christiansen; E. L. Roy Duce, the current Trustee of the so-called "Irrevocable Trust Agreement," AKA "The Dwane Sykes and Patricia Sykes Children's Trust and/or The Dwane and Patricia Sykes Trusts."

However, the initial proceeding in the Fourth Judicial District Court for Utah County filed on Nov. 30, 1995, included the following parties.

HOWARD F. HATCH

Plaintiff,
v.

DWANE J. SYKES, DENNIS L. SYKES, BENOY & ANGELA
TAMANG, Trustees of the co-called "Irrevocable Trust Agreement," AKA
"THE DWANE SYKES AND PATRICIA SYKES CHILDREN'S TRUST
AND/OR THE DWANE AND PATRICIA SYKES TRUST," JOHNNY M.
IVERSON & MAX S. FERRE.

Defendants.

Dennis L. Sykes, Benoy & Angela Tamang, Johnny M. Iverson and Max S. Ferre are no longer part of the case. They have been settled out or are not longer serving as in the case of named trustees.

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IN THE UTAH COURT OF APPEALS

BRIEF OF APPELLANT

JURISDICTION

This case was appealed to the Utah Supreme Court pursuant to Title

78, Chapter 2, Section 2 (3) (j) of the Utah Judicial Code, Utah Code, 1998.

The case was subject to assignment to the Court of Appeals and has been poured-over to the Court of Appeals for disposition under 78-2a-3 (2) (j).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

A. Sykes Allowed to Slander Hatch and make Himself a Hero.

1. A trial court judge's first obligation is to see that the
adversary parties are treated equally, without undue preference shown to either party. It is his first order of business to see that an "even playing field" is maintained throughout the trial. (Utah Code 78-7-5, Powers of Every Court. General Provisions Applicable to Courts and Judges.)

This is true in all cases, but especially critical in a trial by jury as the members of the jury can only view the facts in their proper light when they are unclouded by any kind of prejudice or bias. In this case, the debtor/defendant Dwane J. Sykes ("Sykes") was allowed to make manifold irrelevant statements as though they were statements of fact which was a great waste of the court's time and created confusion for the jury.

Furthermore, Sykes was permitted to make numerous comments of a derogatory nature about Plaintiff/appellant Howard F. Hatch ("Hatch") in an effective effort to prejudice the members of the jury in his own favor and to

go on endlessly bragging about himself to bias the jury in his favor. This constituted a clear violations of Rules 401, 402 and 403, of the *Utah Rules of Evidence* and was an **abuse of discretion** on the judge's part. No party should be allowed to make such prejudicial, inflammatory or slanderous statements, about the adverse party.

2. While it is true that whenever a witness begins to make statements that are irrelevant, immaterial or prejudicial, especially those which might bias the jury toward either party, an objection should be immediately voiced and such testimony interrupted. Unfortunately, Hatch's attorney failed on many occasions to do so out of fear of offending the trial court judge and in the interest of time. **But objections were made by counsel and sanctions should have been assessed against Sykes.** Even when objections were made, far too often, the judge let Sykes continue to ramble on with derogatory remarks. Regardless, the trial court judge himself has the primary responsibility of controlling the parties and seeing that neither party oversteps his bounds. From the very beginning of the trial, as noted above, Sykes was allowed way too much latitude both in presenting irrelevant material which delayed the proceedings and distracted the jury members from the real issues and/or made statements which had a tendency to favor

himself or influence the jury against the cause of Hatch.

Even in his opening statement Sykes was permitted to create a bias in his favor repeatedly without interruption or sanctions being issued by the judge. (Please see R-2469, Trial Transcript dated October 18, 1999, pages 3, 4, 9, 10, 11, 13 to 21, & 23) and in spite of plaintiff's attorney's repeated objections (pp. 6, 13, 14, 16, 17, & 18.)

3. Sykes was allowed to say such things as, "I am the victim myself." (ibid 3/16; "I tried to settle with Mr. Hatch . . . this is not about money . . . he (Mr. Hatch) said: 'I am going to pursue you and your family to your dying days.' And that is what he is doing." (ibid 9/6-13); "I guess I should probably add that during the last few months I have had a major stroke, and open-heart surgery, and major joint replacement . . . I had to learn to talk and walk again in the last few months" (ibid 10/12-16); "And the evidence will show that not only did he back date the date of the deed, and he lied about it, but then he admitted that he had lied about it and he admitted that he had" (ibid 17/22-25).

4. Sykes continued the same sort of inflammable and false statements in his direct examination. Please see his testimony as transcribed in R-2470, Transcript of October 19, 1999, pp. 6, 8, 33 wherein he was allowed

to make such statements as "I am 100 percent disabled, medically disabled. Actually, medically, physically disabled and emotionally disabled." (ibid 6/22-24) And in response to a question about whether he had received a law degree, he answered, "On the disability, I had a stroke right in the middle of the Duchesne thing about six years ago. It was only a mild stroke and a nervous breakdown. And then this year I had a traumatic stroke, which totally disabled me . . . " (ibid 8/3-6) (Even though this was totally nonresponsive to the question asked.) And then one final outrageous assertion: "After a 44-year relationship, because of the problems with Mr. Hatch, my wife divorced me." (ibid 33/7-8)

5. This constituted clearly an **abuse of discretion** on the judge's part as no party should be allowed to make such prejudicial, inflammatory or slanderous statements about an adverse party in a law suit. Nor should a party be allowed to make himself out as a hero when it is completely irrelevant and not supported by the facts and true evidence. See Rule 401, et seq., Utah Rules of Evidence.

6. *Additional supporting citations in the record.* Not only was Sykes allowed to make wild, untrue and gratuitous accusations against Hatch in his opening statement and while he examined himself as a witness, he was

allowed to ramble on interminably during his own direct, i.e., being examined as his own witness by himself. In spite of Judge Burningham's warning to Mr. Sykes to "make just brief statements of fact . . . we can't have you just be narrative either. So just state pertinent facts or identify documents." R-2473, Trial Transcript of October 25, 1999, 5/6-10. The witness began immediately with a long narrative about a totally irrelevant matter concerning some alleged zoning violation by Mr. Hatch, having nothing to do with the case, the intention being clearly prejudicial. Hatch's attorney, Mr. Abbott, interposed an objection. After allowing discussion between the parties for another several pages of testimony and voir dire examination, Judge Burningham not only allowed Mr. Sykes to continue testifying about such an irrelevant matter, but even granted him the liberty of introducing a prejudicial exhibit, No. 113, (ibid 13/7-11) being a letter from Orem City threatening Hatch with legal action for an alleged zoning violation. And in spite of the judge's warning that he was not going to allow Sykes to retry the case leading up to the money judgment against him, (ibid 7/7-15) he thus opened wide the door for all kinds of irrelevant and prejudicial material to come in.

7. Thereafter, Mr. Sykes was allowed to continue his narration for

another page and half on the same irrelevant and prejudicial matter, while acknowledging that it was part of the prior suit, which triggered another objection from Mr. Amott that was finally sustained by Judge Burningham (ibid 15/22-25). This did not stop Sykes, who tried to go right on with the same story, requiring the judge to remind Sykes the objection had been sustained and saying, "If you're talking about the '81 case, you need to move on" (ibid 16/5-6). However, the damage to Hatch's character had already been done.

Undaunted, Sykes returned immediately to say, "Orem City was an active participant in that suit and they filed a ---" which caused the judge to remind him to "move away from that and just get back to this lawsuit, okay"(ibid 17/12-13). Nevertheless, Sykes, as his own witness plunged right back into narrative on matters clearly out of the prior suit, "very briefly and quickly," as he put it (ibid 17/14), then goes for 3 and a half pages of testimony until finally Mr. Abott interjects an objection which the court sustained. But the irrepressible Sykes plunged right back on the same tack for another three full pages (ibid pp. 21, 22 & 23).

8. In spite of the judge's warning that he must "Hurry right along" (ibid 36/11), Sykes continued his expansive narrative for another 3 pages

when he said he wanted to "summarize his opening statements (39/12-13). This gave the judge some pause, but he allowed Sykes to go on to extol the virtues of the children's trust, and how it had benefited them, hoping to thus influence the jury into not disturbing the "assets of the trust" in order that he might pay his own debts.

Which brings us to the most outrageous of all of Sykes maneuvers. The court allowed Sykes to introduce a totally irrelevant and self-serving article, over Mr. Abott's strenuous objections (ibid 42/19-21), which Sykes claimed had appeared in the local newspaper, extolling his merits as a member of the "Explorers Club of New York City" (ibid pages 41 through 43). Please see **defendant's exhibit 60** in the record, entitled: "Have Guts, Will Travel," for the full article, but let us quote just a few sentences from Sykes direct testimony: "I was one of four Utah's (sic) who had been elected to the explorer club, that's with other people such as Neil Armstrong, who walked on the moon and the people who climbed Mount Everest, and Richard Bird, etc." (ibid 41/13-16). Sykes goes on to postulate that his own life was possibly the model for the movie character "Indiana Jones," "a boy scout from a little tiny town in Utah who is adventurous and goes off and does all kinds of things . . . " (ibid 42/13-14.

