

2000

# UTCO Associates, LTD., and Robert D. Kent v. K. Demarr Zimmerman, Summerset Houseboats, DIV. SMI, James E. Sharpe, John Does 1-10 : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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UTCO ASSOCIATES, LTD., a Utah  
limited partnership, by and through its  
general partner, Robert D. Kent,  
  
Plaintiff-Appellant,

vs.

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

Civil No. 20000339-CA  
930904174

Argument Priority 15

---

**REPLY BRIEF OF APPELLANT UTCO ASSOCIATES, LTD.**

---

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

---

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**FILED**  
Utah Court of Appeals

FEB 01 2001

**Paulette Stagg**  
Clerk of the Court

INSTRUCTION NO. 17

In these instructions certain words and phrases are used which require definition in order that you may properly understand the nature of the crimes charged and in order that you may properly apply the law as contained in these instructions to the facts as you may find them from the evidence. The definitions applicable to Count I, Violation of a Clandestine Laboratory Act, are as follows:

*"Clandestine laboratory operation"* means any of the following:

- a. purchase or procurement of chemicals, supplies, equipment, or laboratory location for the illegal manufacture of methamphetamine.
- b. transportation or the arranging for the transportation of chemicals, supplies, or equipment for the illegal manufacture of methamphetamine.
- c. setting up of equipment or supplies in preparation for the illegal manufacture of methamphetamine.
- d. illegal manufacture of methamphetamine.
- e. distribution or disposal of chemicals, equipment, supplies or products used in the manufacture of methamphetamine

*"Controlled substance precursors"* include:

- a) pseudoephedrine
- b) crystal iodine
- c) ephedrine

*"Illegal manufacture of a controlled substance"* means:

the compounding, synthesis, concentration, purification, separation, extraction, or other physical or chemical processing for the purpose of producing

methamphetamine or conversion of methamphetamine to its base form.

INSTRUCTION NO 20

Before you can find the defendant guilty of Count I, Violation of the Clandestine Laboratory Act, a first degree felony, you must find from the evidence, beyond a reasonable doubt, that in Salt Lake County on or about February 5, 1999, all of the following elements of the crime

- 1) Said defendant, James Deluna,
- 2) a. knowingly or intentionally possessed a controlled substance precursor with the intent to engage in a clandestine laboratory operation;

**AND/OR**

- b. knowingly or intentionally possessed laboratory equipment or supplies with the intent to engage in a clandestine laboratory operation;

**AND/OR**

- c knowingly or intentionally conspired with or aided another to engage in a clandestine laboratory operation

**AND**

- 3) one of the following conditions occurred in conjunction with the clandestine laboratory operation:

- a. the defendant, James Deluna, possessed a firearm;

**AND/OR**

- b. the intended laboratory operation was to take place or did take place within 500 feet of a residence,

**AND/OR**

- c. the clandestine laboratory operation actually produced any amount of a specified controlled substance;

**AND/OR**

- d. the intended clandestine laboratory operation was for the production of methamphetamine base.

If you believe that the evidence established each and all of the elements of this offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence failed to establish one or more of said elements, you should find the defendant not guilty

INSTRUCTION NO. 21

You may infer that the defendant intended to engage in a clandestine laboratory operation if the defendant:

- 1) was in illegal possession of a controlled substance precursor;

**OR**

- 2) illegally possessed or attempted to illegally possess a controlled substance precursor **AND** is in possession of any one of the following pieces of equipment:

- a. glass reaction vessel,
- b. separatory funnel,
- c. glass condenser,
- d. analytical balance, or
- e. heating mantle.

INSTRUCTION NO. 22

If you find the Defendant, James Deluna, **GUILTY** of Count I, Violation of the Clandestine Laboratory Act, you must consider which enhancements apply to this case. If you found the Defendant, James Deluna, **NOT GUILTY** of Count I, Violation of the Clandestine Laboratory Act, then you should proceed to deliberate on the remain charges and disregard the remainder of this instruction.

Assuming you have unanimously agreed that the Defendant, James Deluna, is guilty beyond a reasonable doubt of Count I, Violation of the Clandestine Laboratory Act, the Court requires you to further deliberate on the specified enhancements. The Court requires you to determine as a group, beyond a reasonable doubt, which, if any, of the following conditions occurred in conjunction with this violation:

- a. the Defendant, James Deluna, possessed a firearm; and/or
- b. the intended laboratory operation was to take place or did take place within 500 feet of a residence; and/or
- c. the clandestine laboratory operation actually produced any amount of controlled substance, to wit: methamphetamine; and/or
- d. the intended clandestine laboratory operation was for the production of methamphetamine base.

After you decide beyond a reasonable doubt which, if any, of these enhancements apply to this case, you should complete the **SPECIAL VERDICT** form at the end of the instruction packet.



INSTRUCTION NO. 23

Before you can find the defendant guilty of Count II, Unlawful Possession of a Controlled Substance, a third degree felony, you must find from the evidence, beyond a reasonable doubt, that in Salt Lake County on or about February 5, 1999, all of the following elements of the crime:

- 1) Said Defendant, James Deluna,
- 2) knowingly and intentionally,
- 3) possessed a controlled substance,
- 4) to wit: Methamphetamine.

