

1991

## Scott v. Hammock : Unknown

Utah Supreme Court

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CLERK SUPREME COURT  
 UTAH

Geoffrey J. Butler, Clerk  
 UTAH SUPREME COURT  
 332 State Capitol Building  
 Salt Lake City, Utah 84114

Re: Scott v. Hammock, Case No. 910112  
 Rule 24(j) Citation of Supplemental Authorities

Dear Mr. Butler:

Pursuant to Rule 24(j), Utah Rules of Appellate Procedure, this letter is being submitted to advise you of the recent promulgation of Rule 503, Utah Rules of Evidence, which will become effective on April 15, 1992.

Rule 503 will supplant Utah Code Ann. § 78-24-8(3), the clergy-penitent privilege statute at issue in this case, which is cited throughout the briefs.

The promulgation of Rule 503 will certainly give rise to questions regarding the application of the rule in this case. For that reason, we will take this opportunity to also advise you of illustrative authorities addressing the impropriety of retroactive application of an expanded evidentiary privilege. The following authorities address that subject:

State v. Lizotte, 200 Conn. 734, 517 A.2d 610, 612-14 (1986) (where communications not privileged when made, subsequent changes in law regarding privileges will not affect admissibility; "[e]ven if it is a procedural statute, which ordinarily will be applied retroactively without a legislative imperative to the contrary, 'it will not be applied retroactively if considerations of good sense and justice dictate that it not be so applied.'" Quoting American Masons' Supply Co. v. F.W. Brown Co., 174 Conn. 219, 223, 384 A.2d 378 (1978), quoting Carvette v. Marion Power Shovel Co., 157 Conn. 92, 96, 249 A.2d 58 (1968)).

Davison v. St. Paul Fire & Marine Ins. Co., 75 Wis.2d 190, 248 N.W.2d 433, 439 (1977) (where party previously had a right to discovery of documents that were then not privileged, the

Mr. Butler  
Page 2  
April 9, 1992

subsequent enactment of a privilege cannot alter that right; "the right to discovery has . . . become vested in plaintiffs . . . [and the new privilege statute] does affect the substantive rights of the plaintiffs and it cannot be given retroactive effect.")

Woelfling v. Great-West Life Assurance Co., 30 Ohio App.2d 211, 285 N.E.2d 61, 68 (1972) ("the physician-patient privilege is a substantive right and not merely a rule of evidence.")

DeSeve v. Ladd Enterprises, 137 Ill. App.3d 796, 484 N.E.2d 1220, 1223 (1985) ("[E]ven where the legislative intent is clear that a statute be given retroactive effect, the enactment will not be applied when to do so would lead to unreasonable or unjust results.")

State v. Ladiges, 386 P.2d 416, 419 (Wash. 1963) ("As a general rule, . . . newly adopted court rules operate prospectively only.")

20 Am.Jur.2d Courts § 85, at 447 ("[A] rule of court will ordinarily have prospective effect only. An exception to this rule is recognized, however, in instances where the enacting authority clearly indicates that a retroactive effect was intended.")

Cresson Consolidated Gold Min. & Mill. Co. v. Whitten, 338 P.2d 278, 284 (Colo. 1959) ("The legislature is not permitted, under the pretense of regulating evidence, to establish rules of evidence which prevent a party from exhibiting his rights or deny him the opportunity of a fair trial by virtually excluding evidence in his behalf; to do so would substantially deprive him of due process of law." Quoting Public Utilities Commission v. Donahue, 335 P.2d 285, 291 (1959), quoting 20 Am.Jur. 38, § 8).

No indication of whether Rule 503 is to be applied retroactively is found in the relevant constitutional provision (Utah Constitution, Article VIII, Section 4), the relevant statutory provision (Utah Code Ann. § 78-2-4) or the Utah Rules of Evidence. Note should be taken that, even with respect to the Utah Rules of Civil Procedure, those rules are not to be applied retroactively if "in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies." Rule 1(b), Utah Rules of Civil Procedure. See also Rules 1 and 86(a), Federal Rules of Civil Procedure. Also, the Federal Rules of Evidence, which became effective July 1, 1975, were to be applied to "proceedings then pending, except to the extent that in the opinion of the court their application in a particular action or proceeding then pending would not be feasible or would work injustice, in which event the former procedure

Mr. Butler  
Page 3  
April 9, 1992

applies." Orders of the Supreme Court of the United States  
Adopting and Amending Rules, Order of November 20, 1972,  
paragraph 2. See also Pub. L. 93-595, § 1, 88 Stat. 1926 (1975).

Very truly yours,

  
Ross C. Anderson

RCA:rr  
cc: Steven LeRoy Hammock  
Oscar W. McConkie, Esq.