9. As Mr. Sykes continued his "direct testimony," more appropriately
his "disparaging and prejudicial narrative," he was allowed to make a direct
attack against Hatch in these words: "In the process of my ship sinking in
the Uintah Basin I had a nervous breakdown. I had a stroke, a very minor
stroke at that time. I began seeing a psychiatrist. One of my psychiatrists--
Mr. Hatch harassed both me and the psychiatrist. His name ---
attempting to cause me duress with the psychiatrist, and asking for
information. I had a mental evaluation that said I had suffered post
traumatic stress disorder as a result of the -- my ship sinking in Duchesne . .
. " (ibid 55/10-17). (Emphasis added.) He then proposed to "testify"
concerning the "reputation of Howard Hatch in the community for honesty
and veracity" (ibid 55/23-24). Of course, the plaintiff's attorney strenuously
objected to such testimony, which the judge sustained. But this did not stop
Sykes from proposing to offer "specific names and signatures" (ibid 56/16).
He was only cut off when the judge said, "So don't argue with me any
more." (ibid 56/22).

10. From the very beginning of the trial, as noted above, Sykes was
allowed almost unlimited latitude both in presenting irrelevant material
which distracted the jury members from the real issues and/or statements

which had a tendency to favor himself or influence them against the cause of Hatch.

11. The trial court **abused its discretion** by allowing Sykes to continue to slander Hatch with irrelevant, derogatory and mostly false charges, while making himself the victim, alleging he had suffered under Hatch's abusive conduct. There was "no reasonable basis for" allowing the diatribe of Sykes. The whole scenario was "arbitrary and capricious." See generally *State v. Pena*, 869 P.2d 932, 935-39 and *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993) and *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct. App. 1993). The standard of review is Abuse of Discretion.

B. Inappropriate Jury Instruction # 19

1. Over the plaintiff's very strenuous objections, the trial court allowed Sykes to insert a jury instruction that challenged the integrity of Hatch's cause and made jury members wonder just who had dirty hands and how to handle him. In what way, shape or form, could the issue of "unclean hands" come into play when the action was merely to collect an honest debt based on a legal judgment against Sykes? And especially one based not alone on a judgment in the appropriate lower court but one tested on appeal? (See Court of Appeals case number 960561-CA, appealing the

reduction of judgment in 4th District Court case No. 810457127, a copy of which final judgment can be found as Plaintiff's Exhibit 45 in the subject case on appeal.)

We review challenges to jury instructions under a "correctness" standard. *See Steffensen v. Smith's Mgmt. Corp.*, 862 P.2d 1342, 1346 (Utah 1993) *Child v. Gonda*, 972 P.2d 425, 429 (Utah 1998)

2. To allow jury instruction 19 to go to the jury was a **violation of case law** on the part of the lower court. See Rule 51, *Utah Rules of Civil Procedure* and *Powers v. Gene's Bldg. Materials, Inc.*, 567 P. 2d 174, 176. The jury instruction was not "supported by the evidence." Including # 19 as a jury instruction created great prejudice toward Hatch and his case.

3. (See Vonda Bassett's report numbered R-002752, pages 3 & 4 dated October 26, 1999.) Here the judge and Mr. Sykes were considering the clean hands jury instruction. On page 3, lines 23-24, Mr. Sykes set forth his requested jury instruction, and he described it as "Two prongs of that: Unclean hands and he who seeks equity, must do equity." On page 3 Sykes, at his own request, was excused and the attorneys, with the judge, considered the jury instructions "off the record." It was at this time the plaintiff (off the record) vigorously objected to and argued against including

jury instruction 19.

4. The next day (October 27, 1999), on page 3 of Vonda Bassett's report, the Court speaking to Sykes stated: "And Mr. Abbott, I know, **objected** to your equity instruction, **but I did give it**. So with that, should we go on the record? Maybe we're on the record." R-002753 (Lines 17-20.) (Emphasis added.)

5. In Vonda Bassett's report for October 27, 1999 (R-002753) on pages 22-24 the following exchange took place: The Court: "We can return, Mr. Abbott, to the objections you had to any of the jury instructions." Mr. Abbott: "I think it would just be the one that was given on the equity instruction. My objection as I expressed it this morning -- that even if this is considered properly a matter of equity or a case of equity, the very nature of the case was somewhat unique in that none of the testimony or even the facts precedent to what was to be received came from the plaintiff other than the fact that he had to have a judgment he was trying to collect, which is a matter of record on court. And, therefore -- and also in light of the fact that I had made numerous objections during the trial to evidence that came in regarding actions of Mr. Hatch that I felt were irrelevant to the issues the jury had to decide."

"It seems to me the equity instruction given about having clean hands, while certainly an axiom of the law and a truism about what equity is, nevertheless improperly focused the jury on issues that were not in evidence, that were not to be decided by them, and really were not at issue. And that was my objection to using it. **I felt it was unnecessary and could cause prejudicial harm to my client.** (Emphasis added.)

6. Sykes reveals his modus operandi in the case. Following Mr. Abbott's recognition that the jury instruction on the clean hands doctrine "could cause prejudicial harm to" Hatch, the court asked Sykes if he "would like to respond?" Sykes' response was:

"I'd like to respond. Of course, I left this to the discretion of the court, other than having requested it. I'll respond in that the court could have very well, according to the law, and the CGS citations in my summary judgment motion -- **the court could have instructed the jury on this that even if they found that all of the plaintiff's allegations were true and that Dwane Sykes was totally at fault, that they could still not award any relief to the plaintiff Hatch if they found him to have unclean hands.**" (Emphasis added.)

In this admission by Sykes, he reveals, without apology, his whole

purpose (his modus operandi) in dragging Hatch through the mud and in giving Hatch the tar brush treatment without any justification. It also makes clear his reason for requesting Jury Instruction 19 on the clean hands doctrine.

7. This was not a case in Equity. It was an attempt to collect a valid, court determined debt from Sykes. And even had it been a case in Equity, Hatch entered the case with clean hands and prosecuted the case with clean hands from the beginning to the end. Sykes "m. o." was to confuse the jury with slanderous statements against Hatch that had nothing to do with the debt collection, the case under consideration. In spite of objections by plaintiff's counsel and court admonishments, Sykes succeeded in clouding the issues with case unrelated accusations against Hatch and then succeeded in getting the clean hands doctrine put before the jury, in Jury Instruction 19, on Equity and clean hands.

8. Hatch had clean hands throughout the trial. He was simply trying to collect on a court ordered debt. The dirt that Sykes threw at Hatch had nothing to do with the trial. So even if the voiced criticisms by Sykes had been true, they had nothing to do with the trial as the law requires. The trial court should have put a muzzle on Sykes and should have forewarned the

jury.

9. The jury instruction 19 had no place in this case and its use was not legally allowed and was more than a clear abuse of discretion with what was allowed in the record. Surely, the jury reasoned, if Hatch has unclean hands as Sykes has charged him with throughout the trial, then we certainly cannot favor Hatch with a verdict and be true to Jury Instruction 19 that the court has charged us with.

"In order for the doctrine of (unclean hands) to apply, the improper conduct must relate directly to the underlying litigation. In other words, the inequitable conduct must have an immediate and necessary relation to the claims under which relief is sought." *Nakahara v. NS 1991 American Trust*, 718 A.2d, 518, 522 (Del. Ch. 1998). Cited by *AJAY SPORTS, INC. v. CASAZZA*, 1 P.3d 267, 276. Colorado Court of Appeals, Div. IV, March 16, 2000. (Emphasis added.)

"The unclean hands doctrine (also known as the clean hands doctrine) 'stands for the proposition that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful **as to the controversy in issue.**'" *Gilbert v. Nampa Sch. Dist. No. 131*, 104 Idaho 137, 145, 657 P.2d 1, 9 (1983) (internal quotations omitted). **A trial court's application of the doctrine is subject to appellate review for abuse of discretion.** (Cited in *Kirkman v. Stoker*, 6 P.3d 397, 400 (Supreme Court of Idaho, July 7, 2000) (Emphasis added.)

"In order to successfully raise the defense of 'unclean hands,' the defendant must show: (1) that the plaintiff perpetrated some wrongdoing; and (2) **that the wrongful act related to the action being litigated.**" *Hoffman Construction Company v. U.S.*

Fabrication & Erection, Inc. 32 P.3d 346, 360, Supreme Court of Alaska (2001). (Emphasis added.)