If you believe that the evidence established each and all of the elements of this offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence failed to establish one or more of said elements, you should find the defendant not guilty.

INSTRUCTION NO. 24

*"Possession"* means the joint or individual ownership, control, occupancy, holding, retaining, belonging or maintaining of the items at issue and includes individual, joint or group possession of the items.

For a person to be a possessor of an item, it is not required that he be shown to have individually possessed, used, or controlled the item, but it is sufficient if it is shown that he jointly participated with one or more persons in the use, possession or control of any item with knowledge that the activity was occurring.

Actual physical possession is not necessary to convict a defendant of possessing certain items. A conviction may also be based upon *"constructive possession."*

*"Constructive Possession"* exists where the item is subject to the defendant's dominion and control. To find the defendant had "constructive possession" of a controlled substance, it is necessary to prove there was a sufficient nexus or connection between the accused and the controlled substance to permit an inference that the accused had both the power and intent to exercise dominion and control over the item.

INSTRUCTION NO. 25

Before you can find the defendant guilty of Count III, Production of a Controlled Substance, a third degree, you must find from the evidence, beyond a reasonable doubt, that in Salt Lake County on or about February 5, 1999, all of the following elements of the crime:

- 5) Said Defendant, James Deluna,
- 6) knowingly and intentionally,
- 7) produced or possessed with the intent to produce,
- 8) a controlled substance,
- 9) to wit: Marijuana

If you believe that the evidence established each and all of the elements of this offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence failed to establish one or more of said elements, you should find the defendant not guilty.

INSTRUCTION NO. 26

In these instructions certain words and phrases are used which require definition in order that you may properly understand the nature of the crimes charged and in order that you may properly apply the law as contained in these instructions to the facts as you may find them from the evidence. The definitions applicable to Count III, Production of a Controlled Substance, are as follows:

*"Production"* means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

INSTRUCTION NO. 27

You are instructed that:

Methamphetamine is a controlled substance.

Marijuana is a controlled substance.

Iodine is a precursor chemical.

INSTRUCTION NO. 2B

A person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

INSTRUCTION NO. 29

Every person, acting with the mental state required for the commission of the offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

INSTRUCTION NO. 24 35

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 may ordinarily be inferred from acts, conduct, statements and circumstances.



In the District Court of the Third Judicial District  
in and for Salt Lake County, State of Utah

THE STATE OF UTAH,

Plaintiff

vs.

JAMES DELUNA,

Defendant

VERDICT

Case No. 991903035

We, the Jurors impaneled in the above case, find the defendant, James Deluna, Guilty of Clandestine Lab., a First Degree Felony, as charged in Count I of the Information.

Dated July 5 19 2000

Ben Edgley  
Foreperson

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|                |   |                    |
|----------------|---|--------------------|
| STATE OF UTAH, | ) | SPECIAL VERDICT    |
| Plaintiff,     | ) |                    |
| v.             | ) |                    |
| JAMES DELUNA,  | ) |                    |
| Defendant.     | ) | Case No. 991903035 |

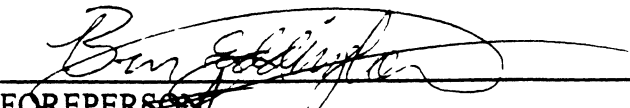
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We, the Jurors impaneled in the above case, have found the Defendant, James Deluna, **GUILTY** of Violation of the Clandestine Laboratory Act, as charged in the information.

In so finding, we unanimously find beyond a reasonable doubt that the following conditions occurred in conjunction with this violation (check any and all that apply):

- ☒ the Defendant, James Deluna, possessed a firearm;
- ☒ the intended laboratory operation was to take place or did take place within 500 feet of a residence;
- ☐ the clandestine laboratory operation actually produced any amount of controlled substance;
- ☒ the intended clandestine laboratory operation was for the production of methamphetamine base.

DATED this 5 day of June, 2000.

  
FOREPERSON

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IN THE UTAH COURT OF APPEALS

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

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REPLY BRIEF OF APPELLANT UTCO ASSOCIATES, LTD.

---

**I. INTRODUCTION**

Sumerset and Sharpe do not dispute that the parties consented to jury trial of UTCO's promissory-estoppel claim<sup>1</sup> and Sharpe does not dispute that UTCO's claims for promissory estoppel, breach of contract, and misrepresentation are alternative theories entitled to jury consideration because of differing proof burdens and elements. UTCO's Brief at 13-16. Accordingly, UTCO will not discuss these issues further; Sharpe

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



and Sumerset have conceded them. Sharpe ignores the trial court's finding that mere similarity in the claims brought against Sharpe and Zimmerman (now discharged from bankruptcy) does not create "total" overlap in the facts of their disparate conduct that would preclude certification under Rule 54(b). Sharpe also forgets the trial court's finding that UTCO's "adequate remedy" at law was UTCO's breach of contract and misrepresentation claims in this case, not UTCO's claims against Zimmerman in bankruptcy. Finally, Sharpe's argument that the trial court properly excluded evidence of Sharpe's fraud is unpersuasive because fraudulent intent is shown by all surrounding facts and circumstances.