10. Other cases, likewise, hold that any claim charging unclean
hands to another party must show that the party acted unfairly and with
"fraud or deceit **as to the controversy in issue.**" See *Knaebel v. Heiner*,
663 P.2d 551, 554 Supreme Court of Alaska,(1983); *Martin v. Allbritton*,
862 P.2d 569, 573. Court of Appeals of Oregon (1993). *Hoopas v. Hoopas*,
861 P.2d 88, 92. Court of Appeals of Idaho (1993). (Emphasis added.)

Unclean hands "argument is without merit" where plaintiff "did not
seek equitable relief." *Ayer v. General Dynamics Corporation*,
625 P.2d 913, 915. Court of Appeals of Arizona, Div. 1 (1980)

11. With the lower court allowing a plethora of statements by Sykes
degrading Hatch, impugning his honesty, challenging his integrity and
simply giving him the tar brush, dirty treatment, while building himself as
the good guy, the hero of our day, the one who has suffered endlessly over
the years because of Hatch's dirty treatment, and then allowing the "unclean
hands" doctrine to go to the jury for their consideration was a clear violation
of case law as clearly pronounced by numerous courts on the subject. We
believe this abuse of discretion in allowing false, slanderous and irrelevant
charges into the record and the illegal use of jury instruction 19, lost the
case for Hatch. Hatch's case was strong in his effort to collect on a court

order judgment, with Sykes playing loosely with properties and money in his efforts to conceal his assets from creditors.

12. The trial court violated case law when it allowed jury instruction 19 to go to the jury. The Instruction reads: "EQUITY A remedy of equity, and one who invokes it must have clean hands in having done equity himself." (R-2135).

There was "no reasonable basis" to allow that instruction to go to the jury. *State v. Pena*, 869 P.2d 932, 936-39 (Utah 1994), *Crookston v. Fire Ins. Exch.* 860 P.2d 937, 938 (Utah 1993).

Giving in to Sykes' request to include the "clean hands" doctrine, with no justification for it, was an "arbitrary and capricious action." *Kunzler v. O'Dell*, 855 P.2d 270, 275 (Utah Ct. App. 1993).

13. This was not a case in equity. Hatch had scrupulously clean hands. He was attempting to collect a court judgment against Sykes, from assets Sykes was doing all he could do to conceal.

It was Sykes who wanted the "clean hands" doctrine to become part of the case after he had dragged Hatch's good name through the mud and did his best to make himself a hero.

14. Abuse-of-Discretion Standard: The trial court abused its

discretion when it allowed so many irrelevant scandalous accusations by Sykes to be made a part of the record. "Where the trial court may exercise broad discretion, we presume the correctness of the court's decision absent 'manifest injustice or inequity that indicates a clear abuse of . . . discretion.'" *Childs v. Childs*, 967 P.2d at 944. "However, '(w)hile trial courts have broad discretion . . . that discretion must be exercised within legal parameters set by appellate courts.'" *Cummings v. Cummings*, 821 P.2d 472,474-75 (Utah Ct. App. 1991).

15. By allowing Jury Instruction 19 to go to the jury, the trial court committed reversible error that affected substantially the rights of Hatch. The error was substantial and prejudicial. Counsel for plaintiff preserved the error as outlined above by his strenuous objections.

Had the case been in Equity then the use of Jury instruction 19 would call for a discretionary ruling. But the case was not in Equity. Hatch had clean hands, so the standard of review is in law. There was no legal right to use jury instruction 19 with the clean hands doctrine.

16. Here the question is whether the facts in this case justify the use of Jury instruction 19. Plaintiff claims this is a question of law allowing no deference to the lower court and should be determined by the appellate

court. This was not a case in Equity and there was no justification for the use of jury instruction 19. None of the other jury instructions taken separately or all together can overcome the damage done with jury instruction 19. So allowing jury instruction 19 in this case was grounds for reversal, even when jury instructions are considered in the aggregate.

17. There was no plaintiff dirty hands in the case---only dirty hands of the defendant with his false charges and misleading statements. Use of jury instruction 19 confused the jury and lost the case for Hatch. When the judge allowed instruction # 19 to go to the jury, the jury must have felt that the judge felt the plaintiff had dirty hands but the jury was to make their own decision. For what other reason was instruction # 19 sent to the jury? There was simply no reason at all to send jury instruction 19 to the jury.

Sykes' "m. o." paid off, for him, and he was able to continue to conceal his assets and keep Hatch from collecting on the debt.

The error of the Judge in allowing jury instruction 19 to go to the jury "was substantial and prejudicial." *State v. Kiriluk*, 975 P.2d 469, 472-473. Utah Ct. App. 1999).

18. At the conclusion of the jury trial, Judge Burningham acknowledged that Sykes wasted time and loaded the case with voluminous

irrelevant verbiage when he said to Sykes:

I think that perhaps it would have been better had you had counsel. It would have been a four-day trial or less. It has taught me something. If I ever have a pro se person doing a jury trial again, I'm going to start off at the very beginning setting some time restraints and making sure you focus on the **relevant things**. (R-002753, 25/25 and 26/1-6) (Emphasis added.)

This case went on for seven days. If Judge Burningham's statement is correct about a four day trial, that means Sykes spent 3 days unloading on the jury with mostly **irrelevant** things. Unfortunately most of that irrelevant material was in finding fault with Mr. Hatch and making him the bad guy---the guy with dirty hands. Sykes succeeded with this "m. o." when he got the judge to give the jury instruction # 19 on the clean hands doctrine.

A clean hands jury instruction is not allowed when the plaintiff has not used unclean hands in the case being considered. (See cases cited above.)

19. A trial court **abuses its discretion** when it allows defendant to make unclean hands charges against a plaintiff, outside of the case under consideration, even if the statements are true. (See cases cited above.)

A clean hands jury instruction is not allowed when the trial is not in

Equity, nor when the plaintiff is not guilty of unclean hands in the trial in issue. The trial court committed reversible error in both counts---abuse of discretion and violating case law by allowing jury instruction 19 to go to the jury.

We know the power to tax is the power to destroy. We might also say:

The power to issue a jury instruction on the clean hands doctrine, when the plaintiff has clean hands, but the defendant has charged plaintiff repeatedly with unclean hands without legal and factual support, is the power to destroy the plaintiff's cause.

None of the other jury instructions in this case, separately or taken together, can overcome the damage done with the use of # 19.

C. Wrongful Summary Judgment granted Christiansen.

1. Judge Eyre granted Christiansen summary judgment dismissal from the case before he had even been served and brought into the case.

The interim judge who handled matters earlier in this bifurcated case, the Honorable Donald J. Eyre, committed a very serious error by granting defendant William Christensen ("Christensen") summary judgment dismissal without ever being served or brought into the case (R-249).

The Standard of Review on this issue is "a question of law, reviewable for correctness." See *Stokes v. Van Wagoner*, 987 P.2d 602, 603. (Utah 1999). *URCP 4, Utah Code Annotated*, requires personal service upon all parties to bring them under the court's jurisdiction as defined in *Rocky Mountain Claim Staking v. Frandsen*, 884 P.2d 1299, 1301. (Utah Ct. App. 1994), to wit: "Personal jurisdiction means the power to subject particular defendant to the decisions of court." "The requirements of Rule 4 relating to service of process are jurisdictional, as per *Garcia v. Garcia*, 712 P.2d 288, 290. (Utah 1986), The court held: "There being no effective service of process, the court was without jurisdiction . . ." See also *Martin v. Nelson*, 533 P.2d 897 (Utah 1975).

Rule 4 (a), Utah Rules of Civil Procedure, provides that a summons shall be deemed to have issued when placed in the hands of a qualified person for the purpose of service. *Fibreboard Paper Products Corp. v. Dietrich*, 475 P.2d 1005, 1006. (Utah 1970)

Service of summons in conformance with the mode prescribed by statute is deemed jurisdictional, for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction. . . . The proper issuance and service of summons is the means of invoking the jurisdiction of the court and of acquiring jurisdiction over the defendant; these cannot be supplanted by mere notice by letter, telephone or any other means. *Murdock v. Blake*, 484 P.2d 164, 167. (Utah 1971).

Since Christiansen had never been served with a summons, he never

came under the jurisdiction of the court. Without jurisdiction, the court had no authority to issue a dismissal and award Christiansen attorney fees and sanctions. Attorney for Hatch assured the court that Christiansen was not served "nor was any attempt made to serve him." See Bottom of **R-0247**. But even if the court had jurisdiction, it made serious errors in handling the issues and those errors are reversible. See the following:

*2. In addition to the above, Judge Eyre seriously erred by granting Christiansen's motion to dismiss, awarding attorney fees and sanctions, within 11 days of it being served on the **Plaintiff** (actually when considering 3 days for mailing, it was only 8 days).*

*3. Judge Eyre denied plaintiff the **right to debate the issues** as provided by Rule 4-501 (1) (B) of the Utah Rules of Judicial Administration.*

Rule 4-501 (1) (B) of the *Rules of Judicial Administration* provides for the parties to properly debate the issues, and grants the opposing party 10 days in which to file a memorandum in opposition, and another 5 days for the moving party to issue his reply memorandum. As this matter is based on the rules of court, it is therefore a **matter of law and the Court of Appeals need not allow any particular deference to the trial court.**

(Emphasis added.) See *Grayson Roper Ltd. v. Finlinson*, 782 P.2d 467, 470 (Utah 1989); as cited in *American Vending Services, Inc. v. Morse*, 881 P.2d 917, 919-920. (Utah App. 1994).