**II. JUDGMENT WAS PROPERLY CERTIFIED UNDER RULE 54(B); THE FACTUAL OVERLAP WAS NOT COMPLETE AND UTCO PURSUED ALL CLAIMS TO JUDGMENT.**

Sharpe incorrectly challenges this Court's jurisdiction and the rule 54(b) order, saying that the claims against Zimmerman "overlapped" with and were not distinct or "separate" from claims against Sumerset and Sharpe under Kennecott Corp. v. Utah State Tax Comm'n, 814 P.2d 1099 (Utah 1991). Sharpe Brief at 20-22. First, Sharpe ignores the trial court's finding that there was insufficient overlap to preclude rule 54(b) certification. The trial court rejected Sharpe's "overlap" claim, finding that:

The Court determines that pursuant to Rule 54(b) and the Utah Supreme Court's decision in Kennecott Corp v. Utah State Tax Commission, 814 P.2d 1099, 1103 (Utah 1991), there is no factual overlap preventing certification. For

example, in the promissory estoppel allegations contained in the Second Amended Complaint, plaintiff alleged separate actions by Zimmerman on the one hand and Sharpe and Sumerset on the other hand.

R. 3211-12 (emphasis added). This put an end to Sharpe's "fact-overlap" challenge.

Second, a complete reading of Kennecott undercuts Sharpe's jurisdiction challenge. The Kennecott Court hesitated to decide the rule 54(b) appeal because there was a total "overlap" in facts for both the certified claims and claims remaining at the trial court, and because the uncertified had not yet been resolved:

Under the analytical approach we adopt today, the key question is whether there is factual overlap between the ostensibly separate claims. Here, the overlap is total. The taxpayers' claims are all based on the same underlying facts. . . . It would be a waste of judicial resources to have this court learn the facts of the case in order to determine the propriety of the trial court's decision under article XIII, section 5 of the Utah Constitution, when at a later time we would be forced to review a variant challenge to the same statute on the same facts.

Kennecott, 814 P.2d at 1105 (emphasis added).

This case is different. First, while each defendant here acted wrongfully, Zimmerman, Sharpe, and Sumerset did different things. The subject of Sharpe's focus, UTCO's promissory-estoppel claim, confirms this. In that claim, UTCO alleged:

"Zimmerman made promises to plaintiff to, among other things, make payments under the Note. Sharpe and Sumerset made promises to plaintiff to apply the Funds to the

purchase of the Houseboat and to deliver the Houseboat to Zimmerman's place of business in Utah.” Second Amended Complaint at ¶51, 54 (emphasis added), R.568-69. A borrower’s promise to make payments on a note is different from a manufacturer’s promise to ship a houseboat to Utah when the lender sends the manufacturer the Funds. The trial court recognized these differences in certifying the matter under rule 54(b). See Certification Order, Addendum L, R. 3211-12. UTCO’s claims against Sharpe arise from his separate unfulfilled promises to use the Funds for the purchase of the Houseboat and to ship it once Sumerset received the Funds from UTCO and Mr. Nelson. See Second Amended Complaint at ¶¶12,13, 15, 18, 19, 38-40, 51, 53, 64, 65, 94-97. R. 563-575. In sum, Sharpe’s and Sumerset’s liability results from their own acts, not the separate acts of Zimmerman.

Second, while Zimmerman was not a party to the trial court’s September 4, 1996, Judgment, UTCO pursued him to final judgment in the bankruptcy court, which ultimately granted a discharge. R. 3165-68; 3211(Trial court found “Zimmerman’s bankruptcy has concluded and Zimmerman obtained a discharge.”) The discharge precluded UTCO from pursuing Zimmerman in this action. R. 3211 (Trial court found “that because of the discharge, the plaintiff has no further recourse against Zimmerman.”) UTCO received partial compensation from Zimmerman during the bankruptcy action. R. 3212, 3149-3164. UTCO’s claims against him have been fully adjudicated and do not

preclude jurisdiction. UTCO was entitled to appeal after its claims against Zimmerman were discharged in the bankruptcy court. Donohue v. Mouille, 913 P.2d 776, 778 (Utah Ct. App. 1996) (court found that plaintiff must either certify the order, dismiss the codefendant who filed bankruptcy or seek relief from the automatic stay).

Certification was consistent with Kennecott. The unresolved claims remaining in the trial court that frustrated certification efforts in Kennecott are not present here. Kennecott, 814 P.2d at 1105. All justiciable claims have been resolved either in the bankruptcy court or the trial court. See exhibits attached to UTCO's Memorandum in Support. R. 3149-68; R.3211-12. This appeal is all that remains.<sup>2</sup>

Applying the prior rulings of this Court, the trial court found that its September 4, 1996, Judgment should be certified, and granted UTCO's Rule 54(b) motion, finding:

Based upon the certified copies of documents submitted by plaintiff, Zimmerman's bankruptcy has concluded and Zimmerman obtained a discharge. The documents from the bankruptcy demonstrate that plaintiff's claims against defendant Zimmerman have been adjudicated fully in the bankruptcy action and that because of the discharge, the plaintiff has no further recourse against Zimmerman. . . . The