Furthermore, "When we review a judgment entered on a motion to dismiss pursuant to Rule 12 (b) (6) of the Utah Rules of Civil Procedure, 'we are obliged to construe the complaint in the light most favorable to the plaintiff and to indulge all reasonable inferences in its favor.' " *Heiner v. S. J. Groves & Sons Co.* 790 P.2d 107, 109. (Utah Ct App 1990).

And as Judge Eyre did not make reference to any of the Plaintiff's arguments whatsoever in his order (R-2201) or consider the plaintiff's offer to voluntarily dismiss Christensen, nor wait to hear the various contentions, it is obvious he did not do this.

The Honorable Donald J. Eyre has clearly abused the rules and the discretion granted lower courts when he refused to hear the Plaintiff's motion for reconsideration, characterized as a "Reply to Christiansen" (R-0249) or properly consider his response to the motion to dismiss by a named, but as yet un-served defendant, Christiansen. This, even in the face of Plaintiff's offer of voluntary dismissal. Rather, the judge went on to award attorney's fees against the plaintiff and to impose sanctions under

Rule 11, *Utah Rules of Civil Procedure*, allowing a jury to determine the extent of damages due to Christiansen on his counterclaim. The Standard of Review in this instance comes under the "**clearly erroneous**" category, the "**correction of error**" and determination of an "abuse of discretion" standard. See *Barnard v. Sutliff*, 846 P.2d 1229, 1233-1235. (Utah 1992).

"Plaintiff's Response Reply to Christiansen's Motion to Dismiss And Counterclaim; And Plaintiff's Motion For Dismissal and/or Removal of Christiansen as a Named Party Defendant," (**R-0249**) makes it clear Hatch did not accept Christiansen as a defendant under the jurisdiction of the court nor did he consider the court's rulings on the Christiansen's matter, that came later, proper and binding, but subject to review. The court completely disregarded the arguments of Attorney Amott and later issued its rulings granting attorney fees and sanctions. Those rulings, Hatch has appealed.

CONSTITUTIONAL PROVISIONS, ETC.

The *United States Constitution*, Article II, Section 2 (1) states that "The judicial power shall extend to all cases, in Law and Equity. . . ." The *Utah Judicial Code*, Section 78-7-5 states regarding the "Power of every court," (9) "to amend and control its process and orders to conform to law and justice." Rule 8 (f) of the *Rules of Civil Procedure, Utah Code*

Annotated, says: "*Construction of pleadings*. All pleadings shall be so construed as to do substantial justice." Rule 11, *Utah Rules of Civil Procedure*, provides as follows: "(c) *Sanctions*. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. (c) (1) *How initiated*. (c) (1) (A) *By motion*. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, **but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenge paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately correct**. If warranted the court may award to the party prevailing on the motion the reasonable expenses and attorney fees..." Rule 401, et seq., *Utah Rules of Evidence* (as attached in the Addendum). Rule 5 *Utah Rules of Civil Procedure*, "Instructions to jury; objections." (as Attached in the Addendum) (Emphasis added.)

A STATEMENT OF THE CASE AND ATTENDANT FACTS

NATURE OF THE CASE: It was to have been a simple collection action.

BACKGROUND: Based on events that transpired in the mid 1970s, Hatch obtained a judgment against Sykes, his wife Patricia and his brother, Dennis Sykes, for slander of title and a number of other allegations. A jury awarded Hatch a judgment for damages in the amount of \$509,942 (R-665). The defendants succeeded in getting this reduced to \$141,694 based on a trial court ordered "amended judgment" (R-662). But on appeal, this court (Case No. 960561 CA), remanded the case to the trial court with instructions to restore much of the money judgment award, resulting in a final judgment of some \$260,000 (Plaintiff's exhibit No. 45, p. 8).

Immediately after the original jury verdict, Sykes' brother, Dennis Sykes, who had been a co-defendant in the action, deeded off to "Benoy and Angela Tamang, Trustees" property which he had been holding for what appeared to be Dwane and Patricia Sykes, the other two defendants, (R-667 and plaintiff's exhibit No. 33). Plaintiff Hatch, acknowledging that the defendants, Dennis and Patricia Sykes, had only played minor roles in the events giving rise to the judgment, agreed to settle with them for a fraction of the judgment amount, intending to settle the matter of the remaining sum

due directly with the defendant Dwane Sykes.

Attempts to execute on property at the Sykes' estate proved fruitless as everything of any real value was claimed by Dwane Sykes as exempt from execution or to have been given to other family members. With the bulk of the Sykes' assets having been transferred to other entities, it was necessary for Hatch to initiate this action in an attempt to collect the sums due. In the initial framing of the complaint, filed November 30, 1995 (R-20), it was based on allegations of fraudulent conveyances to defeat creditors. But as additional discovery was had, there appeared to be evidence that the Sykes had some years earlier created at least one trust that had the appearance of being "irrevocable." It therefore became necessary to amend the complaint to include not only the allegations of fraudulent conveyances but also charging that Sykes had been using the vehicle for his own personal benefit to defeat creditors, that what was alleged to be "irrevocable" might more truly be construed as "self-settled trusts," revocable, or living trusts, where he himself was the *de facto* trustee and the principal beneficiary.

The court was consequently asked to set aside the conveyances to the trust and make these assets available for execution in satisfaction of the

debts of Sykes, as his interest might truly appear (See Second Amended Complaint Including Petition for Determination of Validity and Assets of Trust, (R-688).

At trial, evidence was presented to show that the Sykes, for a number of years, had a personal line of credit at Far West Bank out of which large sums of money had been spent (Transcript of proceedings, 10/20/99, 28/19-25 & 29/1). When the sums had built up to some \$135,000 (ibid 33/8) without serious attempts to retire the debt, the bank demanded satisfaction (Iverson Deposition, op cit.,83/3-7). See also Iverson's testimony at trial, (R-002747, page 43, lines 17-25). The matter was settled by liquidating a "trust" asset, the Lynnwood Park property rental house. (Transcript of proceedings, 10/20/99, 39/14-16). It was also shown that Dwane and Patricia Sykes, the "trustors" of the "Sykes Family Trust" had been the beneficiaries of a very valuable 7-acre estate where they lived, for the nominal amount of \$501 per month rent. (Transcript, 10/19/99, 134/2-6). That Dwane Sykes had run the affairs of the trust single-handedly for many years, was clear from the testimony of the so-called "trustees." For instance, Johnny Iverson admitted he had never received a copy of the original trust agreement, even though he had requested to have a copy

many times. (See Iverson Deposition in Probate Case. No. 943400122, dated 9/19/94, published by permission of the Trial Court and filed in this case with the Court of Appeals on February 19, 2002, p. 91, lines 22-25, also 92/1-17); nor a schedule of properties belonging to the trust, (ibid 39/19,20) because Dwane Sykes was holding them" (ibid 39/9). He also admitted he had never received a copy of the trust's "schedule of assets," (ibid 39/23, 24); or any of the files relating to business of the trust; (ibid 40/7-8) or that he ever paid the real property taxes on trust properties (ibid 40/24-25) or ever filed any tax returns for the subject trusts (ibid 44/14-15). In fact he said it was Dwane Sykes who prepared the tax returns for the trust (ibid 44/12-13). It was also Dwane Sykes who balanced the checkbook, according to his trustee, Johnny Iverson (ibid 34/11-13).

In at least one instance, this same trustee acknowledged having signed 50 checks in blank on the trust account so that Dwane Sykes could use these funds for whatever purpose he chose without recourse to the nominal trustee, his brother-in-law (ibid 35/1, 6 & 7, 8, 9 & 10, 24 & 25). See also Transcript of proceedings in this case, 10/19/99, pages 65 & 69 -- 65/8-12 and 69/17-20). Johnny Iverson gave Dwane Sykes notice he was withdrawing as trustee in the early 1980s (ibid 54/7), that while he did act

as trustee in the purchase of a rental house in Orem for the trust in 1986, (referred to by Johnny Iverson as the "Palisades house," otherwise known as the "Lynnwood property"), he considered himself relieved of those duties as of that year (ibid 48/5-6) until he considered it necessary to sign a formal withdrawal. (ibid 47/12-13). He gave as his reason for withdrawing as trustee lack of time personally and also that "I suspected that there were things going on in the trust that I didn't know about." (ibid 54/2-3) For one thing he discovered that properties had been put in his own personal name which should have been put into the trust (ibid 51/22 & 53/19-23). Not being satisfied that Dwane Sykes had terminated his duties as trustee or made provisions to indemnify him personally or reimburse him for his expenses, he sued the trusts. (See Probate matter 943400122, in the Fourth District Court, Utah County, Utah). He had previously made it clear he would not be the custodian of the books or trust agreement papers and had demanded he be released from further obligations. He had therefore found it necessary to bring suit against Sykes and the trust to be released of his responsibilities as "trustee."