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<sup>2</sup>The trial court's decision is certifiable, as stated implicitly in this Court's prior decision: "the order does not dispose of the matters as to all parties, namely Zimmerman, it cannot be considered final and in the absence of a Utah R. Civ. P. 54 (b) certification, this court has no authority to consider the appeal." UTC v. Zimmerman, Case No. 970190-CA dated April 30, 1998, Memorandum Decision at 1, attached to Brief of Appellant as Addendum "K"(emphasis added).

plaintiff does not have any claims remaining against Zimmerman. Plaintiff's claims against Zimmerman were adjudicated fully in the bankruptcy action and he has obtained a discharge. In the bankruptcy action, plaintiff pursued Zimmerman and obtained certain monies, but not a full recovery from Zimmerman. Because of Zimmerman's discharge, plaintiff may no longer pursue Zimmerman in this action. Finally, the Court determines that 'there is no just reason for delay' of the appeal. Therefore, based upon the record and for the reasons stated above and in plaintiff's memoranda, the Court grants the plaintiff's Motion and certifies the September 4, 1996 Judgment as a final judgment under Rule 54(b).

R.3211-12.

In sum, the September 4, 1996, Judgment and the order dismissing UTCO's promissory-estoppel claim were certified correctly under rule 54(b).

**III. THE TRIAL COURT ERRONEOUSLY FOUND THAT  
UTCO'S ADEQUATE REMEDY AT LAW LAY IN UTCO'S  
BREACH OF CONTRACT AND MISREPRESENTATION  
CLAIMS.**

Sharpe conveniently speculates that the trial court intended UTCO's now-discharged claims against Zimmerman to be the "adequate remedy at law," when the court refused to instruct the jury on UTCO's promissory-estoppel claim. Sharpe Brief at 22-23. Sharpe incorrectly suggests that this is inferred from Sharpe's reference to UTCO's claims in bankruptcy court against Zimmerman in Sharpe's Motion for Directed

Verdict.<sup>3</sup> Sharpe Brief at 16, 23. First, the trial court denied the Motion for Directed Verdict, R. 2416, and allowed evidence on the promissory-estoppel claim. Sharpe defended the claim until the trial court sua sponte dismissed it at the close of the evidence, days after denying the Motion for Directed Verdict. R. 2416.<sup>4</sup>

Second, the trial court never mentioned the Zimmerman bankruptcy when giving its reasons for taking the promissory-estoppel claim from the jury. R. 2606-07. The stated basis for dismissal left little to speculation; it was concern over double recovery and “surplusage”. R. 2606-07. The court said “that the concept of promissory estoppel basically mirrors the causes of action that are being asserted in this case by the plaintiff. And they’ll just be surplusage.” R.2606-07, emphases added. Thus, contrary to Sharpe's suggestion, the “adequate remedy at law” intended by the trial court lay in UTCO's claims for Sharpe's breach of contract and misrepresentations, not claims in bankruptcy court against Zimmerman.

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<sup>3</sup>It is undisputed that the bankruptcy involved only Zimmerman and did not include UTCO's claims against Sumerset and Sharpe for breach of their promise to ship the Houseboat to Utah after receiving the Funds from UTCO. Sharpe and Sumerset argued repeatedly that UTCO's remedy was to assert claims against Zimmerman in the Zimmerman bankruptcy proceeding. R. 2400-01. The trial court flatly rejected this argument when presented in Sharpe and Sumerset's Motion for Directed Verdict, and the court stated the essence of UTCO's claim against Sharpe and Sumerset. R. 2396-97.

<sup>4</sup>The argument on Sharpe's motion for directed verdict is found at R. 2389-2416.

Sharpe's "authorities" do not change this result. Knight v. Post, 748 P.2d 1097 (Utah Ct. App. 1988), involved a claim for quantum meruit (not promissory estoppel) where the plaintiff had failed to exhaust two legal remedies. Unlike the plaintiff in Knight, UTCO pursued its claim against all defendants either in state court or bankruptcy court.<sup>5</sup> The Knight Court was clear, noting that a bankruptcy action did not necessarily preclude recovery under a mechanics' lien nor toll the time for bringing an action to enforce the lien. Knight, 748 P.2d at 1100 n.2 (citing Munson v. Risinger, 114 So.2d 59, 61 (La.Ct.App.1959)). Knight teaches that UTCO could, and was required to, pursue Sharpe in state court and Zimmerman in bankruptcy court simultaneously. Id.

Commercial Fixtures and Furnishing v. Adams, 564 P.2d 773, 774 (Utah 1977), is equally unhelpful to Sharpe. Sharpe Brief at 23. There, a materials supplier sued a tenant and landlord for the value of improvements, asserting unjust enrichment, not promissory estoppel. Sharpe cites Commercial Fixtures selectively, saying the Court

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<sup>5</sup>Sharpe also suggests that Knight requires proof that pursuit of claims in bankruptcy was fruitless and that UTCO presented no such evidence. Sharpe Brief at 24. However, as shown infra in Knight, the Supreme Court has required that actions against third parties must be filed within the appropriate statute of limitations for such actions. Knight, 748 P.2d at 1100 n.2 (citing Munson v. Risinger, 114 So.2d 59, 61 (La.Ct.App.1959)). UTCO was pursuing its claims in the bankruptcy action and ultimately obtained certain monies from that proceeding. R. 3212. Further, Sharpe's expert admitted that recovery of funds by UTCO was speculative because he did "not believe that there is any way to predict the percentage [of the estate] which UTCO may receive." R.2447. Knight is further distinguishable from the present case because the Knight plaintiff failed to assert legal rights in a quantum meruit action which rights were then lost by plaintiff. Knight, 748 P.2d at 1100 (Citing Utschig v. McClone, 114 N.W.2d 854 (Wis. 1962)).

should not imply a contract between UTCO and Sharpe where an express contract existed between UTCO and Zimmerman. See Sharpe Brief at 28. Sharpe ignores the crucial clarifying language in the opinion:

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

Commercial Fixtures, 564 P.2d at 774 (emphasis added). UTCO met this criteria. Sharpe and Somerset committed “misleading acts” and made “requests for services and the like,” which established UTCO’s promissory-estoppel claim. Id. Indeed, the trial court summarized these actions:

The Court: But, Mr. Atkin, Mr. Nelson, in his trust account, had Mr. Zimmerman’s money. And that money came from a loan from UTCO. And part of the deal between Zimmerman and UTCO was that they [UTCOT] would get a lien on this property.

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

...

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



Mr. Atkin: Well --

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

R. 2396-97 (emphasis added).

Sharpe then argued that UTCO was unharmed because the money sent by UTCO to Sharpe was Zimmerman's. Sharpe Brief at 30. The trial court also flatly rejected this:

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

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

...

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

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

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

R. 2401-2403; see also R. 563, 641, 2095, 2091-93, 2196-99, 2278-79, 2077. Consistent with Commercial Fixtures, Sharpe's "misleading acts" and "request for services or the like" allowed UTCO's independent action against them. See also UTCO's Brief at 3-6, 16-23.

A. UTCO WAS ENTITLED TO PRESENT ALTERNATIVE THEORIES TO THE JURY.

Promissory estoppel exists "to enable courts to enforce contract-like promises made unenforceable by technical defects or defenses." 28 Am. Jur. 2d Estoppel and Waiver § 57 (2000). "[P]romissory estoppel comes into play where the requisites of a contract are not met, yet the promise should be enforceable to avoid injustice." Id. Overlooking this, the trial court erroneously took UTCO's promissory-estoppel claim from the jury ostensibly because UTCO would have an adequate legal remedy *if* the jury found a valid contract. However, when the jury found no contract, no promissory-estoppel claim remained for jury consideration. Thus, UTCO was deprived of a jury trial on a valid alternative theory – promissory estoppel.

1. UTCO WAS NOT REQUIRED TO ELECT BETWEEN ITS ALTERNATIVE THEORIES PRIOR TO A JURY VERDICT AND THE TRIAL COURT ERRED IN “ELECTING” FOR UTCO.

Whatever ground the trial court advanced (whether the doctrines of “adequate remedy at law”, election of remedies or “surplusage”), it was reversible error to elect sua sponte for UTCO which alternative remedy the jury could decide. UTCO was entitled to send breach of contract and promissory-estoppel claims to the jury.<sup>6</sup> Not surprisingly, Sharpe cites no Utah case holding that breach of contract and promissory-estoppel claims must be elected before the jury verdict is reached. Other courts allow the jury to decide both claims. See e.g., UFE Inc. v. Methode Electronics, Inc., 808 F. Supp. 1407, 1410 & 1415 (D. Minn. 1992) (after verdict for plaintiff on both promissory estoppel and breach of contract, trial and appellate court found evidence plaintiff “proffered to support its promissory-estoppel claim was the same evidence underlying its breach of contract claim” and “[b]ecause those claims are mutually exclusive as a matter of law, and because the jury found a . . . contract in fact, [plaintiff’s] promissory-estoppel claims fail”) (citing Del Hayes & Sons, Inc. v. Mitchell, 230 N.W.2d 588, 593 (Minn. 1975) (“[p]romissory estoppel is the name applied to a contract implied in law where no

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<sup>6</sup>The Court in Rosander v. Larsen, 376 P.2d 146, 146 (Utah 1962), stated, “To require a party to make an election between alternative counts . . . , particularly at the pretrial stage of the proceedings, would be to emasculate the rule [Rule 8(e), Utah R. Civ. P.] and to render it meaningless.”