In handling the listing and/or sale of numerous of so-called trust properties, it was Dwane and/or Patricia Sykes who signed documents

offering them for sale and signing closing documents. (See Plaintiff's exhibit No. 1 where Patricia and Dwane Sykes' signatures are to be found as the "sellers" of the Lynnwood Park property at 949 E. 1120 South, Orem, Utah, a property affirmed by the Sykes as having been in the trust from its acquisition to the final sale). In a number of instances, "trustees" claimed no knowledge about the affairs of the trust, saying they did not know that various of the trust properties were even in the corpus of the trust.

In another instance, one involving Dwane Sykes' brother, Dennis Sykes, he had been formally called to serve as trustee for a time but resigned that post shortly thereafter, only to have property remain in his name which was supposed to be "trust property." But as soon as judgment was had against him, as well as Dwane and Patricia, for the torts against Hatch, and he found that a number of properties remained in his name which should have been "trust property," he immediately quit claimed all interest in these real properties (Plaintiff's exhibit No. 33). At trial, Dwane Sykes' explanation for this discrepancy was that title had remained in Dennis' name during all those years acting as a "nominee" for the trusts.

Disposition in the Court Below: -- the Case in Chief:

Either the jury failed completely to identify the actions of fraud and

self-serving actions of the defendant Dwane Sykes, as were evident in the case, or they had been so prejudiced against the plaintiff Hatch, or biased in favor of Sykes, that their verdict reflected no cause of action against any of the properties said to have been fraudulently conveyed (R-2219-20).

Disposition of the Rule 11 Sanctions:

Judge Eyre, having allowed for the imposition of Rule 11 sanctions against Hatch, a bifurcated jury trial was held in July of 1999, the outcome of which was that the jury awarded a judgment of \$1,000 against Hatch under Christiansen's counterclaim for damages (R-2193).

SUMMARY OF ARGUMENT

The Appellant brings 5 separate issues before the court for review. However, these can be grouped into 2 different segments. All 5 issues have to do with what we perceive as either a strong prejudice against Hatch and/or his attorney or a gross misunderstanding of his duties as judge and arbiter.

The first two issues involve Judge Burningham's direction of the proceedings at the jury trial held in October of 1999.

1. Issue one concerns the lax way in which the judge conducted the trial, allowing a tremendous amount of irrelevant and immaterial

testimony to come before the jury. This would not have been so damaging to Hatch's cause had not virtually all of it been introduced in an effort to either prejudice the jury against the cause of Hatch or to create a bias in favor of Sykes. Allowing so much irrelevant material in also worked against Hatch's interest in another way. It not only created confusion in the minds of the jurors by obscuring the real issues in the case but also used up much of the time needed by Hatch to make a very difficult case, i.e., to show by a preponderance of the evidence that the so-called trust property was being treated as private property by Sykes, and that virtually all of the transfers which had been made into the trust had been to defeat creditors. Because of the difficulty of this task, Hatch's attorney was very sensitive to the time constraints. He rightly perceived that part of the defense's strategy was to burn up the time by endless objections put forth frivolously by the attorney representing the Sykes' trusts and by Sykes, who was allowed to represent his own interests pro se, bringing before the jury nothing but irrelevant and scandalous assertions designed to confuse and prejudice the jury. And because Hatch's attorney was so sensitive to the shortness of time, he did not always object as strenuously to these proceedings as he should have, either in an effort to conserve the time allotted or out of fear of

offending the trial judge.

2. The second issue for review has to do with this same spirit of prejudice created in the minds of the jury at the October trial before Judge Burningham. This time it was in allowing a jury instruction to be included entitled, "Equity," which suggested that Hatch had come before the jury with "unclean hands." In retrospect, one must wonder if the judge, having allowed Sykes to make so many irrelevant and slanderous assertions, as though they were statements of fact, was not prejudiced himself to such an extent that he would allow such a jury instruction to be considered. How could such an instruction not prejudice the jury even more against the cause of Hatch.

3. The final three issues to be reviewed all stemmed from the actions of Judge Eyre during the preliminary proceedings in November of 1997. The Defendant Christiansen's attorney submitted a motion to dismiss his client even before he was served. Judge Eyre not only (a) allowed him to be dismissed without considering any of the arguments put forth by the attorney for Hatch as to why he had been named as one of the proposed defendants but also (b) granted attorney's fees and (c) sanctions against Hatch in a decision issued within 11 days of the motion being filed. As the

details in our "Argument" will show, this not only violated at least 3 separate rules of the court but manifested a very serious prejudice against Hatch and/or his attorney by refusing to look at any of the arguments put forth at the time or review his decision subsequently. This one ruling subjected Hatch to the payment of attorney's fees, sanctions and a damage award at the end of a jury trial held in July of 1999. It also created a prejudice that may well have carried throughout the proceedings and affected the final outcome before Judge Burningham at the jury trial held in October of that year.

Our cause before the jury was sabotaged by Sykes, aided and abetted by the attorney representing the trusts being attacked, when the trial judge, Judge Burningham, allowed a tremendous amount of immaterial, irrelevant and scandalous material to be brought before the jury in the face of much hard evidence that the so-called "irrevocable trusts" were used to defeat creditors by allowing the so-called "trustors," Dwane and Patricia Sykes, his wife, to treat the property of the trust like a self-settled, or revocable living trust. Had the trial been handled in a fair manner, and according to the proper rules of evidence, it is our belief that Hatch would have prevailed at trial and been allowed to execute against the assets of the so-called trusts.

Hatch was unfairly subjected to penalties by Judge Eyre in his premature decision to dismiss Christiansen and issue various sanctions, including those under Rule 11 of the Utah Rules of Civil Procedure. And that Hatch should have been allowed to proceed against land being held in Christiansen's name for the benefit of Sykes.

CONCLUSION

Judge Burningham **abused his discretion** when he continued to allow scandalous, irrelevant accusations made by Sykes against Hatch to become part of the record. These continuous efforts made by Sykes to drag Hatch through the mud, to dirty his name, took place throughout the trial to make Hatch a target when Sykes later proposed Jury Instruction # 19, which Judge Burningham mistakenly approved.

When the Judge approved jury instruction # 19 in this case he went beyond what the law allows. There was nothing in this case that would allow the use of the clean hands doctrine. The plaintiff had clean hands and this case was not in Equity.

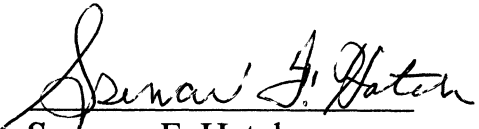
"When it comes to reviewing trial court determinations of law, however, the standard of review is not phrased as "clearly erroneous." Rather, appellate review of a trial court's determination of the law is usually

characterized by the term "correctness." Controlling Utah case law teaches that "correctness" means the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Judge Eyre failed to follow the law when he dismissed Christiansen from the early part of the bifurcated case and granted attorney fees and sanctions to Christiansen. Appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of the law.

Plaintiff Hatch requests the Court of Appeals to reverse the holdings of the lower court in both parts of the bifurcated case and remand the case back to the Fourth Judicial District court for a new and fair trial.

Respectfully submitted this 9th day of August, 2004.

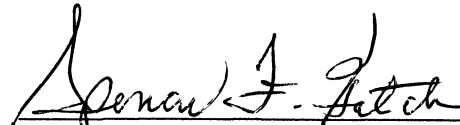

Spencer F. Hatch
Attorney for Appellant,
Howard F. Hatch

Certificate of Service

I hereby certify that on the 9th day of August 2004, eight copies (including one original) of the foregoing Brief of Appellant was personally served upon the Clerk of the Utah Court of Appeals, and that two copies were served by United States mail, postage prepaid, to each of the following at the addresses shown:

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Spencer F. Hatch

ADDENDUM

- A. Jury Instruction 19**
- B. Jury Instruction 1 to 38**
- C. Rule 5, Utah Rules of Civil Procedure (Service of Pleadings)**
- D. Rules 401 to 403, Utah Rules of Evidence (Relevancy)**

JURY INSTRUCTION 19

EQUITY

A remedy of equity, and one who invokes it must have clean hands in having done equity
himself.

*Clean
Hands*



A

✓

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
6/28/11 TK Deputy

JURY INSTRUCTION 1

INTRODUCTION

B

Members of the jury, I would like to thank you for your attention during this trial. I will now explain to you the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions, what we call your deliberations. Please pay attention to the legal instructions I am about to give you. This is an extremely important part of this trial.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. The order in which the instructions are given has no significance as to their relative importance. If a direction or an idea is stated more than once, or in varying ways, no emphasis is intended and none must be inferred by you.

NATURE OF CASE

Instruction No. 2

The party who brings a lawsuit is called the plaintiff. In this action the plaintiff is Howard F. Hatch. The party against whom the suit is brought is called the defendant. In this action the defendants are Dwane Sykes and three irrevocable trusts he and his former wife established. Mr. Hatch is represented by Ralph C. Amott, Attorney. Dwane Sykes represents himself. The Trusts are represented by B. Kent Ludlow, Attorney.

The Plaintiff brought this action seeking the right to pursue assets of Defendant Sykes which he and his former wife, Patricia had previously placed in the ownership of three separate Trusts they set up for the benefit of their children. The language of the trusts make the various Sykes children the beneficiaries of the trusts and state that the trusts are irrevocable. Plaintiff seeks the right to go after these assets to satisfy a judgment obtained in February of 1995 against Defendant Dwane Sykes in the amount of approximately \$225,000.00.

Plaintiff brings this action based on two theories of law under the Fraudulent Transfer Act. Plaintiff argues that many of the conveyances made from Mr. Sykes to the trusts, to nominees or trustees or by others controlled by Mr. Sykes should be labeled fraudulent conveyances done with the intent to defraud or delay lawful creditors of Mr. Sykes. Plaintiff further argues that Mr. Sykes' improper influence or control of trustees, nominees and trust assets, are factors, among others, which show he actually intended to hinder, delay or defraud lawful creditors of Mr. Sykes. If Plaintiff is successful, he would be able to set aside the conveyances made to the trusts.

2 cont

Defendant Dwane Sykes and the Defendant Trusts through their attorney, deny any impropriety in the operation of the trusts alleging, among other things, that all actions taken by the trusts and their trustees over the years, have been solely for the benefit of the children and not for any other persons. That the trustees, nominees or others were not controlled by Mr. Sykes and none of the conveyances made by Mr. Sykes or others, should be labeled fraudulent conveyances done with intent to defraud or delay lawful creditors of Mr. Sykes. Defendants further argue that Dwane Sykes did not improperly control or influence trustees, nominees or trust assets to hinder, delay or defraud lawful creditors or Mr. Sykes. If Defendants are successful Plaintiff would not be able to set aside the conveyances made to the Trusts.

JURY INSTRUCTION 3

DUTY OF THE COURT

It is my duty to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as I state it to You, regardless of what you personally believe the law is or ought to be. Even if you do not like the laws that must be applied, you must use them. On the other hand, it is your exclusive duty to determine the facts in this case, and to consider and weigh the evidence for that purpose. Your responsibility must be exercised with sincere judgment, sound discretion and honest deliberation.

*need to
see law
JBA*

JURY INSTRUCTION 4

SYMPATHY, PREJUDICE, PASSION

This case must not be decided for or against anyone because you feel sorry for anyone or angry at anyone. It is your sworn duty to decide this case based on the facts and the law, without regard to sympathy, passion or prejudice.

JURY INSTRUCTION 5

CONSIDERATION OF EVIDENCE

This case must be decided only upon the evidence which you have heard from the witnesses, and have seen in the form of documents, photographs or other tangible things admitted into evidence.

Anything you may have seen or heard from any other source may not be considered by you in arriving at your verdict.

You should not consider as evidence any statement of the lawyers made during trial.

JURY INSTRUCTION 6

DUTY OF LAWYERS

Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case. The lawyers are here to represent the best interests of their clients. It is the duty of the lawyer on each side of a case to object when the other side offers evidence which the lawyer believes is not admissible. You should not speculate as to the reasons for the objections, nor should you allow yourself to become angry at a party because a party's lawyer has made objections.

JURY INSTRUCTION 7

PROVINCE OF JURY

It has never been my intention to give any hint that you should return one verdict or another in this case. Please understand that I do not wish in any way to influence your verdict. It would be improper for me to do so. Deciding a proper verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything that I may have said or done if it made you think that I preferred one verdict over another, that I believed one witness over another, or that I considered any piece of evidence more important than another.

You are the exclusive judges of the facts and the evidence. It is your duty to render a just verdict based upon the facts and the evidence.

JURY INSTRUCTION 8

CREDIBILITY OF WITNESSES

You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. In judging the weight of the testimony and credibility of the witnesses, you have a right to take into consideration any biases, any interest in the result, and any motive or lack of motive to testify fairly. You may consider the witnesses' conduct while testifying before you, the reasonableness of their statements, their apparent frankness or candor, or the want of it, their opportunity to know, their ability to understand, and their capacity to remember. You should consider those matters you believe have a bearing on the truthfulness or accuracy of the witnesses' statements.

JURY INSTRUCTION 9

INCONSISTENT STATEMENTS

You may believe that a witness, on some former occasion, made statements inconsistent with that witness's testimony given here in this case.

That does not necessarily mean that you are required to entirely disregard the present testimony. The effect of such evidence upon the credibility of the witness is for you to determine.

JURY INSTRUCTION 10

EFFECT OF WILLFULLY FALSE TESTIMONY

If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of that witness, except as that witness may have been corroborated by other credible evidence.

JURY INSTRUCTION 11

DEPOSITION TESTIMONY

In the present action, certain testimony has been read to you by way of deposition. You are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration as if the witness had personally appeared.

JURY INSTRUCTION 12

STATEMENT OF OPINION

An opinion is the expression of a conclusion or judgment which does not purport to be based on actual knowledge. In determining whether a particular statement was a statement of fact or merely an expression of opinion, you may consider the surrounding circumstances under which it was made, the manner in which the statement was made and the ordinary effect of the words used. You may also consider the relationship of the parties and the subject matter with which the statement was concerned.

JURY INSTRUCTION 13

BURDEN OF PROOF

Whenever in these instructions it is stated that the burden of proof rests upon a certain party, or that a party must prove a certain proposition, or that you must find a certain proposition to be true, I mean that unless the truth of the allegation is proved by clear and convincing evidence, you shall find that the same is not true. The Burden of Proof in this case rests upon the Plaintiff.

JURY INSTRUCTION 14

CIRCUMSTANTIAL EVIDENCE

A fact may be proved by circumstantial evidence. Circumstantial evidence consists of facts or circumstances that give rise to a reasonable inference of the truth of the facts sought to be proved.

JURY INSTRUCTION 15

CLEAR AND CONVINCING EVIDENCE

Clear and convincing evidence is evidence that produces in your mind a firm belief as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof beyond a reasonable doubt is not required.

For evidence to be clear and convincing, it must at least have reached the point where there remains no substantial doubt as to the truth or correctness of the conclusion based upon the evidence.

JURY INSTRUCTION 16

PREPONDERANCE OF THE EVIDENCE

The term "preponderance of the evidence" means that evidence which, in your minds, seems to be of the greater weight; the most convincing and satisfactory. The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony, weighed impartially, fairly and honestly by you. If the evidence is evenly balanced as to its convincing force on any allegation, you must find that such allegation has not been proved.

INSTRUCTION NO. 17

In all criminal cases, the State is required to prove each element of the crime charged against a defendant beyond a reasonable doubt. This burden of proof is required to be based only on the legal evidence presented in court. You must keep in mind in assessing whether the State has met its burden of proof beyond a reasonable doubt that the burden never shifts to a defendant to call any witnesses, produce any evidence or disprove any element of the crime charged.

In the context of the above, you are instructed that a reasonable doubt is a doubt based on reason and common sense growing out of the evidence or lack of evidence in this case. Proof beyond a reasonable doubt does not require proof to an absolute certainty but requires that degree of proof which satisfies the mind and convinces the understanding of those who are bound to act conscientiously upon it.

If, after an impartial consideration of all of the evidence, you have a reasonable doubt as to a defendant's guilt, you must acquit that defendant. If, however, after such consideration of the evidence you have no reasonable doubt, you should find such defendant guilty.

INSTRUCTION NO. 18

The intent with which an act is done denotes a state of mind and connotes a purpose in so acting. Intent being a state of mind is seldom susceptible of proof by direct and positive evidence and must ordinarily be inferred from acts, conduct, statements and circumstances. Thus, you would be justified in inferring that a person must have intended the natural and probable consequences of any act purposely done by that person.

JURY INSTRUCTION 19

EQUITY

A remedy of equity, and one who invokes it must have clean hands in having done equity
himself.

McLean



JURY INSTRUCTION NO. 20

HOLDING TITLE TO PROPERTY IN NOMINEE NAME

Utah law governing the powers of Trustees specifically provides that Trustees have the power to hold property in the name of a nominee or other form without disclosure of the trust. Further, the trusts themselves authorize the Trustee to hold title to property in nominee name.