contract exists in fact; and thus doctrine is wholly inapplicable in situations where an actual contract exists”) (parenthetical summary by the Court));) Innovative Material Systems, Inc. v. Santa Rosa Utilities, Inc., 721 So.2d 1233, 1233 (Fla. Ct. App. 1998) (“Pursuant to our rules of civil procedure, a party may assert inconsistent claims or defenses in a single pleading. An election between inconsistent remedies need only be made before the entry of judgment.”) (emphasis added); Town East Ford Sales, Inc. v. Gray, 730 S.W.2d 796, 811 (Tex. Ct. App. 1987) (“Under the doctrine of election of remedies, if a plaintiff pleads more than one theory of recovery, he need not make an election between them until after the verdict. He is entitled to the greatest relief under either theory that the verdict will support.”) (citation omitted) (emphasis added). See generally Harris-Dudley Plumbing Co. v. Professional United World Travel Ass’n (WTA), Inc., 592 P.2d 586, 588 (Utah 1979) (After judgment of lien foreclosure and judgments against lessor and lessee, Court found “it should of course be observed that while all possible avenues of relief may be pursued simultaneously, there can be but one satisfaction of the debt.”) (emphasis added); Martindale v. Adams, 777 P.2d 514, 516-17 (Utah Ct. App. 1989) (“While Martindale is entitled to collect the amount of his judgment only once, the court could certainly enter both personal judgments and an order foreclosing the mechanic's lien, allowing Martindale the option of choosing his method for a single recovery.”) (emphasis added); Council of and for the Blind of Delaware

County Valley, Inc. v. Regan, 709 F.2d 1521, 1550 n.76 (D.C. Cir. 1983) (“Mere existence of a remedy at law has not sufficed to warrant denial of equitable intervention; rather, as the [U.S.] Supreme Court has declared, ‘the legal remedy both in respect to the final relief and the mode of obtaining it, [must be] as efficient as the remedy which equity would afford under the same circumstances.’”) (quoting Gormley v. Clark, 134 U.S. 338, 349 (1890) (emphasis added)). In sum, the trial court incorrectly took UTCO’s promissory-estoppel claim from the jury, over UTCO’s objections.<sup>7</sup>

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<sup>7</sup>R. 2606-07; 2610-11. Sharpe cites Chartiers Valley School District v. Virginia Mansions Apartments, Inc., 489 A.2d 1381 (Penn. 1985) and Justice v. United States, 6 F.3d 1474 (11<sup>th</sup> Cir. 1993) and argues that although UTCO’s legal claims were unsuccessful they were nonetheless adequate. Sharpe Brief at 25-26. Chartiers involved a school district’s pursuit of equitable remedies to recover a tax claim, though the city failed to pursue the statutorily-provided remedy for recovery of tax claims, the statute offered no equitable recovery of tax claims, and the statute of limitations had run. The court held: “[C]ourts of equity will not relieve a party from the consequences of an error due to his own ignorance or carelessness when there are available means which would have enabled him to avoid the mistake if reasonable care had been exercised.” Id. at 1391-92 (citations omitted). Here, UTCO pursued all its legal remedies and was not negligent. Chartiers is inapposite. In Justice, the case was dismissed without prejudice for failure to prosecute and failure to comply with court orders after the statute of limitations had run. The plaintiff filed another action and argued that the statute was equitably tolled during his prior case. The court ruled equitable tolling did not apply because plaintiff could have continued in his original case by filing a motion to reconsider, a Rule 60(b) motion for relief from judgment, and an appeal of the dismissal. See id. at 1481. Sharpe cites a footnote in Justice quoting Thompson v. Allen Co., 115 U.S. 550, 554 (1885). However, Thompson is readily distinguishable because plaintiff had a judgment, was granted a legal remedy, tried unsuccessfully to execute on the judgment, and then returned to court and requested an equitable remedy. See id. at 554.

Even without a “contract”, UTCO could recover against Sharpe through promissory estoppel because UTCO reasonably relied on Sharpe’s hollow promises to its detriment. Quagliana v. Exquisite Home Builders, 538 P.2d 301, 310 (Utah 1975) (Court held defense of no consideration “would avail nothing, because of the applicability of the doctrine of promissory estoppel”).<sup>8</sup> UTCO proved its promissory-estoppel claim, showing that Sharpe received the Funds based upon his promise to ship the Houseboat to Utah, a promise which he never kept. But because the trial court erroneously dismissed the claim, when the jury found no contract, R.1672, UTCO could not recover in equity, even though evidence established the promissory-estoppel claim. UTCO was and is entitled to a jury verdict on its promissory-estoppel claim.

#### IV. UTCO RELIED ON THE MISREPRESENTATIONS.

Citing no evidence or trial court ruling, Sharpe claims incredibly that they can just walk from their actions because UTCO never relied on their representations.

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<sup>8</sup>See also Restatement (Second) of Contracts § 90 (“A promise which the promisor should reasonably expect to induce action . . . on the part of the promisee . . . and which does induce such action . . . is binding if injustice can be avoided only by enforcement of the promise.”); Heathcote Assoc. v. Chittenden Trust Co., 958 F. Supp. 182, 188 (D. Vt. 1997) (“Promissory estoppel is an equitable doctrine designed to prevent ‘injustice and unconscionable advantage’ where an exchange of promises did not create a binding contract.”) (citations omitted) (Vermont follows Restatement (Second) of Contracts § 90). Utah adopts the Restatement Second formulation of the doctrine. Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171, 175 (Utah Ct. App. 1993). Promissory estoppel applies “only where there is no agreement, where the promise is gratuitous, and there is unbargained-for-reliance.” Heathcote, 958 F. Supp. at 188.