JURY INSTRUCTION 21

TAKING OF NOTES

I have noticed that some of you have been taking notes during the testimony. The use of notes in the jury room to refresh your memory is perfectly acceptable. But let me caution you not to rely excessively upon your notes. You must arrive at a verdict independently, after consultation with the other jurors; and each of you must rely on your own memory of the evidence. One juror's opinion should not be given excessive consideration solely because that juror has taken notes.

JURY INSTRUCTION NO. 22

ALL PARTIES EQUAL BEFORE THE LAW

The fact that the plaintiff is an individual and some of the defendants are trusts, should make no difference whatever to you. It is your duty to hear and determine this case the same as if it were between individuals. You should look solely to the evidence for the facts and to the instructions I give you for the law, and return a true and just verdict according to the facts established by the evidence and the law as I have stated it to you.

JURY INSTRUCTION 23

MULTIPLE DEFENDANTS

Although there are multiple defendants in this action, it does not follow from that fact alone that if one is liable, all are liable. Each defendant is entitled to a fair consideration of that defendant's own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against another defendant. Unless otherwise stated, all instructions given you govern the case as to each defendant.

JURY INSTRUCTION NO. 23A

Fraudulent transfer -Actual Intent

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or**
- (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:**

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

- (a) the transfer or obligation was to an insider;**
- (b) the debtor retained possession or control of the property transferred after the transfer;**
- (c) the transfer or obligation was disclosed or concealed;**
- (d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;**
- (e) the transfer was of substantially all the debtor's assets;**
- (f) the debtor absconded;**
- (g) the debtor removed or concealed assets;**
- (h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;**
- (i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;**
- (j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and**
- (k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.**

JURY INSTRUCTION 24

ATTITUDE AND CONDUCT OF JURORS

Your attitude and conduct at the outset of your deliberations is very important. It will not be productive for any of you, upon entering the jury room, to make an emphatic expression of your opinion on the case, or to announce a determination to stand for a certain verdict. When that happens, your sense of pride may be aroused and you may hesitate to recede from an announced position, even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges. Your deliberations in the jury room are for the ascertainment and declaration of the truth and the administration of justice.

JURY INSTRUCTION 25

JURORS TO DELIBERATE AND AGREE IF POSSIBLE

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if your individual judgment allows such agreement. You each must decide the case for yourself, but only after consideration of the case with your fellow jurors. You should not hesitate to change an opinion when convinced that it is wrong. However, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

JURY INSTRUCTION 26

RESORT TO CHANCE

The law forbids you to decide any issue in this case by resorting to chance.

JURY INSTRUCTION 27

AGREEMENT OF JURORS ON SPECIAL INTERROGATORIES

It is your duty to make findings of fact as to the questions I will submit to you. In making your findings of fact, you should bear in mind that the burden of proving any disputed fact rests upon the party claiming the fact to be true, and that fact must be proved by clear and convincing evidence.

This is a civil action and six members of the jury may find and return a verdict. At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question, have the verdict signed and dated by your foreperson and then return it to his room.

JURY INSTRUCTION 28

SELECTION OF FOREPERSON AND RETURN OF VERDICT

Upon retiring to the jury room you will select one of you to act as foreperson, who will preside over your deliberations and sign the verdict to which you agree. The foreperson should not dominate the jury, but the foreperson's opinion should be given the same weight as the opinions of the other members of the jury.

in the hands of a qualified person for service until seven months after the complaint was filed, the summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

—Amended complaint.

In wrongful death action filed November 15, 1973 with no summons issued, filing of amended complaint on November 8, 1974 did not recommence action, but amended complaint related back to time of original one by virtue of Rule 15(c); therefore, since summons did not issue within three months of filing of complaint, action was dismissed. *Cook v. Starkey*, 548 P.2d 1268 (Utah 1976).

—Waiver.

If a party appears in court, counterclaims, and is partially successful, the party may not claim untimely service under Subdivision (b). *Sorensen v. Sorensen*, 18 Utah 2d 102, 417 P.2d 118 (1966).

Cited in State ex rel. Utah State Dep't of Social Servs. v. Santiago, 590 P.2d 335 (Utah 1979); *Wood v. Weenig*, 736 P.2d 1053 (Utah 1987); *Van Tassell v. Shaffer*, 742 P.2d 111 (Utah Ct. App. 1987); *Schultz v. Conger*, 755 P.2d 165 (Utah 1988); *Wilcox v. Geneva Rock Corp.*, 911 P.2d 367 (Utah 1996); *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835 (Utah 1996); *Cooke v. Cooke*, 2001 UT App 110, 22 P.3d 1249.

COLLATERAL REFERENCES

Utah Law Review. — *Graham v. Sawaya*: Utah's Notice Requirements for In Personam Actions, 1982 Utah L. Rev. 657.

Recent Developments in Utah Law — Judicial Decisions — Constitutional Law, 1988 Utah L. Rev. 153.

Recent Developments in Utah Law — Judicial Decisions — Civil Procedure, 1989 Utah L. Rev. 166.

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgement in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 19 Am. Jur. 2d Corporations § 2192 et seq.; 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions, § 854; 62B Am. Jur. 2d Process § 1 et seq.; 72 Am. Jur. 2d States, Territories, and Dependencies § 126.

C.J.S. — 19 C.J.S. Corporations § 1305 et seq.; 20 C.J.S. Counties § 263; 64A C.J.S. Municipal Corporations § 1956 et seq.; 72 C.J.S. Process § 26 et seq.; 79 C.J.S. Schools and School Districts § 436; 81 C.J.S. States § 226.

A.L.R. — Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons, or the like, 6 A.L.R.3d 1179.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Airplane or other aircraft as "motor vehicle" or the like within statute providing for constructive or substituted service of process on nonresident motorist, 36 A.L.R.3d 1387.

Sunday or holiday, validity of service of summons or complaint on, 63 A.L.R.3d 423.

In personam jurisdiction under long-arm statute of nonresident banking institution, 9 A.L.R.4th 661.

In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor, or other party whose acts were performed outside the state, 16 A.L.R.4th 1318.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 A.L.R.4th 852.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 A.L.R.4th 1115.

Service of process by mail in international civil action as permissible under Hague Convention, 112 A.L.R. Fed. 241.

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(2) No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings). Pleadings asserting new or additional claims for relief against a party in default shall be served in the manner provided for service of summons in Rule 4.

(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no answer is filed,

named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) *Service: How made and by whom.*

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

(2) Unless otherwise directed by the court:

(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(C) an order or judgment prepared by the court shall be served by the court.

(c) *Service: Numerous defendants.* In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* Except where rules of judicial administration prohibit the filing of discovery requests and responses, all papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service.

(e) *Filing with the court defined.* The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

(Amended effective September 4, 1985; January 1, 1987; November 1, 1997; April 1, 1999; April 1, 2001.)

Advisory Committee Note. — Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and re-

specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.

The 1999 amendment to subdivision (b)(1)(B) does not authorize the court to conduct a hearing with less than 5 days notice, but rather



ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Advisory Committee Note. — This rule is the federal rule, verbatim, and is comparable in substance to Rule 1(2), Utah Rules of Evidence (1971), but the former rule defined relevant evidence as that having a tendency to prove or

disprove the existence of any "material fact." Avoiding the use of the term "material fact" accords with the application given to former Rule 1(2) by the Utah Supreme Court. *State v. Peterson*, 560 P.2d 1387 (Utah 1977).

NOTES TO DECISIONS

Burden of proof.

Discovery.

Effect of remoteness.

Relationship to crime charged.

Victim's testimony on defense theory.

Cited.

Burden of proof.

The defendant failed to meet his burden to lay the necessary two-part foundation of relevance to admit evidence of the witness's health history, offered for the purpose of attacking the witness's credibility, because he did not show that the witness's mental health disorder impaired the witness's ability to accurately perceive, recall, and relate events, nor did defendant offer evidence that the disability was contemporaneous with the witness's observations or testimony. *State v. Stewart*, 925 P.2d 598 (Utah Ct. App. 1996).

In a prosecution for rape, it was not error to exclude testimony of defendant's expert on Japanese cultural values since its only relevance was to the credibility of the victim, not any elements of the crime, and defendant did not lay a proper foundation for its admission. *State v. Finlayson*, 956 P.2d 283 (Utah Ct. App. 1998).

Discovery.

Defendant's stipulation that she would not use a vehicle valuation comparison at trial removed any need plaintiff might have had for information useful to impeach that document. The information sought was therefore irrelevant and undiscoverable. *Major v. Hills*, 1999 UT 44, 980 P.2d 683.

Effect of remoteness.

Remoteness usually goes to the weight of the evidence and not its admissibility. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979), overruled on other grounds,

McFarland v. Skaggs Cos., Inc., 678 P.2d 298 (Utah 1984).

Relationship to crime charged.

Evidence of nicknames, chants, and dances by defendant and his friends, which was not remote in either time or place and provided background for the rape charged, was admissible. *State v. Boyd*, 2001 UT 30, 25 P.3d 985.