Sharpe Brief at 21-24. They simply ask the Court to assume that the trial court found that UTCO's reliance was insufficient as a matter of law. This is baseless. R. 2606-07. The record is devoid of such an important ruling. R.2606-07.

Further, Mr. Nelson testified unequivocally that UTCO would not have loaned the money if it did not believe that Sharpe and Somerset would ship the Houseboat:

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

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

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

R. 2198-99.

Mr. Nelson also confirmed that the arrangement with Zimmerman required that UTCO receive an invoice, the registration for the Houseboat (MSO) and wiring instructions from Somerset as it had four times before. R. 2195-97, 2278-79. Mr. Nelson testified that on December 1, prior to closing the loan, he received from Sharpe the invoice and MSO describing the Houseboat and wiring instructions requiring UTCO to

send the Funds to be sent to Sharpe. R. 2195, Exhibits 7-9. And, Sharpe sent the MSO and invoice so UTCO could accurately describe the Houseboat in its loan documents with Zimmerman. R. 2184-85. Finally, Mr. Nelson testified that the parties did business on three prior occasions where UTCO received a security interest in the houseboats and then Sumerset sent them. R. 2196, 2278-79. See also UTCO's Brief at 18-20; R. 563, 641, 2095, 2091-93, 2196-99, 2278-79, 2077. This puts an end to Sharpe's claim that: "the undisputed evidence established that UTCO's decision to loan \$60,000 to Mr. Zimmerman and the loan itself occurred before the alleged promise." Sharpe Brief at 23. UTCO's evidence established reliance and entitled UTCO to a jury verdict on promissory-estoppel.

Finally, Sharpe suggests that because UTCO had loaned the money to Zimmerman, UTCO could have no interest in the Funds wired to Sharpe and therefore, UTCO suffered no harm. Sharpe's technical theory ignores the realities the evidence established. Zimmerman promised UTCO a \$58,384 security interest in the Houseboat. R. 699-709, 2196-99, 2278-79. Sharpe's promise, as Sharpe admitted, induced UTCO to send the Funds to Sumerset. R. 2060-62, 2092-93. Sharpe testified that he had a "little trail going" or "course of dealing" with UTCO, whereby UTCO would send money and obtain an interest in a boat which had been or would be shipped by Sharpe to Utah. R. 2092-93. Sharpe also admitted he never told Nelson that he would apply the \$58,384



payment to the balance Zimmerman owed Sharpe on another boat. R. 2077. Sharpe also testified that when he was sending MSOs to Nelson, he understood that Nelson “would be using that as collateral on the boat” and that the MSO was required to license the boat in another state. R.2095. Finally, Sharpe admitted that the boat described in the MSO and other documents sent to Nelson “was never manufactured by Somerset.” R.2097-98. On cross-examination, Sharpe admitted that his answers to interrogatories established that the \$58,384 was applied the same day it was received to the balance due on the other boat. R.2148-50; see also R.2196-2202. Finally, Mr. Nelson testified that he subsequently discovered that the boat with the serial number on the MSO Nelson received had been sold to someone else. R. 2210-11.

In sum, UTCO’s overwhelming evidence established that it was damaged because it relied on Sharpe’s promises and misrepresentations. Thus, UTCO convincingly established every element of its promissory-estoppel claim.

**V. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE SHOWING THAT SHARPE CHANGED SERIAL NUMBERS AND SOLD THE HOUSEBOAT TO ANOTHER PARTY.**

Sharpe does not question UTCO’s authorities demonstrating that all surrounding circumstances in a fraud action must be viewed to assess fraudulent intent. See UTCO Brief at 20-23. Sharpe incorrectly suggests that the trial court used proper discretion to admit relevant evidence, Sharpe Brief at 31-33, and that UTCO only showed

a “technical violation of the hull identification statute” which, they say, is inadmissible under Utah R. Evid. Rules 402 and 403.<sup>9</sup> Sharpe Brief at 37. Statutory violations are proper for jury consideration in determining whether Sharpe committed fraud or negligent misrepresentation. See Ryan v. Gold Cross Services, Inc., 903 P.2d 423, 426 (Utah 1995) (“It is a general rule of Utah law that violation of a safety standard set by statute or ordinance constitutes prima facie evidence of negligence.”) (cited with approval in Adkins v. Uncle Bart’s, Inc., 2000 UT 14, ¶ 20, 1 P.3d 528).

That was not the only purpose of UTCO’s evidence. UTCO was entitled to show that Sharpe reassigned the serial numbers to hide their fraud. This Court has confirmed that, “[a] Court may look to all of the surrounding facts and circumstances and a continuing pattern of wrongful behavior is one indicator of fraudulent intent. . . .” Harline v. Barker, 854 P.2d 595, 602 (Utah Ct. App. 1995) (emphasis added) (citation omitted); see also Bails v. Gar, 558 P.2d 458 (Mont. 1976) (holding that fraudulent intent must be determined in light of all surrounding circumstances); Ledbetter v. Webb, 711 P.2d 874 (N.M. 1985) (holding that facts and circumstances surrounding a transaction may provide clear and convincing evidence of fraudulent intent). “The existence of fraudulent intent is a factual question, which may be inferred from all of the attendant

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<sup>9</sup>Inconsistently, Sharpe says: “No serial numbers were altered or changed”, Sharpe Brief at 15, but later admits that he did “merely a reassignment on paper of a serial number to avoid a gap in serial numbers.” Sharpe Brief at 37. Though the alteration has been admitted, Sharpe finds it more palatable to call it a “reassignment.”

circumstances. It necessarily involves weighing the evidence presented and assessing the credibility of witnesses--tasks largely within the province of the fact-finder." Selvage v. J.J. Johnson & Assoc., 910 P.2d 1252, 1262 (Utah Ct. App. 1996) (emphasis added).<sup>10</sup>

Sharpe vigorously tried to keep out evidence showing the altered serial numbers, saying it lacked relevance because it occurred three months after the UTCO transaction.<sup>11</sup> However, subsequent conduct supports an inference of prior intent not to fulfill a promise or representation. See, e.g., Miller v. National Am. Life Ins. Co., 126 Cal. Rptr. 731 (Cal. Ct. App. 1976). Ultimately, the very nature of fraud claims requires proof of all circumstances at all times "[s]ince fraud is usually denied, it must be inferred from all facts and circumstances . . . including subsequent conduct." Garden State Standardbred Sales Co. v. Seese, 611 A.2d 1239, 1243 (Pa. Super. Ct. 1992) (emphasis added).

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

<sup>11</sup>Sharpe sought support in State v. Winward, 909 P.2d 909, 913 (Utah Ct. App. 1995), saying simply that fraud claims like other claims are governed by the Utah Rules of Evidence. Sharpe Brief at 26-27; 31-32. However, Winward decided an issue in a criminal forgery case where the trial court erred in assuming that the State would ultimately establish that victims had been defrauded by defendant's forgery of a check made payable to someone other than the victims. Winward, 909 P.2d at 913. Here, Sharpe's acts prove the fraud perpetrated against UTCO directly, not via a third party. Winward is therefore inapposite.

Sharpe also alleged that evidence of changing the serial numbers was excluded or should have been excluded under Rule 403, Utah Rules of Evidence. But in Utah, the exclusion of evidence under rule 403 is reviewed under a harmful error standard: " '[a]n erroneous decision to admit or exclude evidence does not constitute reversible error unless the error is harmful.'" Joufflas v. Fox Television Stations, Inc., 927 P.2d 170, 173 (Utah 1996) (quoting Cal Wadsworth Constr. v. City of St. George, 898 P.2d 1372, 1378 (Utah 1995)). Harmful error occurs where "the likelihood of a different outcome in the absence of the error is 'sufficiently high so as to undermine confidence in the verdict.'" Id. at 174 (quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)).

Harmful error occurred here. The following evidence was admitted:

1. A houseboat matching the MSO and invoice sent by Sharpe was never constructed by Sumerset; R. 565, 643, 2097-98;
2. The Houseboat did not even exist when Sharpe received UTCO's \$58,384 though Sharpe promised to send the Houseboat after receiving the Funds, R. 565, 643, 2097-98;
3. The Houseboat whose serial number appears on the invoice and MSO given to UTCO was sold to another person, R.2211.

While UTCO's evidence of the altered numbers is compelling, even damning evidence, that should had been laid before the jury, confirming Sharpe's

fraudulent intent, and completing UTCO's claims for fraud and negligent misrepresentation. Preclusion of evidence from which Sharpe's fraud may be inferred created prejudicial harm to UTCO. Confidence in the jury verdict is undermined by the exclusion of evidence of Sharpe's fraud. The jury's reaction would be predictable; the outcome of the trial would have been different.

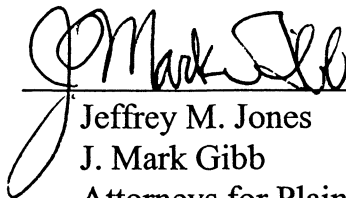
In sum, evidence of Sharpe's and Sumerset's fraudulent intent -- shown also by the altered serial number and subsequent sale of the second houseboat -- was not only relevant but necessary to UTCO's fraud claim. Excluding the evidence was highly prejudicial, and constitutes reversible error. UTCO is entitled to a new trial on its claims for fraud, negligent misrepresentation and punitive damages.

### **CONCLUSION**

For the above reasons, UTCO requests that the trial court's judgment be vacated, and that this action be remanded for proceedings on UTCO's causes of action for promissory estoppel, fraud, negligent misrepresentation and punitive damages.

DATED this 8th day of February, 2001.

DURHAM JONES & PINEGAR



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Jeffrey M. Jones

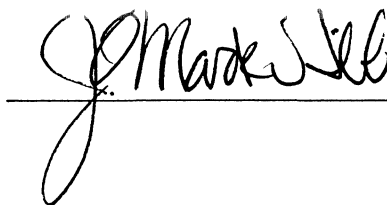
J. Mark Gibb

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I certify that on this 8th day of February 2001, I caused two true and correct copies of the foregoing to be mailed in the U.S. Mail, first-class, postage prepaid to the following:

Blake S. Atkin  
Jonathan L. Hawkins  
ATKIN & LILJA  
136 South Main Street, #810  
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