Victim's testimony on defense theory.

In a prosecution for attempted aggravated murder arising from an incident in which the defendant, while a passenger in an automobile, thrust a gun at a police officer after the vehicle was stopped for a traffic violation, the court properly excluded testimony as to whether the officer had ever heard of people pulling guns on police officers in an attempt to commit suicide, as any such knowledge by the police officer was not relevant to the defendant's state of mind at the time of the incident and as the defendant was allowed to present his theory of "officer assisted suicide" by other means. *State v. Colwell*, 2000 UT 8, 994 P.2d 177.

Cited in *State v. Gray*, 717 P.2d 1313 (Utah 1986); *State v. Nickles*, 728 P.2d 123 (Utah 1986); *Meyers v. Salt Lake City Corp.*, 747 P.2d 1058 (Utah Ct. App. 1988); *Fisher ex rel. Fisher v. Trapp*, 748 P.2d 204 (Utah Ct. App. 1988); *Belden v. Dalbo, Inc.*, 752 P.2d 1317 (Utah Ct. App. 1988); *State v. Worthen*, 765 P.2d 839 (Utah 1988); *State v. Maurer*, 770 P.2d 981 (Utah 1989); *State, In re R.D.S.*, 777 P.2d 532 (Utah Ct. App. 1989) *Whitehead v. American Motors Sales Corp.*, 801 P.2d 920 (Utah 1990); *State v. Pascual*, 804 P.2d 553 (Utah Ct. App. 1991); *State v. Larsen*, 828 P.2d 487 (Utah Ct. App. 1992); *State v. 633 E. 640 N.*, 942 P.2d 925 (Utah 1997); *State v. Nelson-Waggoner*, 2000 UT 59, 6 P.3d 1120.

COLLATERAL REFERENCES

Utah Law Review. — Utah Rules of Evidence 1983, 1985 Utah L. Rev. 63, 78.

United States v. Downing: Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L. Rev. 839.

A.L.R. — Admissibility of evidence of ob-

sence of other accidents or injuries at place where injury or damage occurred, 10 A.L.R.5th 371.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 921.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Advisory Committee Note. — The text of this rule is Rule 402, Uniform Rules of Evidence (1974) except that prior to the word “statute” the words “Constitution of the United States” have been added.

Compiler’s Notes. — The Utah rule also adds the words “or the Constitution of the state of Utah” to Rule 402, Uniform Rules of Evidence (1974).

NOTES TO DECISIONS

Discretion of court.
Effect of remoteness.
Harmless error.
Irrelevant evidence.
Other crimes.
Probability evidence.
Relevance.
Scientific evidence.
Standard of review.
Cited.

Discretion of court.

The trial court is given considerable discretion in deciding whether or not evidence submitted is relevant. *Bambrough v. Bethers*, 552 P.2d 1286 (Utah 1976).

While relevant evidence is generally admissible, a trial court has broad discretion to determine whether proffered evidence is relevant, and the appellate court will find error in a relevancy ruling only if the trial court has abused its discretion. *State v. Harrison*, 805 P.2d 769 (Utah Ct. App.), cert. denied, 817 P.2d 327 (Utah 1991).

In a personal injury action, the trial court did not abuse its discretion in admitting evidence of plaintiff’s prior injuries because they were relevant to the issues of causation and damages. *Ortiz v. Geneva Rock Prods., Inc.*, 939 P.2d 1213 (Utah Ct. App. 1997).

Effect of remoteness.

Remoteness usually goes to the weight of the evidence and not its admissibility. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979), overruled on other grounds, *McFarland v. Skaggs Cos., Inc.*, 678 P.2d 298 (Utah 1984).

Harmless error.

Even if the admission of testimony regarding the ammunition and firing status of firearms used in the commission of a crime was erroneous, that error was harmless where the defendant objected only to the first attempt to admit the evidence and failed to raise an objection to the admission of the testimony from later witnesses, since the evidence would have been before the jury and the reviewing court could not say there was a reasonable likelihood of a more favorable result. *State v. Kohl*, 2000 UT 35, 999 P.2d 7.

Irrelevant evidence.

participant in the crime had no bearing on defendant’s guilt or innocence and was properly excluded as not relevant to defendant’s participation in the crime. *State v. Stephens*, 667 P.2d 586 (Utah 1983).

Other crimes.

In deciding whether evidence of other crimes is admissible under Rule 404(b), the trial court must determine (1) whether such evidence is being offered for a proper, noncharacter purpose under that rule, (2) whether such evidence meets the requirements of Rule 402, and (3) whether it meets the requirements of Rule 403. *State v. DeCorso*, 1999 UT 57, 993 P.2d 837, cert. denied, 528 U.S. 1164, 120 S. Ct. 1181, 145 L. Ed. 2d 1088 (2000).

Probability evidence.

Courts have routinely excluded probability evidence when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies. *State v. Rammel*, 721 P.2d 498 (Utah 1986).

Relevance.

In an action arising from a motor vehicle accident in which the sole issue was the extent of damages, evidence that the defendant was not injured in the accident was relevant as an indicator of the severity of the accident. *Robinson v. All-Star Delivery, Inc.*, 1999 UT 109, 992 P.2d 969.

Defendant’s statements to one individual that he would be better off killing his wife than divorcing her, to his girlfriend that his wife was going to have an “accident,” and to another individual asking him to kill his wife were relevant as they tended to demonstrate defendant had a plan, intent, and motive to kill his wife. *State v. Mead*, 2001 UT 58, 27 P.3d 1115.

Scientific evidence.

The *Frye* test (that scientific tests still in the experimental stages should not be admitted in evidence, but that scientific testimony deduced from a well recognized scientific principle or discovery is admissible if the scientific principle is sufficiently established) is a valid test, though not necessarily an exclusive test, for determining when scientific evidence is sufficient to be admitted and is not incon-

sistent with Rules 402, 403, and 702 of the Utah Rules of Evidence. *Kofford v. Flora*, 744 P.2d 1343 (Utah 1987).

Standard of review.

The judgment of the trial court admitting or excluding evidence will not be reversed unless it is shown that the discretion exercised therein has been abused. *Terry v. Zions Coop. Mercan-*

tile Inst., 605 P.2d 314 (Utah 1979), overruled on other grounds, *McFarland v. Skaggs Cos., Inc.*, 678 P.2d 298 (Utah 1984).

Cited in *State v. Larsen*, 828 P.2d 487 (Utah Ct. App. 1992); *Salt Lake City v. Alires*, 2000 UT App 244, 9 P.3d 769; *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 432 Utah Adv. Rep. 44, — P.3d —.

COLLATERAL REFERENCES

Utah Law Review. — *United States v. Downing*: Novel Scientific Evidence and the Rejection of *Frye*, 1986 Utah L. Rev. 839.

Note, Establishing Paternity Through HLA Testing: Utah Standards for Admissibility, 1988 Utah L. Rev. 717.

The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example, 1993 Utah L. Rev. 751.

Note, Utah Rule of Evidence 403 and Gruesome Photographs: Is a Picture Worth Anything in Utah?, 1996 Utah L. Rev. 1131.

A.L.R. — Admissibility of voice stress evaluation test results or of statements made during test, 47 A.L.R.4th 1202.

Admissibility and weight of evidence of prior misidentification of accused in connection with commission of crime similar to that presently charged, 50 A.L.R.4th 1049.

Products liability: admissibility of evidence of absence of other accidents, 51 A.L.R.4th 1186.

Thermographic tests: admissibility of test

results in personal injury suits, 56 A.L.R.4th 1105.

Criminal law: dog scent discrimination line-ups, 63 A.L.R.4th 143.

Products liability: admissibility of experimental or test evidence to disprove defect in motor vehicle, 64 A.L.R.4th 125.

Admissibility, in criminal cases, of evidence of electrophoresis of dried evidentiary bloodstains, 66 A.L.R.4th 588.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

Admissibility of DNA identification evidence, 84 A.L.R.4th 313.

Admissibility in evidence of composite picture or sketch produced by police to identify offender, 23 A.L.R.5th 672.

Admissibility of results of presumptive tests indicating presence of blood on object, 82 A.L.R.5th 67.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

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

Advisory Committee Note. — This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of

dealing with "surprise." See also *Smith v. Estelle*, 445 F. Supp. 647 (N.D. Tex. 1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

Cross-References. — Admissibility of evidence, Rules of Civil Procedure, Rule 43(a).

NOTES TO DECISIONS

Balancing test.

Bias.

Blood-soaked clothing.

Childhood sexual experiences.

Circumstantial evidence.

Confusion of issues.

Credibility of witness.

Cumulative evidence.

Determination of admissibility.

Disability benefits.

Expert testimony.

Extent of damages.

Film of murder scene.

Guilty plea.

Harmful error.

Harmless error.

Impeachment of witness.

Inflammatory evidence.

Offensive remarks.

Out of court